



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 209 OF 2012

EVANS MOGIRE OMWANSA APPELLANT

VERSUS

BENARD OTIENO OMOLO.....1ST RESPONDENT

JOSEPH OPONDO ONYINGO..... 2ND RESPPONDENT

(Being an Appeal from the judgment/decree of Honourable. Kombo, Principal Magistrate, Nakuru delivered on 23rd November 2012 in Nakuru CMCC No 256 of 2010)

JUDGMENT

1. The appellant who was the plaintiff in the trial court being aggrieved by the judgment of the trial magistrate preferred this appeal, upon eleven grounds and faulted the trial court in its finding that he did not prove any negligence against the Respondent to the required standard. Taken together, they are based on the issue of negligence and the role of police officers in production of police abstracts without any evidence or investigation report to back the statements appearing in the police abstracts. It is a further ground as to the probative value of controverted and unchallenged evidence in an attempt to prove particulars of negligence against a party.

2. The appellant's case and submissions.

The appellant in his testimony stated as follows:

“I recall 5th January 2010, I was on y bicycle riding in the morning hours at around 6.40a.mI was in lower Abedi Road in Nakuru town. I was riding from town centre towards Shabab Estate. At a junction in the road where it meets Oginga Odinga road, a motorcycle sped along Oginga Odinga road and hit my bicycle. It was registration number KMCF 362H. It moved at high speed.It hit the front of my bicycle and I fell down.It did not stop at the junction as required.Lower Abedi roadis the main road.I braked but was still hit. The rider of the motorcycle did not brake or stop, I was inJured on the head and lost six teeth.I was also injured on the lower side, which was fractured ---- I reported at central police station Nakuru and received a statement, and a police abstract and P3form which was filled. The motor cycle was ridden by Benard Ochieng Omolo.The owner is Joseph Opondo.--- this is the copy of records---”

3. The Appellant called PC Stephen Lengopita, a police officer based at Nakuru Traffic base who brought to court the Occurrence Book Number 10 of 5th January 2010. He stated that he was not the investigating officer and only relied on the information stated in the OB. He produced the police abstract dated 19th April 2010. He stated that the abstract showed that the pedal cyclist the Respondent was to blame. He did not have a sketch plan of the accident scene. On cross examination he stated that as no one was charged with a traffic offence, only the court to conclude on who was to blame.

4. The defence called only one witness. Another police officer corporal Caroline Mojenge Simani. She too produced the same OB No. 10 of 5th January 2010, dated 19th April 2010. blame was once again placed upon the pedal cyclist the Appellant and plaintiff in the trial court.

From the above several material facts are not in dispute.

That the occurrence of the accident is established by production of the police abstract. That motor vehicle records issued by Kenya Revenue Authority (KRA) confirms ownership of the motor cycle Registration **KMF 362H** as the second Respondent, and the rider as the first Respondent. That the Respondents did not testify in the lower court, and lastly that the Appellant was stated to have been to blame for the accident in the police abstract dated 19th April 2010 and that the said abstract was issued at the instance of the second respondent apparently for insurance purposes.

5. Upon consideration of the above evidence tendered before him, the trial Magistrate made a finding that the appellant's (plaintiff) evidence was scanty in details and specifically found that he did not establish that the first respondent had authority of the second respondent to ride the motorcycle, that he did not establish the particulars of negligence save that the motorcycle was being driven on high speed, and that an estimate of the speed of the motorcycle, extent of damage on the bicycle and the motorcycle were not given.

6. On the police abstract, the trial court made a finding that the one produce by the appellant was issued earlier than the one issued by the respondent which state that the plaintiff/appellant was to blame. To this trial court stated that the appellant did not produce any evidence that the Respondents abstract was issued at the instance of the respondents, and that the appellant had not produced any sketch plan to show the point of impact.

7. This court has re-evaluated the above evidence. As mandated it is my duty to analyse the same and come up with my own findings and conclusions. See **Selle -vs- Associated Motor Boat Co. Ltd (EA) 123**.

Further, this court will not interfere with the trial court's findings of facts unless they are based on no evidence or on a misapprehension of evidence, or is shown demonstrably to have relied on the wrong principles in reaching these facts – See **Mwanasokoni -vs- KBS(1982) 1 KAR 278**.

The respondents did not tender any evidence in the trial court. The two police officers who produced the police abstracts were not the investigating officers, hence were of no assistance to the court as to causation save production of the abstracts which confirmed the occurrence of the accident only. The evidence tendered by the appellant was uncontroverted and therefore unchallenged. He however did not prove by way of sketch plans of drawings the possible point of impact which could have assisted the court to piece up his evidence as to come to a well informed conclusion. He did not tell the court where on the road junction he had stopped when he alleges to have been knocked down.

8. **Section 107, 108 ad 109 of the Evidence Act** places the burden of proof of a fact to who wishes the court to believe him. He did not call any corroborative evidence by way of witnesses. He stated that the first respondent hit the front of his bicycle. He did not elaborate on how the bicycle was hit on the front part if he had stopped at the junction. I agree with the trial court's finding that the respondents evidence was scanty in detail. The Appellant was under a duty to prove his case on a balance of probability notwithstanding that the respondents did not testify.

The provisions of the **Evidence Act** came to play that he who asserts must prove. It was the appellants duty to tender satisfactory evidence to discharge the burden placed upon him. It is not enough to say that since the opposing part has not testified, my testimony must be taken as truthful. It must be proved. The Respondents in their written submissions stated correctly that though they did not testify there was enough rebuttal evidence during cross examination.

9. In **Trust Bank Ltd -vs- Paramount Universal Bank Ltd** it was held that where a party fails to call evidence in support of his case, the parties pleadings remain as mere statements. The two police abstracts produced confirmed occurrence of the accident only. All other statements therein, there having been no evidence in support to the same, they remained as opinions, that are not binding on the court. The police abstract produced or the Respondent stated that the appellant was to blame yet no evidence was called to support such finding. As stated above, no investigation file and report were produced.

Honourable Justice Kasango J in Antony Musita & Another -vs- Purity Gatakaa HCCC No. 2 of 2009 at Meru held that evidence of an investigating officer is not binding on the court as it is only an opinion unless it is corroborated.

The same opinion was held in **David Kajogi M'mugaa -vs- Francis Muthomi (2012) KLR**. The court in its discretion can either reject or accept it.

In the premises, it is my considered view that statements in a police abstract unless corroborated by evidence by the investigating officer is not sufficient and conclusive. The court can either reject it or accept it depending on circumstances of each case.

Evidence tendered must be linked to the police abstract, and the claimant must prove causation.

I agree with the trial court's finding that there can be no liability without fault as stated in **Kiema Muthuku -vs- Cargo Handling Services Ltd (19191) KLR 258**.

10. In the matter of vicarious liability, the trial court concluded that the Appellant did not tender evidence that the second Respondent had authority of the first Respondent to ride the motorcycle. Neither of the Respondents testified to support their assertion in their defence. As stated earlier, those pleadings remain as mere statements. The appellant testified and produced motor vehicle records that the motor cycle was owned by the second respondent. In **KBS Ltd -vs- Humpreys (2003) KLR**, the court held that there is presumption in that a driver of a motor vehicle drives with the owner's authority in absence of contrary evidence. I therefore find the above finding by the trial court without sound legal basis.

In its totality, and after careful re-evaluation of the evidence before the trial court, this court comes to the conclusion that the appellant fell short of proving negligence against the Respondents to the required standards. The appeal is therefore dismissed with costs albeit on the different findings on various issues stated above touching on liability.

11. The appeal having been against liability only this court need not address itself on the damages awarded by the trial court had liability been established against the Respondent.

Dated, signed and delivered in open court this 28th day of January 2016.

JANET MULWA

JUDGE