



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 218 OF 2011

BEN THUO MUTHAMA.....APPELLANT

VERSUS

JACQUES PETER COMBES.....RESPONDENT

(Being an appeal from the Judgment of Hon C. Meoli (Mrs), Chief Magistrate (CM) at the Chief Magistrate's Court at Kiambu Civil Suit No 36 of 2007 delivered on 14th April 2011)

JUDGMENT

INTRODUCTION

1. In her judgment delivered on 14th April 2011, the Learned Trial Magistrate, C.W Meoli (Chief Magistrate) (as she then was) dismissed the Appellant's suit on the ground that he had failed to prove his case on a balance of probabilities. She directed that each party bear its costs of the suit.
2. Being dissatisfied with the said judgment, on 12th May 2011, the Appellant filed his Memorandum of Appeal of even date. He relied on nine (9) Grounds of Appeal.
3. His Written Submissions were dated and filed on 29th May 2018 while those of the Respondent's Written Submissions were dated 25th June 2018 and filed on 27th June 2018.
4. When the matter came before the court on 28th June 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

5. The Appellant's case was that the Learned Trial Magistrate erred when she found that he did not prove his case, on a balance of probabilities, that he was hit by the Respondent's Motor Vehicle Registration Number KAB 368U (hereinafter referred to as "Subject Motor Vehicle") on 31st October 2005 and as a result, that he suffered multiple fractures and soft tissue injuries.
6. He pointed out that there were two (2) separate accidents on the aforementioned date and that the first accident that involved him and a Nissan matatu was not a subject of litigation. He stated that he was knocked by the Respondent's Subject Motor Vehicle in a second accident as he was placing a life saver on the road.
7. He stated that as the Respondent testified that he saw the Appellant's "**body being carried**", that "**body**" must have been referring to him as he was unconscious at the material time and seemed dead. He also said that the Police Officer who was summoned to court blamed him for the accident which raised the question as to how a pedestrian could cause a vehicle to hit him.
8. It was also his further contention that the Learned Trial Magistrate erred in having found him to have been to blame for the accident yet the Police Abstract Report had indicated that Eric Muchangi (hereinafter referred to as "PW 2") was to blame for the accident. He argued that the Learned Trial Magistrate did not ascertain who was telling the truth.
9. He further contended that the Learned Trial Magistrate erred in disproving his case because the witness he relied upon was his friend. It was his submission that all persons, save for those who were prevented from answering questions put to them as stipulated in Section 125 of the Evidence Act Cap 80 (Laws of Kenya), were competent witnesses.

10. He relied on the case of Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR to buttress his argument that parties are bound by their pleadings. He added that the Learned Trial Magistrate raised issues that had not been pleaded by the parties by insinuating that there could not have been an accident because it was only him who was injured.

11. He therefore urged this court to allow his Appeal herein.

THE RESPONDENT'S CASE

12. According to the Respondent, the Appellant did not substantiate any Ground of Appeal. It was his submission that after evaluating the evidence before her, the Learned Trial Magistrate could not have come to any other conclusion.

13. He therefore urged this court to dismiss the Appeal herein.

LEGAL ANALYSIS

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

15. This was aptly stated in the cases of Selle vs Associated Motor Boat Company Ltd[1968] EA 123 and Peters vs Sunday Post Limited [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

16. Having considered the respective parties' Written Submissions, the case law and the provisions of law that they relied upon, this court found that the only issue that had been placed before it was whether or not the Learned Trial Magistrate was justified in having dismissed his case on the ground that he did not prove his case on a balance of probabilities.

17. The facts of this case were that on the material night of 31st October 2005, the Appellant was a passenger in PW 2's Motor Vehicle Registration Number KAD 335T when they were involved in an accident with a Matatu Registration Number KAS 748J. They came out of the Motor Vehicle and as they were discussing with the driver of the said Matatu, the Subject Motor Vehicle hit the Appellant herein and he became unconscious. He also sustained injuries to his legs. He was emphatic that he was hit by the Subject Motor Vehicle and that he did not sustain injuries as a result of the first accident involving the Matatu Registration Number KAS 748J.

18. PW 2 corroborated the Appellant's case and stated that patrol police officers were at the scene when the second accident occurred. He admitted having been charged with careless driving.

19. No 75301 PC Florence Anyim (hereinafter referred to as "PW 3") was a Traffic Police Officer attached at Pangani Police Station. She confirmed that the person who was blamed for the accident between the Motor Vehicle Registration No KAD 355T and the Matatu Registration Number KAS 748J was PW 2 and that the Respondent was never blamed for any accident.

20. On his part, the Respondent testified that on the material night he was driving along Kiambu Road when he came across an accident scene. Police and members of public had surrounded a Matatu. Motor Vehicle Registration No KAD 355T that was lying across the road. He admitted having hit the said Motor Vehicle Registration No KAD 355T at the boot but denied having hit a person. He said that his Subject Motor vehicle was hit on the left front wheel.

21. There was no dispute that the Appellant sustained injuries in an accident on the material date along Kiambu Road, that he, PW 2 and the Respondent were present on that road on the same date and at the same time and that there was some contact between his Subject Motor Vehicle and PW 2's Motor Vehicle Registration Number KAD 355T. What was in dispute was who caused the Appellant the injuries.

22. It is trite law that he who asserts must prove. The burden of proof never shifts on the person who is alleged to have done something. The burden remains on the one who asserts that another did something.

23. PW 3 adduced in evidence a Police Abstract Report showing that PW 2 was to blame for the accident involving his motor vehicle and Motor Vehicle Registration No KAS 748J owned by Stephen Mwangi Nganga. PW 2 confirmed having been charged with the offence of careless driving for this first accident.

24. The Appellant did not adduce in evidence any other Police Abstract Report in respect of Motor Vehicle Registration No KAB 368U. In this regard, the Appellant failed to show the nexus between his injuries and the Respondent's Subject Motor Vehicle.

25. Indeed, nothing would have been easier than for PW 3 to have clarified about the two (2) accidents and/or apportioned blame against the Respondent, if at all the same was the position. Notably, PW 2 testified that patrol police officers were at the scene. The duty was on the Plaintiff to have called the patrol officers as witnesses in this case. This court was curious why if there were patrol officers at the time they did not give the traffic officers who visited the scene the correct position.

26. The evidence of these patrol officers and a separate Police Abstract Report was critical in proving that there were indeed two (2)

accidents that would have warranted the intervention of the police. Whereas PW 2 was blamed in respect of the accident between his Motor vehicle and Motor Vehicle Registration No KAS 748J, there was no documentary evidence to show that there was any accident between the Appellant and the Respondent's Subject Motor Vehicle.

27. Accordingly, having perused the oral and documentary evidence and the respective Written Submissions and the case law herein, this court found itself in agreement with the Learned Trial Magistrate that the Appellant did not prove, on a balance of probability, that the injuries he sustained was as a result of him having been hit by the Respondent's Subject Motor Vehicle. He sustained serious injuries but unfortunately, the law is what it is. A case must be won on evidence that has been placed before a Trial Court for determination of a case. This court was therefore not persuaded to interfere with the finding of the Learned Trial Magistrate as she did not apply the wrong principles in arriving at the conclusion that she arrived at.

DISPOSITION

28. For the foregoing reasons, the upshot of this court's Judgment was that the Appellant's Appeal that was lodged in court on 12th May 2018 was not merited and the same is hereby dismissed with costs to the Respondent.

29. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of October 2018

J. KAMAU

JUDGE