



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 473 OF 2011

CATHERINE NJERI MUNGAI.....APPELLANT

VERSUS

THOMAS NJOROGE KIARIE.....RESPONDENT

(Appeal from the judgment of Honourable W. Mokaya (Ms.)

Principal Magistrate at Nairobi delivered on 5th

September, 2011 in CMCC No. 7979 of 2008)

JUDGMENT

The Appellant herein was the Plaintiff in the lower court where she filed a Complaint dated 25th November, 2008 claiming that on or about 04/11/2007 she was travelling in motor vehicle registration number KWT 665 along Thika -Kirwara road, when the defendant, his employee, servant and/or agent so negligently drove, managed or controlled motor vehicle registration number KAB 533Y that it collided with KWT 665 and the Plaintiff sustained injuries, suffered loss and damage. As a result, the Appellant sued for general and special damages.

The claim was denied by the Respondent who filed a Defence dated 6th March, 2009 and averred that the accident was solely caused and/or substantially contributed to by negligence of the driver of motor vehicle registration number KWT 665. The Respondent also averred that the suit was fatally defective and the same ought to have been struck out.

Upon hearing the case, the trial magistrate found that the Appellant had not proved liability against the Respondent and dismissed the Appellant's case. Aggrieved by the judgment of the lower court, the Appellant filed this Appeal on the grounds contained in the Memorandum of Appeal dated 22nd September, 2011. The Appellant's appeal is on the grounds that the trial magistrate erred in not finding either full or contributory negligence on part of the Respondent's driver, that the magistrate erred by relying on the evidence of DW3 and that the magistrate erred in not assessing the damages she would have awarded had the appellant succeeded.

At the hearing of the case, the Appellant called two witnesses whereas the Respondent called three witnesses.

Dr. Wokabi testified as (PW1). He examined the Appellant on 2/10/09 and relying on her medical history found out that she had suffered soft tissue injuries which had fully healed though there was a scar on the right thigh.

The Appellant **CATHERINE NJERI MUNGAI** testified as PW2. It was her evidence that on the fateful night, she was a passenger in motor vehicle registration number KWT 665 which was being driven by her deceased husband who died as a result of the accident. PW2 testified that the Respondent's vehicle KAB 533Y veered from its lane and encroached into their lane and despite the deceased's efforts to avoid the accident, the Respondent's vehicle hit theirs. Upon the impact, their vehicle overturned and faced the direction from which they were coming.

The Respondent called Mathew Njoroge Muiruri as DW1. He was driving Motor vehicle KAB 533Y at the material time. It was his evidence that at around 10.30pm, he was driving from Thika heading to Kirwara when he saw motor vehicle KWT 665 which was driving from the opposite direction. He dimmed his headlights and slowed down but the oncoming vehicle KWT 665 instead, switched off its lights completely and suddenly there was a collision between the two vehicles. He stated that his vehicle was on its lane and it is the Appellant's vehicle KWT 665 that veered to his side and hit his vehicle on the right side.

Thomas Njoroge Kiarie testified as DW2 and stated that he is the owner of motor vehicle KAB 533 Y and that he was seated next to the driver. He saw motor vehicle KWT 665 approaching from Kirwara side heading to Thika in full lights. He stated that KWT 665 was over speeding because the time it took to hit their vehicle from when he first saw it was a short duration. When they went to assist the occupants of the Appellant's vehicle, he noted that the driver was drunk and smelling of alcohol. His vehicle underwent a police inspection that revealed that it did not have pre accident defects.

PC Alex Anyona based at Kirwara police station testified as DW3. He told the court that the Investigating Officer PC Mutinda had been transferred but he produced the investigation file which contained the report of the accident which blamed the deceased driver of KWT 665 for the accident. DW3 testified that the point of impact was on the left lane approximately 2.2 meters as one drives from Thika to Kirwara where vehicle KAB 533Y was being driven. That, it was motor vehicle KWT 655 that entered the lane of the other vehicle by 0.8 meters and that motor vehicle KAB 533Y was intact as it did not move. He further testified that the Investigating Officer found that the deceased was driving at high speed and moved to the other lane.

The Appeal was canvassed by way of written submissions which I have considered together with the authorities cited. It is the Appellant's submissions that the trial magistrate erred in not finding the Respondent's driver liable and not to have contributed to the accident. The Appellant further submitted that slowing down does not amount to taking precaution and that the Respondent's drive ought to have done more by moving to the left to avoid the accident. The Appellant also submitted that, the fact that the trial magistrate noted that her evidence was not corroborated ought not to have been a ground for consideration.

On the other hand, it is the Respondent's submissions that the Appellant did not prove her case on a balance of probability, that according to the evidence adduced by both parties, the Respondent's evidence is more believable that the accident was occasioned by negligence on the part of the Appellant. The Respondent submitted that the Appellant did not adduce any evidence to support her allegation, which is contrary to the evidence Act that, he who alleges must prove.

I have considered the submissions in totality together with the authorities cited by the parties. An appellate court is tasked with re-evaluating the evidence before the lower Court in order to reach an independent conclusion but in so doing, it will not interfere with the exercise of discretion by the lower court unless the exercise of that discretion was erroneous in law. This is well captured in **Mbogo & Another -v- Shah (1968) EA 93 at 96**, where it was stated that;

an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which the court should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

On liability, the standard of proof in civil cases is that on a balance of probability. Therefore, all that the Plaintiff needed to prove is that the Respondent was liable for the accident. It was upon the Appellant to adduce evidence to show that indeed DW1 swerved and encroached into their lane and hit their vehicle. The question that begs is, did the Appellant discharge that burden?

The Appellant alleges that Motor Vehicle KAB 533Y left its lane and encroached on the lane being used by KWT 665 hence hitting it. On the other hand, the Respondent called DW2 who was a passenger in the vehicle KAB 533Y and collaborated DW1's evidence that motor vehicle KWT 665 encroached into their lane and hit their vehicle. This evidence is in line with the testimony of DW3, the police officer who produced the investigation report prepared by PC Mutinda. The report showed that the driver of KWT 665 is the one who veered to the lane of motor vehicle KAB 633Y by 0.8 meters and hit it. From that report, it was concluded that the driver of KWT 665 was over speeding, veered off and caused the accident.

This court has been invited by the Appellant to make a determination that her evidence must not be collaborated for it to stand and for the court to make a determination that, in that situation, it was not possible to outrightly determine who caused the accident and henceforth find both parties equally liable.

On the issue of liability, a court can only make a determination based on the evidence placed before it and it is on the basis of the evidence placed before the learned magistrate that she made her determination. In the case of **Ignatius Makau Mutisya Vs Reuben Musyoki Muli [2015] eKLR Lord Denning** was quoted in the case of **Miller –vs.- Minister Of Pensions [1947]2 All ER 372**, discussing the burden of proof where he said:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

From the evidence on record and the testimonies of the Appellant and the Respondent, it can be concluded that the Appellant did not discharge the burden of proving that the accident was occasioned by the Respondent's driver. Weighing the evidence of both parties, it is more probable that the Deceased driver of motor vehicle KWT 665 occasioned the accident. The Appellant failed to discharge the evidential burden as required of her under section 107 of the evidence act that,

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

I agree with the trial magistrate that the Appellant did not prove her case on a balance of probability. No evidence was tabled to show that the Respondent was to blame for the accident. The burden of proof placed on the Appellant was not discharged and as such, I dismiss the Appeal. Had the Appellant been successful, I would have awarded Kshs. 50,000 in general damages considering that her injuries were soft tissue injuries and has already healed. I would be guided by the decisions in **Timsales Limited V Penina Achieng Omondi [2011] eKLR** where the Respondent had sustained a deep cut wound on the left index finger and severe soft tissue injuries to the left index finger and the court awarded Kshs. 60,000/= in general damages and **Socfinaf Ltd V. Joshua Ngugi Mwaura NRB HCA 742 of 2003**, where an award of Kshs.70,000/- was reduced to Kshs.20,000/- where only the right forearm was injured and had completely healed.

In the end, the Appeal is dismissed with costs.

Dated, Signed and Delivered at Nairobi this **15th** day of **November, 2017**

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L. NJUGUNA

JUDGE

In the presence of:-

.....*for the Appellant*

.....*for the Respondent*