



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 79 OF 2017

SIMON KIMANI.....APPELLANT

-VERSUS-

JULIUS ROBI.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. R. Odenyo, Senior Principal Magistrate in Migori Senior Principal Magistrate's Civil Suit No. 359 of 2014 delivered on 26/07/2017)

JUDGMENT

1. Out of a road traffic accident which occurred in the night of 24/01/2014 around Kogelo Garage along Migori-Isebania road involving motor cycle registration number KMCN 098N (hereinafter referred to as '**the motor cycle**') and motor vehicle registration number KBS 326H (hereinafter referred to as '**the motor vehicle**'), the Appellant herein, **Simon Kimani**, who was riding the motor cycle sustained serious injuries and instituted Migori **Senior Principal Magistrate's Civil Suit No. 359 of 2014** (hereinafter referred to as '**the suit**') seeking general and special damages.

2. The suit was defended, and hearing conducted. The trial court delivered its judgment on 26/07/2017 where it dismissed the suit for want of liability. The Appellant preferred an appeal against the judgment and raised five grounds of appeal being: -

1. The learned trial magistrate erred in law and in fact, when he without any justifiable reason held that the plaintiff / appellant had failed prove liability on part of the defendant/respondent

2. The learned trial magistrate erred in law and in fact, when he disregarded the testimony of PW2, a police officer, yet PW2 had produced a copy of the Police Abstract without any objection from the defendant and blamed the defendant / respondent for having caused the accident. PW2 even confirmed that it was the defendant who was charged for having caused the accident.

3. The learned trial magistrate erred in law and in fact, when he held that there was no independent witness to corroborate the plaintiff's claim; yet there was PW2, a police officer who testified and corroborated the plaintiff's testimony that it was the defendant who was to blame for the accident.

4. The learned trial magistrate erred in law and in fact when he dismissed the plaintiff case on the ground that the plaintiff had failed to prove his case yet the plaintiff had proved his case on a balance of probability as required by the law.

5. The learned trial magistrate was biased against the plaintiff / appellant as he chose to believe the testimony of the defendant who did not even produce any exhibit to support his claim; but disregarded the testimonies of PW1, PW2 & PW3 which were supported by exhibits.

3. Directions were subsequently taken, and the appeal was disposed of by way of written submissions where both parties complied and expounded on their rival positions relying on various judicial decisions.

4. As the first appellate Court it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**).

5. In discharging the foregone duty, I will first deal with the issue of liability. The evidence on liability was tendered by the Appellant (**PW1**), a Police Officer (**PW2**) and the Respondent herein, **Julius Robi**, who testified as **DW1**. PW1 testified that as he was riding the motor cycle and as he approached a corner, he saw the motor vehicle which was oncoming in full lights swerve to his side and despite him moving

closer to the yellow line on his lane of travel, DW1 failed to manage the motor vehicle which collided with the motor cycle resulting to his serious injuries. PW2 was a Police Officer who produced a Police Abstract on behalf of PW1. DW1 testified that the motor cycle did not have any lights and was ridden on the wrong side of the road and despite doing what was reasonable possible to avoid any collision PW1 rammed into the motor vehicle and sustained injuries.

6. The evidence of PW1 and that of DW1 were parallel. Each took a firm position that it was the other who was on the wrong. It was the evidence of PW2 which attempted to bring out the nexus between the accident and the motor cycle and the motor vehicle. PW2 did not take part in the investigations of the accident. She also did not visit the scene of accident. Neither the police file nor a sketch plan of the scene was produced in an attempt to paint the picture of how the scene was. PW2 simply produced the Police Abstract as filled by her fellow officers. The Police Abstract indicated that while the investigations were still underway there was a likelihood of PW1 being charged with the offence of **Careless Driving** contrary to **Section 49(1)** of the **Traffic Act**.

7. The foregone evidence backed the pleadings. The Statement of Defence vehemently denied the occurrence of the accident and any liability and put PW1 into strict proof. PW1 therefore bore the duty to prove that DW1 was to blame for the occurrence of the accident. Surprisingly, PW2 testified that according to the Police Abstract DW1 was to blame for the accident. Whereas that was contrary to the clear contents of the Police Abstract, PW2 did not expound on how she reached at such a contrary finding. Since the oral evidence of PW2 tended to contradict a written document, that evidence fell short of attaining the exceptions to the general rule that the contents of a written document cannot be challenged by oral evidence. (See **Sections 97 to 105** of the **Evidence Act, Cap. 80** of the Laws of Kenya). The evidence of PW2 did not at all support PW1's case on liability. Infact the evidence of PW2 to the effect that DW1 was to blame for the accident was inadmissible and of no probative value. With such a state of affairs, there was no way DW1 could be held liable for the accident.

8. The learned trial magistrate was hence right in dismissing the suit on account of liability. I have as well looked at the proposed awards on general and special damages by the trial court as required by the law and I find them very reasonable.

9. I have also been called upon by the Appellant to address my mind to the issue that the judgment was not dated. I note that the issue was not among any of the grounds in the appeal. As our civil litigation system is adversarial in nature, it will not only be contrary to the settled rules of litigation but in outright contravention of **Article 50(1)** of the **Constitution** which roots for fair hearing. By this Court adjudicating on the issue of undated judgment then the Respondent will be condemned unheard. In the spirit of upholding the **Constitution**, this Court declines to consider the issue of undated judgment.

10. Going by the foregone analysis which has yielded that PW1 failed to adduce evidence on how DW1 was to blame for the accident, the appeal has no legal leg to stand on and is hereby dismissed with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 8th day of August 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Kerario Marwa instructed by the firm of Kerario Marwa & Co. Advocates for the Appellant.

Messrs. O. M. Otieno & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant