



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. 64 OF 2015**

**ALFRED PENGU MAMBOLEO.....APPELLANT**

**-VERSUS-**

**OSERIAN DEVELOPMENT CO. LTD.....1<sup>ST</sup> RESPONDENT**

**JOSEPH MWANGI KIBAICO.....2<sup>ND</sup> DEFENDANT**

**(An Appeal from the judgment of the Chief Magistrate(Mungai) dated 22<sup>nd</sup> May 2015 in Nakuru chief Magistrate's court civil suit No. 1287 of 2012)**

**JUDGMENT**

1. By the trial courts judgment dated the 22<sup>nd</sup> May 2015 the appellants suit was dismissed for what is stated as his failure to prove the case on a balance of probabilities, leading to this appeal based on three main grounds thus, failure by the trial magistrate to consider

**(a) the appellants pleadings and annexures**

**(b) failure to consider appellants evidence and applying extraneous facts to dismiss the suit and**

**(c) ignoring and disregarding the appellants submissions dated 9<sup>th</sup> December 2014 together with the authorities provided.**

It is sought that the appeal be allowed and this court make a determination on the suit in his favour together.

2. Parties filed written submissions on the grounds of appeal – which I shall address sequentially as stated above.

My duty as the first appellate court is to re-evaluate the evidence adduced before the trial court and come up with my own findings. While doing this, I ought to be minded that an “appeal court would not normally interfere with finding of facts by the trial court unless it is based on no evidence or it is based on misapprehension of the evidence or the Judge has acted on a wrong principle in reaching the finding he did” **Sumaria & Another -vs- Allied Industries Ltd (2017) e KLR**, and **Ephantus Mwangi & Geoffrey Nguyo Ngatia -vs- Duncan Mwangi Wambugu (1982 – 88) I KAR 278**.

**Analysis of evidence and submissions as against the grounds of appeal, and findings.**

**3. Appellants pleadings and Annextures.**

**Madan JA in CMC Aviation Ltd -vs- Cruis Arif Ltd (1) (1978) e KLR 103** observed that:

**“Pleadings contain the averments of the three concerned until they are proved or disapproved, or there is admission of them or any of them by the parties. They are not evidence and no decision could be founded upon them. Prove is the foundation of evidence.”**

4. Further it is trite law that submissions cannot be treated as evidence or take place of evidence as stated by the Court of Appeal in **Daniel Toroitich Arap Moi & Another -vs- Mwangi Stephen Murithi & Another (2014) e KLR** when it held that:

**“Submissions cannot take place of evidence. The Respondent had failed to prove his claim by evidence what appeared in submissions could not come to his aid---Submissions are generally parties “marketing language”----”**

Section 107 of the Evidence Act Cap 80 is categorical that:

**“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”**

5. In his Amended plaint dated 10<sup>th</sup> May 2013, the appellant averred that the Respondent was riding his motor cycle Registration No. KAN 712G along Moi South Lake Road when the Respondent's motor vehicle No.KAT 470Q was so negligently driven and controlled that it hit the appellant's motor cycle KAN 712G from behind from which the respondent sustained grievous harm.

Particulars of negligence were stated as well as the injuries sustained, and the after effects of the injuries. General and special damages were prayed for.

Likewise, the Respondents pleadings by way of Amended defence dated 12<sup>th</sup> July 2013 are stated. The entire claim by the appellant was denied and the appellant was put to strict proof.

6. I have considered the evidence adduced by both parties (PW1 and DW1), as well as the trial court's judgment. It is the law that a party is bound by its pleadings, and a court cannot be called upon to make a determination on unpleaded issues. - **IEBC & Another -VS- Stephen Mutinda Mule & 3 Others (2014) e KLR.**

7. Upon the above pleadings, it was incumbent upon the appellant, then plaintiff, to prove the particulars of negligence as stated to the required standard of a civil suit being **upon a balance of probabilities – Civil Appeal No. 58 of 2013 Dorcas Wangithi Nderi -vs- Kiburu Mwaura & Another (2015) e KLR** and **Civil Appeal no. 55 of 2012 at Meru. Julius Muriuki Muturia -vs- Joseph Mogere & 2 Others (2017) e KLR.**

8. I have considered the appellant's evidence and his statement against his pleadings. He relied on his statement dated 10<sup>th</sup> May 2013 that:

**“I was turning to my right to access the aforesaid companies gate. Suddenly and without warning motor vehicle registration No. KAT 570Q that was following at high speed violently crushed the motorcycle I was riding as a result I sustained very severe injuries. ---”**

9. On cross examination, the appellant testified that:

**“---the vehicle knocked me from behind --- I had seen the motor vehicle on the driving mirror-it was coming fast. I had slowed to 5 kph. I could not leave the road to avoid the accident. --- I was about to branch to the right.”**

10. That is the recorded evidence as adduced by the appellant.

The particulars of negligence as stated in the amended plaint are stated in Paragraph 5 to the effect that the motorcyclist was knocked from behind by the respondents vehicle that failed to slow down, drove at an excessive speed in the circumstances, failed to observe the highway code and failed to slow down as to avoid the accident.

11. In his judgment, the trial magistrate while analysing the entire evidence (Paragraph 10) observed that each of the two parties blamed each other for the causation of the accident, but further stated that the impression created by the appellants evidence was that he was knocked from behind before he started turning to the right.

13. That in my view is consistent with the appellant's pleadings by his plaint. However upon consideration of the entire evidence including the investigation report, the trial magistrate made a finding that the motorcycle could not have been knocked from behind as the damage to the motor vehicle could then have been to the front. The damage was on the left passengers door, hence concluded that the vehicle was hit by the motorcycle when it turned to the right and while the vehicle was in the process of overtaking it. I am satisfied that the trial magistrate considered the appellants pleadings and annexures. If he did not he would not have come to the above observations. Ground (No. 2) therefore fails.

14. I have stated above and cited authorities that buttress the findings that submissions cannot take the place of pleadings and evidence – **Daniel Toroitich Arap Moi case – Supra.** It was upon the appellant to call sufficient evidence to prove averments in his pleadings, specifically on the matter of negligence – **Section 107 and 108 of the Evidence Act, and CMC Aviation Ltd Case (Supra)**, as failure to prove particulars of negligence, and any other claim, will renders the claim to be dismissed as proof is the foundation of evidence.

15. **Ignoring and disregarding the appellants submissions dated 9<sup>th</sup> December 2014 and authorities annexed thereto.**

This ground of appeal is closely twined with the first ground – Paragraph 4 above. I need not repeat the legal principles that I have already stated, and basically that submissions cannot take the place of evidence. Any submissions must be based on the pleadings and the evidence as adduced, and nothing more. A court cannot substitute its own opinions and observations especially, while exercising its appellate jurisdiction.

16. I have considered the appellants submissions filed in the trial court on the 10<sup>th</sup> December 2014, and specifically on the matter of liability.

The appellant's evidence is as I have stated earlier. I do not see in what manner the trial magistrate ignored the submissions and authorities, yet the judgment very ably analyses the entire evidence tendered by all the appellants witnesses.

In particular, the trial magistrate in Paragraph 13 of his judgment sums up the totality of the evidence and makes his findings.

17. In my view, the crux of this appeal is simple and straight, and is well captured in the trial courts judgment Paragraph 10 thus:

**The issue for determination is who between the plaintiff and the 2<sup>nd</sup> Defendant was negligent thereby occasioning the accident.**

The 2<sup>nd</sup> respondent denied having caused the accident and blamed the appellant in his statement of Amended defence dated 12<sup>th</sup> July 2013. He blamed the appellant for failing to adhere to warning given to him by the 2<sup>nd</sup> appellant and cycling without due care and attention in a zigzag manner and cycling the motorcycle on the path of its motor vehicle.

18. I have re-evaluated the entire evidence. – **Sumaria & Another (Supra)**. The appellants evidence was that he was knocked from behind, that he had slowed down to turn to the right to enter an access road, that he had seen the respondent's vehicle driving fast, behind him on same left lane, that the said vehicle was in the process of overtaking his motorcycle when it hit it from behind.

19. The evidence in itself is contradictory. If indeed the motor vehicle was behind the motorcycle and it was trying to overtake on the right side how could it then hit the motorcycle from behind? If indeed the motorcycle was hit from behind – as pleaded, and evidence adduced by the appellant to the same effect, it is expected that damage to the vehicle would have been squarely to the front and not to the front door as stated.

20. The investigating officer (PW4) told the court that he did not have sketch map to show or indicate the point of impact. He too did not have the motor vehicle inspection report or photographs to confirm the areas damaged during the accident to the vehicle and the motorcycle.

I find the investigating officer's report to have been of no evidential value. It makes no sense for the investigating officer to state before the trial court that the motor vehicle was overtaking the motorcycle without proper care, nor that the motor cyclist was careful when turning without supporting evidence from the investigating report. It is total hearsay.

21. I have noted that the appellant testified that he could not leave the road to avoid the accident yet he saw the vehicle approaching fast and without warning the vehicle crushed onto his motorcycle. He did nothing to try to avoid the accident. He did not state why he could not take any evasive action.

22. The 2<sup>nd</sup> respondent testified that he was driving at a speed of 60-70 KPH behind the appellant's motorcycle and that he observed the cyclist's movements. His testimony was that the cyclist did not indicate his intention to turn to the right so he confirmed it was clear to overtake him but while overtaking, the cyclist moved to the right lane and knocked his pick up on the left passenger door, and further that if he was behind he would have knocked the motorcycle with the front of the pick up.

23. I agree with the appellant's submissions that there are glaring contradictions in the entire evidence as well as in the trial magistrates judgment in the manner the accident occurred.

24. The alleged damage to the left front door of the 1<sup>st</sup> appellant's vehicle was not demonstrated by any evidence. It therefore remains as hearsay evidence, as no report or even photographs of the damage was produced or shown to the court.

The trial Magistrate relied on the evidence of the investigating officer and ruling in Traffic Case No. 1520/2007 to come to his findings that the damage was on the front door of the pick up and therefore that the 2<sup>nd</sup> respondent could not have knocked the Appellants motorcycle from behind as pleaded.

25. I have looked at the Traffic Case No. 1520/2007 proceedings. The 2<sup>nd</sup> Respondent was charged with the offence of careless driving. The complainant being the Appellant in this Appeal did not testify as he was said to have been in hospital for over a year. While acquitting the 2<sup>nd</sup> Respondent, the traffic court stated:

**“The motor cyclist was not called and therefore the court has no evidence to support the charge. The investigator of the case is dead and we are not able to tell what evidence he gathered. We cannot now know why the accused was blamed for the occurrence of this accident.”**

26. In its totality and upon re-evaluation, it is my finding that it is not clear from the evidence adduced by both parties who between the appellant and the 2<sup>nd</sup> Respondent caused the accident.

27. It is trite that whenever an accident occurs between two vehicles, one or both must be held liable.

The Court of Appeal in **Farah and Lento Agencies and Multiple Hauliers Ltd -vs- Ralids Muthomi Kimani (2015) e KLR**, held that where there is no concrete evidence to determine who is to blame between two drivers, both should be held liable or proportionately to the degree of contributory negligence based on the circumstances after consideration of the entire evidence – See also **David Kajoji M'mugaa -vs- Francis Muthomi (2012) e KLR**.

28. I agree with the trial courts observation that if the motorbike was knocked from behind, the damage to the vehicle would have been on

the front part and on the left passenger's door. This observation was however not supported by any demonstrable evidence by way of either photographs of the damaged vehicle or even a sketch map as I have stated above. It is therefore a conclusion based on no evidence but an observation - **Selle & Another -vs- Associated Motor boat Co. Ltd & Another (EA) 123, and Mwanasokoni -vs- Kenya Bus Services Ltd and Others (1982-88) I KAR 278.**

29. In our adversarial litigation system, cases are tried and determined on the basis of pleadings, issues of facts and the law. Having considered, and re-evaluated the entire evidence, and the trial court's findings on facts and the law, I am persuaded to come to a conclusion that both the appellant and the 2<sup>nd</sup> Respondent contributed to the occurrence of the accident on equal basis, there being no sufficient evidence to apportion liability in any other manner.

30. Consequently, I proceed to set aside the trial court's judgment dismissing the appellants case with costs, and instead substitute the said **finding to one that both parties contributed to the occurrence of the said accident equally, on 50-50 basis.** To arrive at this conclusion, I have considered authorities cited by both parties among them **Robert Muriithi Njeru -vs- Diocese of Embu Salesians of Don Bosco (2015) e KLR , and Boniface Waiti & Another -vs- Michael Kariuki Kamau (2007) e KLR,** among others.

31. **Failure to Consider the Appellant's testimony and his witnesses and application of extraneous facts to dismiss the suit.** The above issue has been addressed adequately in the main issue for determination as to who, between the Appellant and the 2<sup>nd</sup> Respondent caused the accident. I need not repeat.

32. In the matter of **quantum of damages** as assessed by the trial magistrate, none of the parties seem to have any issues, and non submitted on the same. There is therefore no challenge to the awards.

**I uphold the awards, but order and direct that the said awards shall be subjected to the apportionment of liability on 50:50 basis. However, special damages shall accrue interest at court rates from the date of filing the primary suit while general damages shall attract interest from the trial court's judgment.**

33. In the matter of costs, I order that each party bears own costs at the trial court and at this court.

**Dated, signed, and delivered this 31<sup>st</sup> Day of July 2018.**

**J.N. MULWA**

**JUDGE**