REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 213 OF 2013

FAITH MUMBUA KIIO.....APPELLANT

VERSUS

PATEL DEVIKA.....RESPONDENT

(Being an Appeal from the original judgement and decree of Hon. A. Odawo (SRM) in Machakos CMCC No. 821 of 2011 delivered on 25th September, 2013)

JUDGEMENT

1. The Appellant sued the respondent for recovery of damages arising from an accident alleged to have occurred on 1st January, 2011 along Nairobi- Mombasa road. The Respondent was sued as the registered owner of motor vehicle registration number KAQ 555F. In her plaint dated 15th September, 2011, the appellant alleged that she was on the material day lawfully travelling aboard motor cycle registration number KMCH 067Z ('*the motor cycle*') when KAQ 555F ('*the vehicle*') which was negligently driven veered off the road and collided with KMCH 067Z.

2. She alleged that as a result of the accident, she suffered head injury with loss of consciousness, blunt pelvic trauma with pelvic ring fracture-acetabulum, ischium, fractures left clavicle and blunt hip trauma. The appellant's testimony was that the vehicle was overtaking another and hit the motor cycle. That she lost consciousness which she regained at the hospital. She received first aid treatment and was referred to Machakos General Hospital for further treatment. She made a report to the police and was issued with a p3 form and later an abstract. A search was conducted at the registrar of motor vehicles to establish the owner of the vehicle. She was later examined by Dr. Mutuku who prepared a medical report. She produced treatment notes, x-ray report, p3 form, police abstract, copy of records and medical report to that effect as P. Exhibit 1-6 respectively.

3. On cross examination, she indicated that she was on board the motor cycle with her seven (7) years old child and that it was legal to do so. That they were on the left from the junction. That the vehicle was overtaking another.

4. The Respondent in his amended defence admitted ownership of the vehicle but contended that her son who was driving the vehicle on the material day had been accosted by armed gangsters who took control of the vehicle. That one of the robbers got onto the driver's seat and her son was forced to the back seat. That the respondent's son heard a bang and felt the vehicle move in a zig zag manner. The gangsters thereafter stopped the vehicle and took off. He contended that during the hearing, a supplementary list of documents by the respondent was tendered in evidence by consent. The list comprised of a medical report by Dr. R. P. Shah dated 24th June, 2013, police abstract dated 24th December, 2012, Police abstract dated 2nd January, 2011, OB entry No. 07/2/2011 and report of investigation by Counterstrike ltd 24th February, 2013. The Respondent then proceeded to close his case.

5. The trial magistrate considered the case and dismissed it on the basis that the documents, particularly, the abstracts which indicated that a report of carjacking was made by the respondent, were produced by consent without the appellant's counsel questioning their authenticity.

6. Aggrieved by the decision, the appellant filed this appeal on the following grounds:

i. The learned magistrate erred in law and facts when she shifted the blame of the occurrence of the accident on perceived carjackers without proof of the allegations whatsoever.

ii. The learned magistrate erred in law and facts when she maintained that the plaintiff has not proved her case on a balance of probabilities when in actual sense there was no evidence adduced by the defence to controvert that of the plaintiff.

iii. The learned magistrate erred in law and fact when she relied on documents produced by the defendant without calling their makers against the provisions of Civil Procedure Rules, 2010 and the Evidence Act.

iv. The learned magistrate erred in law and fact when she relied on document produced in favour of the defendant without any evidence being adduced.

v. The learned magistrate erred in law and fact when she admitted in evidence documents that were not part of pleadings nor had she granted any leave to have the said documents form part of the proceedings.

7. This being a first appeal, this court is under duty to re-analyze the evidence and arrive at its own independent conclusion. See: **Sumaria & another v. Allied Industrial Ltd [2007] 2 KLR**. I have given due consideration to this appeal, the submissions tendered and the authorities cited in reliance. It is clear that the issue in contention is that of blameworthiness.

8. It was the appellant's submission that she proved her case on a balance of probability. That she alleged that the accident occurred involving the vehicles and was proved. It was further argued that section 67 as read with 65 of the Evidence Act provides that contents of a document must in general be proved by primary evidence but that there are exceptional circumstances where it may be proved by secondary evidence. That the documents do not prove themselves. The case of **Rosemary Wanjiru Kungu v. Elijah Macharia Githinji & another Nairobi HCCA No. 145 of 2010** where the court was of the opinion that the fact that the defendant would not get an opportunity to cross examine the deponent greatly reduces the value and weight of the evidence. It was further contended that there was no proof from the documents produced that any investigations were carried out on the alleged car-jacking. It was argued that there was no rule permitting court to admit documents outside the set timelines and further that the court can never permit any party to adduce additional evidence that was not furnished to the other party. On this issue the appellant cited **Raila Odinga & 5 others v. IEBC & 3 others [2013] e KLR**.

9. The Respondent on the other hand submitted that for an owner of a motor vehicle to be held vicariously liable for negligence of his driver, it must be proved that the driver was acting in his capacity as a servant in the course of employment. The case of **Tabitha Nduhi Kinyua v. Francis Mutua Mbuvi & another [2014] eKLR**. It was submitted that the evidence led by the appellant did not prove that the respondent was vicariously liable. That the police abstract relied upon by the respondent names the owner of the vehicle but does not name the driver. That likewise, the respondent's abstract does not name the driver since the car-jackers were still unknown. It was submitted that the documents by the respondent which point to the driver of the motor vehicle are unchallenged. That the documentary evidence admitted by the consent was enough to prove that the respondent's vehicle was in control of a car-jacker at the time of the accident.

10. It was further submitted that section 67 of the Evidence Act deals with proving documentary evidence and not production of documentary evidence in court. That authors of documents are required to verify the authenticity of documents but that this can be done away with if both parties have no issue with the authenticity of the documents and consent in having the documents produced without calling the authors.

11. It was submitted that the case of Rosemary Wanjiru (supra) was quoted out of context by the Appellant. That the court clearly relied on various decisions showing that the general rule on the production of documents is that documents should be produced by their authors in court as provided in section 35 (b) of the Evidence Act. That although it was so held, the court relied on other cases to show that documents can be produced by consent in court. The respondent cited **David Ndung'u Macharia v. Samuel K. Muturi & another, Nairobi HCCC No. 125 of 1989** where Ringera J. (*as he then was*):

> **"The second issue is that it is only an agreed report that can properly be admitted without calling the maker. The mere exchange of medical reports does not render such report or admissible without calling the maker(s) unless one or both of them have been agreed."**

It was argued that the documentary evidence produced by the respondent therefore proved that the vehicle was under control of car-jackers and that the respondent could not be vicariously liable for the said accident.

12. The Respondent finally relying on Article 159 (2) (d) of the Constitution and section 3A of the Civil Procedure Act, submitted that the court may make orders as it deems necessary in achieving justice and to this end grant leave for filing of documents out of time. That further the production of the supplementary list of documents was not objected to and the trial magistrate can in the circumstances not be faulted.

13. The Appellant pleaded *res ipsa loquitor*. The Court of Appeal had this to say in the case of **Nandwa v. Kenya Kazi Ltd [1988] KLR 488** on the maxim:

> **"In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial 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 provides some answer adequate to displace that inference."**

14. In **Embu Public Roads Services Ltd v. Riimi [1968] EA 22** it was held that:

> **"…Where the circumstances of the accident give rise to the inference of negligence then the defendant in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence."**

15. In **Muthuku v. Kenya Cargo Services Ltd [1991] KLR 464**, it was observed that:

> **"…it was for the appellant to prove, of course upon a balance of probability, one of the forms of negligence as was alleged in**

the plaint. Our law has not yet reached the stage of liability without fault."

16. Applying the tests above, it is clear from the record that the appellant indicated that the vehicle hit the motor cycle while overtaking, a fact that the respondent did not rebut. The respondent however alleged that the vehicle had at the material time been car-jacked and was under control of the car-jackers. To clear herself from the blame, the respondent produced two police abstracts which revealed that a report on alleged car-jacking was made. The said documents were admitted in evidence by consent. It is for this reason that the respondent argued that the documents were admissible in evidence. I have taken the liberty to look at the respondent's documents produced by consent. While I acknowledge the fact that parties agreed to have them on record, I must note that the exact date on which the report was made by the respondent is unclear. The police abstract at paragraph 8 does not indicate the date of the report and occurrence book number. The abstract from police records indicate that the report was made on 2nd November, 2010 yet the accident occurred on 1st January, 2011. The said abstract also contradicts itself. At the introductory part it indicates that the report was made at Spring Valley police station on 2nd November, 2010 and at the end stated that report was alleged to have been made on 2nd January, 2011. Considering the said grey areas, it was incumbent upon the respondent to call the makers of the documents to shed some light on the exact date the report was made whether or not the documents were admitted by consent. In this regard, I am guided by the finding of the Court of Appeal in **Kenneth Nyaga Mwige v. Austin Kiguta & 2 Others [2015]** where it was held:

> **"…In the present case, there are material differences in the typed proceedings of the court marked as "MF1 2." These differences needed a witness to explain the authenticity of the handwritten photocopy, this could only be done of the document marked for identification as "MFI 2" were produced in evidence as an exhibit by the maker or any other competent witness."**

17. Having found so, I must add that it is unclear why the respondent was reluctant to call her son to give an account of how exactly he was accosted by the alleged car-jackers. Having such evidence and choosing not to tender it in court leads to a presumption that the respondent's son's evidence would be detrimental to her case. In the circumstances, those allegations remain just that, mere allegations. The failure by Respondent to call his son raised doubts as to his claim that a carjacking incident had taken place. The documents in support of the alleged carjacking do not pass the credibility test. Had the trial court carefully looked at the Respondents documents it would have realized that they had discrepancies requiring thorough interrogation.

18. In the circumstances, I find and hold that the appellant established liability on the part of the respondent on a balance of probability. It is noted that Respondent was travelling as a pillion passenger and the motor cycle was on its lawful left lane when the Appellant's motor vehicle that was overtaking other vehicles rammed onto it. It is clear that the Respondent or his driver or agent failed to ensure that he or she had a proper lookout before making the move to overtake. The Respondent must be held solely liable for the accident at 100%. Hence I find the trial court went into error when it failed to find that it was the Respondent who was solely to blame for the accident.

19. Having established liability against the Respondent, the remaining issue is on quantum of damages. It is settled that an Appellate court will not disturb the quantum of damages awarded by a trial court unless the trial court in assessing the damages took into account an irrelevant factor or left out a relevant one or that, the amount awarded is so inordinately low or inordinately high that it must be a wholly erroneous estimate of the damages (see **ILAGO =*VS*= MANYOKA [1961] EA 705, BUTT *VS* KHAN [1982 – 1988] KAR S**. The Appellant was examined by doctors P.N. Mutuku and a R. P. Shah who confirmed that indeed she sustained injuries on the head and several fractures. Permanent disability was put at 25% and that she was likely to suffer osteoarthritis in the future due to the several fractures. The authorities cited before the trial court by the Appellants counsel had plaintiffs who sustained fractures and the awards ranged from Kshs. 300,000/= to Kshs. 400,000/= whereas the cases cited by the Respondent's counsel ranged from Kshs.120,000/= to Kshs. 200,000/=. The trial magistrate indeed considered the said authorities as well as the Appellant's injuries and formed the opinion that had the suit succeeded an award of Kshs.300,000/= would have been suitable to cater for pain, suffering and loss of amenities. There was no award on special damages as none was specifically proved with receipts. Looking at the Appellant's injuries as observed by both doctors, I find that the same were quite serious. The 25% permanent disability established by the doctors further emphasizes this point. I find the award arrived at by the learned trial magistrate reasonable and ought not to be disturbed.

20. In the result it is the finding of this court that the Appellant's Appeal is merited. The trial magistrate's judgement dated 25th September, 2013 is hereby set aside and substituted with the following orders:-

a. Judgement on liability is entered for the Appellant as against the Respondent at 100%.

b. The Appellant is awarded general damages of Kshs.300,00kemei0/= for pain, suffering and loss of amenities.

c. The Appellant is awarded costs of this appeal and in the lower court

Orders accordingly.

Dated and delivered at Machakos this 22nd day of March, 2018.

D.K. KEMEI

JUDGE

In the presence of:-

Nagwere for Wambua for the Appellant

No appearance for Muchiri -for the Respondent

Kituva - court assistant