REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 3 OF 2015

Arising from the Judgment of Hon D.W Mburu, PM, delivered

on 19th December 2014, in MERU CMCC NO. 240 2012

(CORAM: F. GIKONYO J.)

KENCHIC LIMITED.....APPELLANT

Versus

JOHN WAMAHIU KIMUNGE.....DEFENDANT

JUDGMENT

[1] The Appellant was aggrieved by the Judgment of Hon D.W Mburu (Principal Magistrate), delivered on 19th December 2014, in MERU CMCC NO. 240 2012 in which the Learned Trial Magistrate awarded the Respondent a sum of Kshs 1,500,000 in General Damages for injuries suffered as a result of two separate accidents that occurred on 1st September 2009 and 18th January 2018. The Respondent was in the course of employment with the Appellant when he sustained the injuries.

[2] The Appellant filed this appeal and cited the following grounds in the Memorandum of Appeal filed in court on 14th January 2015, namely;

a) That the Learned Magistrate erred in law and in fact in holding the defendant 100% liable against the strength of the evidence tendered therein

b) That the Learned Magistrate erred in law and in fact in disregarding the submissions by the defendant and the testimony by the plaintiff as to the lack of blameworthiness by the defendant.

c) That the Learned Magistrate erred in law and in fact in holding that the defendant never called a witness in support of its defence while the plaintiff was the only witness available and hence arrived at an erroneous decision that the plaintiff had proved his case fully.

d) That the Learned Magistrate erred in both law and in fact when he awarded a sum of Kshs 1,500,000 as damages for injuries suffered which amount was manifestly excessive and high in the circumstances and connotes an erroneous estimate of the damage suffered.

e) That the Learned Magistrate erred in both law and in fact when he awarded a sum of Kshs 1,390,000 as for future medical expenses which amount was not specifically pleaded and which was manifestly excessive and high in the circumstances and connotes an erroneous award.

f) That the Learned Magistrate erred in law and fact in failing to consider or even adequately adopt and appreciate the written submissions of the defendant on record and the authorities annexed therein in support of the defendant's case.

g) That the Learned Magistrate erred in fact and in law by failing to follow rules of precedents in awarding general damages.

h) That the Learned Magistrate erred in both law and in fact for considering irrelevant matters in arriving at the said decision in favour of the Respondent as against the Appellant.

Submissions by the Appellant

[3] On 12th June 2018 when the appeal was scheduled for hearing, the court directed that the appeal shall be canvassed by way of written submissions. Briefly, it was submitted for the Appellant that form the judgment, it was clear that the court found the Appellant liable for the occurrence of the accident for the sole reason that the Appellant did not summon any witnesses or adduce any evidence to controvert that of the plaintiff. They argued further that the judgment did not interrogate; (1) whether the Respondent had proved on a balance of probabilities the allegations of negligence leveled against the Appellant; and (2) the inconsistency of the evidence tendered by the Respondent who was the only witness to the accident. The manner the accident happened and the cause thereof was in controversy and ought to have been interrogated deeply by the trial court.

[4] It was further submitted that the Respondent had alleged that that the Appellant failed to take precautions for the safety of the Respondent while engaged in his work and that he had not been availed safety gear and suitable working conditions while engaged in his work. But from his evidence in court, he testified that he had been availed by the employer and was indeed wearing safety implements to wit a helmet, gloves, overall and riding boots. It was further submitted that the Respondent had testified that he had been availed a group life insurance cover by the Appellant incase he was involved in any accident that would affect his health. Ultimately, it was submitted that the cause of the accident in question was well explained by the Respondent when he stated that it was a pedestrian that encroached onto his path of travel which caused him to brake hard and fall and that the proximate cause had thus been established to be the offending pedestrian and not the Appellant herein. They urged two things; (1) that nexus between the cause of the accident and the Appellant was too tenuous to be sustainable; and (2) the Respondent was in exclusive control of the machine and never alleged nor proved that it was defective. According to them, the liability of the employer did not arise in these circumstances.. Consequently, the Appellant urged the court to allow the Appeal with costs to the Appellant.

[5] The Appellant also submitted that the award of Kshs 1,500,000 for general damages was excessive and not commensurate with previous awards on similar nature. Thus, the trial court erred both in law and in fact.

[6] On special damages, it was submitted that such damages are only awardable when specifically pleaded and proved. The amended plaint only prayed for *"future medical expenses"* which was not quantified. Therefore, the trial court erred in making an ward of Kshs 1,390,000 under this award. Consequently, the Appellant urged the court to allow the appeal and set aside the judgment of the lower court with costs to the Appellant.

Submissions by the Respondent

[7] On the other hand it was submitted for the Respondent that he testified that he was riding the motorcycle in question at a speed of 30-40 KPH, but it was defective as it had sharp brakes. He said that the Appellant did not warn him of that fact and so when he applied the brakes, he was thrown off the motorcycle and sustained injuries. According to the Respondent, since the Appellant did not call any evidence to rebut what the Respondent told court, his evidence remained unchallenged. The Respondent thus contended that the Appellant could not fault the trial magistrate for holding that it was 100% liable for failure to adduce evidence to controvert that of the Respondent

[8] The Respondent set out the principles in which an appellate court may interfere with the discretion of the trial court on quantum of damages in the case of **Kenya Bus Services Limited v Jane Karambu Gituma Civil Appeal No. 241 of 2000.** Based on the law, the Respondent argued that that the award of Kshs 1,500,000 as damages for injuries suffered by the respondent was not excessive as the injuries suffered were severe and the trial magistrate arrived at the right award taking into account all circumstances of this case.

[9] The Respondent posit that the award of Kshs 1,390,000 was made after the court found that it had been pleaded in the plaint and proved by way of production of a medical report. He says that it was clearly captured in the judgment that the Respondent needed a Bone Anchored Hearing Aid (BAHA) costing Kshs 1,300,000 plus surgery to remove implants at Kshs 90,000 and that the medical report of Dr. John Macharia produced as exbiti 10 (a) supported this award and that as such the Appellant was in error to say that future medical expenses were not pleaded or proved against the evidence on record.

ANALYSIS AND DETERMINATION

My sacrosanct duty

[10] This court will, with circumspection, analyze and re-assess the evidence afresh and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify. I should not miss the power and grace of the testimony of witnesses. See ***SELLE vs. ASSOCIATED MOTOR BOAT CO. [1968] EA 123*** **and** ***KIRUGA vs. KIRUGA & ANOTHER [1988] KLR 348***.

[11] Only the Respondent testified. His evidence was that; on 1st September 2009, while in the course of his employment with the Appellant, at about 4:00PM, was riding motor cycle KMCE 007Z along the road next to the mosque in Meru town, when he met a pedestrian who was crossing the road. He applied emergency brakes, fell down and lost consciousness. The Respondent further stated that the motor cycle was new and that he was never advised on the efficiency of the braking system. The Respondent further particularized the particulars of negligence against the Appellant at paragraph 5 of his plaint where he inter alia contended that the Appellant failed to take any or adequate precautions for the safety of the plaintiff and that further he had failed to provide/or maintain safety gears or provide sustainable working conditions to enable the plaintiff carry out his duties safely. Save for making general denials in the defence, the Appellant did not call any evidence.

[11] In cross examination however, the Respondent stated as follows:

> ***"I was the one in control of the motorcycle. I had helmet, gloves, overall and riding boot provided for by my employer. I fell when I braked to avoid hitting a pedestrian. The motor cycle was defective. It had sharp brakes. It threw me off."***

He continued to state as follows;

> ***"…….I had not reported to my employer about the sharp brakes…."***

[12] The Learned Trial Magistrate while holding the Appellant 100% liable for the accident stated as follows;

> ***"the only evidence available on how the accident occurred is that of the plaintiff. The defendant did not adduce any evidence either to challenge that of the plaintiff or to prove the contents of the defence. That being the case, I find that the plaintiff has proved his case against the defendant and hold the defendant 100% liable."***

[13] It is not in dispute that the Appellant's did not call any evidence. It is also not in dispute and is evident from the Respondent's evidence that the accident was self involving. From the evidence by the Respondent, on the material date, he was riding a motor cycle along Tom Mboya Street when he encountered a pedestrian who was crossing the road. He stated that he applied emergency brakes, fell down and lost consciousness. In the ordinary course of things, motorcycle riding a motor cycle in a busy street requires extreme care and caution for pedestrians may cross anytime and anyhow. It also demands such rider to maintain low speed. If indeed he maintained low and appropriate speed in the circumstances, application of emergency brakes would not produce violent effects as to throw him down. The Respondent has attempted to show that the brakes were faulty such that when he applied emergency breaks resulted a violent effect. This accident is the nature of things which falls within the rule of *res ipsa loquitur;-*

> **'…happenings that do not normally occur in the absence of negligence…''** See the book by ***Winfield & Jolowicz on Tort*** 17th Edition.

[14] The Respondent alleged and ought to have proved negligence on the part of the Appellant in maintaining and servicing of the motor cycle. More, specifically, he ought to have shown the brakes were defective and so caused the accident. Other than merely stating that the brakes were defective he did not prove they were defective and caused the accident. He admitted that he did not inform or report the ''faulty'' brakes to the employer. The manner the accident happened tell its own story of negligence on the part of the Respondent. Available evidence is that the motor cycle was under the control of the Respondent and ought to have taken care when driving on a busy street. No evidence that the Appellant did not take or use proper care in the management and maintenance of their motor cycle. The story by the Respondent on alleged faulty brakes was a mere afterthought. The fact of the occurrence of the accident, taken with the surrounding circumstances, does not permit an inference or raise a presumption of negligence on the Appellant, or make out a Respondent's prima facie case against the Appellant.

He was given protective gear

[15] Another important aspect of this case: Even though in his plaint the Respondent had contended that the Appellant were negligent by falling to provide him with *inter alia* safety gears or suitable working conditions, it emerged during cross examination that he had been provided with and wore helmet, gloves, overall and riding boots. As he was the one in control of the motorcycle as at the time of the accident, he ought to have taken care by driving at safe low speed such that he will stop with ease should an eventuality such as careless crossing by pedestrians occur. The scene was in Meru town and busy street and a mosque was nearby.

Consequences of lack of Evidence in rebuttal

[15] Before I close however, I wish to address one salient point. The legal burden of proof rests with the person alleging. In this case, it was the Respondent. And that legal burden does not shift. The only burden which shifts is evidential burden which arises after such preponderant amount of evidence has been adduced against a party that the said party would fail without further evidence. Such party will need to rebut the evidence adduced to avoid judgment being entered against him. But, judgment is entered on the basis that the weight of evidence satisfies the standard of proof; on balance of probabilities; and not on the basis that that a party did not call evidence. In simple language, the successful party is one who proves his case on the required standard of proof. I have ample reasons for this proposition. Even where no evidence is called by the defendant, a plaintiff who does not adduce evidence to the required standard will fail. Again, rebuttal may come from cross-examination of a witness, or law, for instance, where statutory requirements underpinning the transaction have not been met. Therefore, entering judgment against a defendant merely because he did not call evidence is an error in principle. Accordingly, the trial court fell into error. The trial magistrate ought to have properly applied mind to establishing whether the Respondent has proved, on balance of probabilities, that the Appellant was negligent or did not take proper care of the motor cycle such that the brakes were faulty, and caused the accident. The accident was self involving, and the possibility that the Respondent was speeding or did not manage the said motorcycle in a manner that does not culminate into an accident is high. Only speeding motor cycle would throw a person off in a violent way upon application of emergency brakes. Had the Respondent been riding at a moderate speed, he would probably have been in a position to brake and manage the said motorcycle in a manner that would have avoided the accident. It bears repeating that nothing shows that the breaks were faulty. With tremendous respect to the trial court, I see no basis on which the Appellant was found to be negligent or responsible for this accident. In light thereof, this appeal should succeed.

[16] Taking into totality all the circumstances in this case, I find the Appellant's appeal to be merited and I accordingly allow it with no order as to costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 27th day of September 2018

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F. GIKO NYO

JUDGE

In the presence of:

M/s. Nyaga advocate for Mr. Kimunya advocate for respondent

Mr. Kibichio advocate for Appellant - absent

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F. GIKO NYO

JUDGE