REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 5 OF 2015

DAVID MWANGI KARIUKI.....1ST APPELLANT

R W (Minor suing through next friend and father and the 1ST appellant

DAVID KAROKI MUCHIRI(deceased).....2ND APPELLANT

VERSUS

STEPHEN MWANGI.....1ST RESPONDENT

SILAS WAIGWA KIMITI.....2ND RESPONDENT

(An appeal from the Judgment/Decree of Honourable S. Mungai Chief Magistrate

delivered on 3rd December 2014 in Nakuru CMCC No. 548 of 2011

David Mwangi Kariuki -vs- Stephen Mwangi and Sailas Waigwa Kimiti)

JUDGMENT

1. The appeal before me arises from the trial court's judgment delivered on the 3rd December 2014. The Appellants case was dismissed with costs.

The appellants preferred four grounds of appeal:

> ***1. That the learned trial Magistrate erred in law and fact in not appreciating the evidence on record in totality hence arrived at a wrong finding that the Appellants had not proved their case to the required standards.***
>
> ***2. That the learned trial Magistrate erred in law and fact in failing to consider Appellants evidence which abundantly confirmed the defendants were to blame for the subject accident.***
>
> ***3. That the learned trial Magistrate erred in law and fact in not appreciating that the plaintiff had proved the particulars of negligence pleaded.***
>
> ***4. That the learned trial magistrate erred in Law and fact in not considering adequately the testimony of witnesses vis-a-viz the police record and put a lot of weight on erroneous matters***

which did not touch on the issue of liability.

This court has been urged to set aside the said Judgment and hold that the Respondents are wholly to blame for the accident, and to award special damages pleaded and specifically proved. The appellants are comfortable with the award of general damages assessed by the trial court had their suit succeeded.

Parties submitted written submissions on the appeal.

2. **Appellants Case**

In his submissions, the appellant contends that evidence was tendered that the 1st appellant while carrying a child crossed the Nakuru-Eldoret road at Shell Petrol station from the right and stated that:

> ***"I passed the road to Eldoret and stopped at the pavement which separates the dual carriage way. I then crossed the road and was knocked by a motor vehicle coming from Eldoret direction. It was KAQ 497F."***

The appellants blamed the driver of the vehicle for careless driving as he knocked him while on the side of the road. The 1st appellant further stated on cross examination that he had finished crossing the road and was knocked on the side of the road, and that he was not careless, and he fell on the road on the left facing town. (Meaning Nakuru direction)

3. I have carefully considered the 1st Appellants evidence as recorded. His evidence is that he had stopped at the pavement separating the two roads, then crossed to the other side of the road when the motor vehicle coming from Eldoret direction knocked him that he had finished crossing and was knocked on the side, not on the road but on the pedestrian path. He confirmed that there was a Zebra crossing ahead.

PW2, P.C Samuel Munyiri was not the investigating officer and only attended court to produce the police abstract. He absolutely knew nothing about the accident and said as much. His evidence is therefore irrelevant for all purposes save for the production of the police Abstract that was issued from the police station.

4. **Respondents Case**

The 2nd Respondents evidence as driver of the accident vehicle was that he saw a vehicle ahead swerve to the right then suddenly he saw a person on the road, that he braked and tried to swerve to the right but time and distance could not allow him avoid knocking down the said person. It was his testimony that the person was crossing from the right and he was holding a child, and both were knocked down. He blamed the pedestrian for suddenly crossing the road on a NO Zebra crossing place, which was 20 metres ahead.

5. **Analysis of Evidence**

I have perused the trial courts judgment as well as submissions by the parties.

It is submitted that given the circumstances as narrated by the 2nd Respondent, there was no room for the respondent to avoid knocking down the pedestrian and the child and that the Appellant was the author of his misfortune in that his evidence corroborates that of the 1st Appellant and therefore ought to be wholly liable as found by the trial magistrate.

6. It is trite that an appellate court should be very slow to find fault on the findings of fact by the trial court. See Court of Appeal decision in **Nkube -vs- Nyamiro (1983) e KLR 403** as the appellate court neither saw or heard the witnesses testify.

The 1st appellants evidence is that he was knocked off the road after crossing the road when the vehicle veered off to the pedestrian pathway. The Respondents version of the event is that the 1st appellant was crossing the road in front of a vehicle, swerved to the right to avoid hitting him, that he was barely 20 metres ahead and despite breaking he could not avoid hitting him as the space between was not enough, meaning he was on the road, not off the road.

7. The court is unable to make clear determination on the point of impact this being the borne of contention as no sketch plan of the scene was produced by the police officer who could not do so in any event as he was neither the investigating officer nor did he have the police file.

It was incumbent upon the appellants to produce to the court all relevant materials and documents to enable it make well informed decision. Section 107 (1) of the Evidence Act comes into play in that:

> ***"Whoever desires any court to give judgment as to any right or liability dependent on the existence of facts which he asserts, he must prove that those facts exist."***

The burden of proof lies upon the person who asserts. This burden in my considered opinion was not discharged by the appellants.

8. The duty of the court is to re-evaluate and re-consider the evidence on record and not to introduce new or extraneous matters not dealt with in the parties respective evidence.

See **Robert Opala Omuhinda -vs- Simon Githure Marongo (2016) e KLR** in **HCA No. 128 of 2010 at Kakamega and HCA No. 58 of 2013 Nderi -vs- Samuel Kiburu Mwaura & Another (2015) e KLR.**

9. I agree with the trial Magistrates findings that the 1st appellant was knocked by the respondents vehicle coming from Eldoret direction.

This finding in my view is informed by the evidence of the 1st appellant that he had stopped at the pavement separating the two roads. The only rationale is that the appellant was crossing to the other side of the road from the pavement, and entered onto the path of the oncoming vehicles from Eldoret direction without checking that the road was clear and safe to cross, a fact corroborated by the respondents driver that the vehicle ahead swerved to the right to avoid hitting him and due to the distance despite applying brakes he could not avoid knocking him down. The appellants were further crossing the road in darkness on a No zebra crossing place yet the Zebra crossing was a few meters away.

10. I find the trial magistrates findings were founded on the evidence as tendered. I associate myself with the holding in **Ndiritu -vs- Ropkoi & Another EALR 334, Okubasu, Githinji & Waki JJA,** that an appellate court should be very slow to differ with the trial court where the findings of fact are based on evidence and not on wrong misapprehension of evidence or on wrong principles of law.

11. **<u>Determination</u>**

Having considered the evidence and taking into account the grounds of appeal and submissions by counsel, I am of the view that the appellants did not prove their case to the required standards.

In **Kirugi & Another -vs- Kibiya & 3 Others (1987) e KLR 347**, the Court of Appeal held that:

> ***"the burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."***

12. The only document produced by the appellants was the police abstract. Admittedly such document proved the occurrence of the accident by giving the salient details of the accident. It does not by any means prove how the accident occurred. It was upon the respondent to call and tender credible evidence

on how the accident occurred, and to prove negligence on the driver's part.

In the Court of Appeal case **Patrick Mutie Kamau & Another -vs-Judy Wambui Ndurumo** the court held:

> ***"that pedestrians too owe a duty of care to other road users, and they ought to move with due care and follow the Highway Code. They should too take care of their own safety and not to run across the road when it is not safe to do so. If they do so, it is at their own peril and cannot blame and oncoming vehicle which is unable to avoid the accident due to short distance."***

13. A driver is not expected to do the impossible in the face of a pedestrian who dashes into the road on the path of an oncoming vehicle.

My findings, based on the evidence in its totality comments to me that the 2nd respondent cannot be held liable in negligence for the accident. The appellants failed to prove negligence against the driver of the accident vehicle upon a balance of probabilities. The weight of evidence adduced before the trial Magistrate by the appellants fell far below the required standards.

14. For those reasons, the appeal has no merit.

It is dismissed with costs.

Dated, Signed and Delivered this 13th Day of April 2017.

J.N. MULWA

JUDGE