REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

(CORAM: R MWONGO, J)

CIVIL APPEAL NO. 641 OF 2012

PETER GATIMU MWANGI.....APPELLANT

VERSUS

DANFORD OFWORI.....1ST RESPONDENT

LOUIS SIGOMBE.....2ND RESPONDENT

(Being an appeal against the judgment and decree of the Magistrates' Court (Hon. S. Atambo (Ms.) Principal Magistrate) delivered on 2nd November, 2012 in Milimani CMCC No. 4886 of 2009)

JUDGMENT

1. This is an appeal against liability. It arises from the judgment and decree of the lower court in CMCC No. 4886 of 2009. There are three main grounds of appeal, namely that:

> ***"1. The Learned trial magistrate erred in finding the appellant liable in contributory negligence.***
>
> ***2. The learned magistrate erred in finding the appellant contributed to the extent of 50%.***
>
> ***3. The learned magistrate erred in relying on hearsay***
>
> ***4. The learned magistrate erred in ignoring precedents cited in submissions of the appellant on police records and their production thereof without calling the makers***
>
> ***5. The learned magistrate erred in her appreciation of the appellant's evidence.***
>
> ***6. The learned magistrate erred in making conclusions contrally(sic) to the law and evidence."***

2. The brief facts of this case are that: on or about 20th March, 2009, the Plaintiff/ Appellant asserted that he was standing on a pedestrian highland along Mombasa road, Nairobi, when he was hit by a vehicle. He claimed that the 1st defendant so negligently drove, managed and or controlled motor vehicle registration number KAX 712S that it collided into him. As a result, he contended, he sustained serious injuries, and suffered loss and damage. He sued the driver and the 2nd defendant, who was the registered owner of the aforesaid motor vehicle.

3. In her judgment, Atambo, S, then Principal Magistrate, found against the respondents. However, she apportioned liability at 50%:50% as between the plaintiff and the respondents. The court awarded: general damages of Kshs. 500,000.00 less contribution; special damages of Kshs. 25,800.00; and costs and interest. It is this apportionment of liability against the appellant at 50% that raises this appeal.

4. In the circumstances, the Appellant prays that:

> ***"the decision of the lower court be set aside and be substituted with: a finding on full liability against the defendants; alternatively, a lesser finding on liability against the appellants; (and) costs of the appeal be for the appellant".***

5. The appeal is opposed.

6. At the hearing Mr. Kaburu for the Appellant submitted that the appeal is premised on findings as to liability, apportioned at 50% equally between the parties. According to counsel, the appellant was hit by the motor vehicle registration number KAX 712S while he was standing as a pedestrian on the highland along Mombasa Road. Particularly, it was stated that the appellant was standing in between the dual carriageway when the aforesaid motor vehicle mounted the kerb and knocked him down. As such, he could not have had any responsibility for the accident. He urged that, in their defence pleading, the respondents failed to specifically deny that the plaintiff (Appellant herein) was hit whilst standing in the highland of the road.

7. Counsel submitted that the police officer who produced the record of the accident as contained in the Occurrence Book on behalf of the respondent was neither an eyewitness nor the investigating officer. Further, that apart from the Occurrence Book, there were no other investigations carried out. It was thus contended that it was wrong for the Magistrate to apportion liability equally. Counsel urged this Court to reassess the case as if at first instance noting, however, that it has not seen the demeanor of the witnesses.

8. For the Respondents, Mr. Kariuki opposed the appeal. Counsel's submission was that the trial court did not err in apportioning liability. He argued that the appellant was in fact to blame for his misfortune, noting that there was no zebra crossing at the point of the road where the appellant was hit. It was submitted that the challenge as to admissibility of the Occurrence Book extract is misplaced and that the aforesaid extract is admissible. Counsel urged the court to dismiss the appeal with costs.

Discussion and Analysis

9. In my view the issues for determination may be framed as follows:

(a) *Whether the Respondents failed to specifically deny that the appellant was standing on the highland when he was knocked down.*

(b) *Whether the lower court erred in apportioning liability equally at the 50%:50% as between the appellant and the respondents.*

Whether the Respondents failed to specifically deny that the appellant was standing on the highland when he was knocked down.

10. As earlier noted, the Appellant contends in his submissions, that the Respondents failed to specifically deny in the defence that he – the Appellant – was standing on the highland when he was knocked down. The Respondents on the other hand contend that this is not an issue that was raised during proceedings in the lower court. As such, it is trite that this is not an issue that can or should be canvassed on appeal before this court. Having not been raised in the lower court, can this court then entertain the issue at appeal?

11. I have perused the record of proceedings, the pleadings and submissions and documents in the lower court file. In the plaint at paragraph 4 the Plaintiff asserted that he:

> ***"…was standing on a pedestrian highland along Mombasa Road, Nairobi when the 1st defendant or the defendants' authorised agents acting for the defendant so negligently drove, managed or controlled the aforesaid vehicle that it collided with the plaintiff…"***

12. In the defence, the defendant at paragraph 3 denied the occurrence referred to in paragraph 4, which I deem to include a denial of the facts set out in in that paragraph, by stating:

> ***"…the Defendants further deny the occurrence referred to in paragraph 4 of the Plaint and further deny the particulars of negligence as enumerated thereunder…"***

13. This meant that the facts in paragraph 4 of the plaint were subject to proof through evidence. From the proceedings, it is clear that PW1, the plaintiff in his evidence stated :

> ***"….I alighted and crossed the road. Passed 1st lane and waited to cross the road. Vehicle form Embakasi direction knocked me down….I was in between the four lanes - head(sic) to Nairobi and Embakasi…he avoided hitting the vehicles at the stage and hit me…."***

In cross- examination, the plaintiff said:

> ***"I had crossed one part of the road and was standing on the side between the double lanes. I was on the side of the road."*** (Emphasis supplied).

14. The plaintiff was the only eye-witness called to give evidence. The driver of the accident vehicle, the 1st Defendant, was not called to give evidence. Instead, Corporal Joyce Osili gave evidence as DW1. She was neither the investigating officer nor an eye witness. She produced the Occurrence Book (OB) extract, according to which the plaintiff was crossing the road when he was hit by the vehicle. The OB extract is not on the file, but there is no indication that it identified the spot on the highway where the plaintiff was located when he was hit by the location.

15. In her evidence, DW1 said:

"That pedestrian was crossing the road from General Motors direction to the matatu terminus to across and was knocked down…According to the Investigating Officer plaintiff was crossing the road when knocked. That Am a traffic officer and its known on a highway motor vehicles have a right of way especially when there's no zebra crossing".

In cross-examination she said:

"I would have charged the pedestrian if I was the investigating officer. I know the junction in issue….its not an offence to cross the road but the plaintiff should be careful while crossing…"

This evidence is hearsay to the extent that DW1 was relaying information which she had received from the investigating officer who was not availed to give evidence. The rest of her evidence, however, constituted her own opinion evidence of the general statement of the law and of her alleged personal knowledge of the area. She had not observed the position of the plaintiff when he was knocked down. Further, she was not entitled to give opinion evidence.

16. From the above evidence the learned magistrate found as follows:

"In cross–examination he (plaintiff) stated that he was standing on the side of the road waiting to cross the last bit of the road. He admitted there being no zebra crossing at the said point of the road and that he was cautious to the fact that he had to wait for all motor vehicles to clear before he could cross…

…. Cpl. Joyce Osili confirmed occurrence of the accident ….She testified that that the plaintiff was crossing the road towards the matatu terminus when he was knocked down…"

17. The learned magistrate also found that :

"Both parties are agreeable that the road in issue is a highway and both motorist and pedestrians have to be very careful while using it….

The plaintiff has not proved that indeed he was on the side of the road when he was hit following description of the spot he was hit at….".

18. With respect, the learned Magistrate was not entitled to conclude as she did. The plaintiff 's evidence in chief and cross-examination clearly indicates that the plaintiff was in *between the four lanes*; that he was *standing between the double lanes*; the Magistrate noted that plaintiff was *waiting to cross the last bit of the road*. In light of this evidence, it is clear that the plaintiff was not hit within the road.

19. The learned Magistrate appears to have placed a great deal of weight on the evidence of Corp. Joyce Osili who gave a good dose of opinion evidence and self-evidence, including stating that she would have opted to charge the plaintiff. Nowhere in the proceedings is there any clear evidence of the spot on or about the road where the plaintiff was hit. Such evidence could have controverted the plaintiff's evidence that he was in between the four lanes, there being no dispute that the road was a highway.

20. I therefore find on this issue, that the respondents did in fact deny pargraph 4 concerning the fact that the plaintiff was standing on the highland. Their denial, however, was unsupported by evidence assertion was supported by evidence. It is, indeed, surprising that the 2nd respondent/defendant was not called to give evidence despite the fact that he was an eyewitness as the driver whose vehicle hit the plaintiff. In the result, I am persuaded that the evidence demands a review on the question of liability.

Whether the lower court erred in apportioning liability equally at the 50%:50% as between the appellant and the respondents.

21. On the issue of liability, this court must remind itself that, when sitting as an appellate court, it must act on the principles as set out by the Court of Appeal in the case of **Selle v Associated Motor Boat Company Ltd [1968] EA 123 where the court (Sir Clement De Lestang V-P) stated:**

"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohmed Sholan (1955), 22 E.A.C.A. 270)."

22. Further, in **Mbogo & Another v Shah [1968] E.A.** the court held that:

"…A Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice…"

23. Cumulatively, this court as an appellate court is entitled to **reconsider the evidence, evaluate it itself and draw its conclusions though it should always bear in mind that it has neither seen nor heard the witnesses or seen their demeanour, and should make due allowance in this regard. That being said, this Court is not bound to follow the lower court's findings of fact if it appears the court failed to take into account some particular circumstances or probabilities materially affecting the case so as to arrive at an unjust decision.**

24. In light of the aforesaid, under what circumstances can this court then interfere with the lower court's finding on liability? On this issue, I guided by the Court of Appeal in the case of **Karanja v Malele [1983] KLR**, where it was held that:

> ***" 'There are two elements in the assessment of liability, namely, causation and blameworthiness. See Baker v Willoughby [1970] AC 467. In my opinion there can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car (per Potter JA.)***
>
> ***'…apportionment of blame represents an exercise of a discretion with which this court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.' (per Chesoni Ag JA)***
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> ***As per Kneller JA., 'It is part of the relevant law with which I am concerned and it begins fifty years ago, in England, when Scrutton LJ held that a cyclist riding in the dark must be able to pull up within the limits of his vision. Baker v Longhurst & Sons Ltd [1933] 2 KB 461, 468.***
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> ***The very next year, however Lord Wright in Tidy v Battman [1934] 1 KB 319, 322 declared:***
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> ***"…show that no one case is exactly like the other, and no principle of law can, in my opinion, be extracted from these cases. It is unfortunate that questions, which are questions of fact alone, should be confused by importing into them, as principles of law, a course of reasoning which has no doubt properly been applied in deciding other cases on other sets of facts."***
>
> ***and twelve years later Lord Greene MR pointed out that:***
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> ***"There is sometimes a temptation for judges in dealing with these traffic cases to decide questions of fact in language which appears to lay down some rule which users of the road must observe."***
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> ***which he thought was a habit much to be deprecated. Morris v Luton Corporation [1946] 1 KB 114, 115.***
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> ***Add to that the consideration of the doctrine of the "last opportunity" (to avoid the accident) has been obsolete since 1949: see Denning LJ (as he then was) in Davies v Swan Motor Co (Swansea) Ltd [1949] 2 KB 291 322-4: and that no distinction can be drawn between negligence after seeing the danger and negligence in not seeing it beforehand: Denning LJ in Harvey v Haulage Executive [1952] 1 KB 120, 129 (CA) then the two causes of the accident cannot be severed Hodson LJ (ibid) 129: and so the trial judge was right to find both were at fault.***
>
> ***Furthermore, he found it was a case for contribution and in my view, we must accept that finding. … The trial judge saw and heard the witnesses. We have not; and, in my opinion, we are in no position to substitute our findings of fact for those reached by him. See Worsford v Howe [1980] 1 WLR 1175 (CA).' "***

25. It has been argued that the appellant was hit while standing as a pedestrian on the highland along Mombasa Road. That while standing there in between the dual carriage motor vehicle registration number KAX 712S mounted the kerb and knocked him down.

26. According to the information entered into the Occurrence Book, the pedestrian, the Appellant herein :

> ***'…was trying to cross the road from General Motors direction to where there was a matatu terminus on the other side of the road. As a result he was knocked by the said Nissan matatu and sustained injuries…'***

However, there was no indication of the person who made the report to the police. That person was not called to give evidence as to whether the plaintiff was hit on the highland or in the midst of a lane in the highway.

27. As earlier stated, I am satisfied that the learned Magistrate, in exercising his discretion to apportion liability, concluded that the plaintiff had not proved that he was on the side of the road when hit. Yet his evidence in chief and in cross examination affirm so. And the court was not availed any evidence which was capable of being tested by cross-examination to discredit the plaintiff's evidence. Indeed, Corp Joyce Osili in her cross examination said she didn't know whether the pedestrian had been interviewed when the OB report was being written.

28. On the basis of the above reasoning, I have come to the conclusion that, clearly, the learned magistrate wrongly exercised his discretion based on his conclusion that the plaintiff had:

> ***"…not proved that he was indeed on the side of the road when he was hit following the description of the spot he was hit at"***

29. As shown in the reasoning herein, firstly, the plaintiff's evidence was not discredited by any other defence evidence. Secondly, the proceedings do not show that any witness gave evidence as to *"the description of the spot where he [the plaintiff] was hit at"*.

30. Applying **Mbogo v Shah** I am satisfied that the learned Magistrate in exercising his discretion misdirected himself in appreciating the evidence and as a result has arrived at a wrong decision. That decision led to the apportionment of liability at 50%:50%.

31. Following the finding this court has arrived at, I am of the opinion from the evidence assessed above, that the plaintiff was less liable than the defendants. There was no clear evidence that the plaintiff was on the road when hit. Instead, I am persuaded on balance of probabilities from the evidence that he was more likely on the road-side in between the lanes of the highway. From that perspective, and taking into account the guidance from the Court of Appeal in **Karanja v Malele (supra)** that there can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car, I would apportion liability at 80% for the defendants/respondent and 20% for the plaintiff/appellant. I would not disturb the quantum awarded by the lower court, as this was not in issue.

32. In the result, the appeal succeeds to the extent that the Appellant shall be entitled to an award as follows:

a. Liability 80% to be borne by Respondents: 20% by the Appellant

b. General damages Kshs 500,000/- less contribution

c. Special Damages Kshs 25,800/=

33. As regards costs, I direct that given the outcome herein, the Respondents shall bear 80% of the costs and the Appellants 20% thereof in both the lower court and on this appeal.

Orders accordingly.

Dated and Delivered at Nairobi this 27th Day of September, 2018

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. ……..……for the Appellant

2. …….....…for the Respondents

3. Court Clerk……