REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 126 OF 2013

FADNA ISSA OMAR..APPELLANT

VERSUS

MALNE SIRENGO CHIPO.................................1ST RESPONDENT

MUNGAI MWANGI..2ND RESPONDENT

INTERLINK TRADERS LIMITED......................3RD RESPONDENT

LEONARD ISAIAH CHERUYOT.......................4TH RESPODNENT

(An Appeal from the Judgment and Decree of the Resident Magistrate

Honourable C. WATTIMAH (RM) in CMCC No. 671 of 2011

dated 4th October 2013)

JUDGEMENT

1. The appellant was the plaintiff in Eldoret CMCC NO. 671 of 2011. She had sued the four respondents claiming general and special damages for injuries allegedly sustained in a road accident which occurred on 15th July, 2011 along Eldoret - Kitale road. The accident involved two motor vehicles namely, motor vehicle registration number KAR 048N which was being driven by the 2nd respondent and in which the plaintiff was travelling as a fare paying passenger and motor vehicle registration number KBD 544W which was being driven by the 4th respondent. The 1st and 3rd respondents were sued in their capacity as owners of Motor Vehicle registration No KAR 048N and KBD 544W respectively.

2. It was the appellant's case in the lower court that the 2nd and 4th respondents negligently caused the accident in which she sustained soft tissue injuries on her head and neck, a bruise on the nose and tenderness on her neck; a blunt injury to her chest and pain on the left arm. The particulars of the negligence attributed to each of the two drivers were pleaded in paragraphs 5 of the Amended plaint filed in court on 3rd May 2012. The appellant averred in paragraph 8 of the said plaint that the 1st and 3rd respondent were vicariously liable for the negligent acts committed by their respective servants or agents who were the 2nd and 4th respondents..

3. The 1st and 2nd respondents filed a joint amended statement of defence on 22nd May, 2012. They

denied that an accident occurred in which the appellant was injured on the date alleged; the particulars of negligence pleaded against the 2nd respondent and that the 1st respondent was vicariously liable for the acts of the 2nd respondent. In the alternative, they averred that if the accident occurred which was denied, the accident and the injuries allegedly suffered by the appellant were wholly caused by or substantially contributed to by the negligence of the appellant or the negligence of the 3rd and 4th respondents.

4. On their part, the 3rd and 4th respondents filed their joint statement of defence on 6th September, 2012. They vehemently denied all the allegations of negligence and vicarious liability leveled against them by the appellant and put her to strict proof thereof.

5. It was their case that if the accident occurred as alleged, it was caused by the negligence of the appellant and the driver of motor vehicle Registration No KAR 048N and that they were wrongly enjoined in the suit. To further buttress this point, the 3rd and 4th respondents pleaded that following the accident, the 2nd respondent was charged in Eldoret Traffic Case No 1491 with the offence of careless driving and was convicted on his own plea of guilty.

6. After a full trial, the learned trial magistrate rendered her decision on 4th October, 2013. She held the 1st and 2nd respondent jointly and severally liable for the accident at a 100% but dismissed the appellant's suit with costs on grounds that she had failed to prove on a balance of probabilities that she had sustained the injuries pleaded during the accident.

7. The appellant was aggrieved by the judgment of the trial court. She proffered an appeal to this court through a memorandum of appeal dated 8th October, 2013. She raised four grounds of appeal which can be condensed into two as follows:

> i. That the learned trial magistrate erred in law and fact in dismissing the appellant's claim on grounds that she had failed to prove her injuries on a balance of probability against the weight of the evidence on record.
>
> ii. That the learned trial magistrate erred in law and fact in failing to consider the appellant's submissions.

8. Parties agreed that the appeal be prosecuted by way of written submissions. The appellant's submissions were filed on 12th October, 2015 by her advocates *Ms Mwinamo Lugonzo & Co. Advocates* while those of the 1st and 2nd respondents were filed on their behalf by their advocates *Ms Magare Musundi & Co Advocates* on 24th November, 2015. Those of 3rd and 4th respondents were filed by their advocates *Ms Mose, Mose & Milimo Advocates* on 16th May, 2016.

9. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. As the first appellate court, I am enjoined to revisit the evidence presented before the trial court to arrive at my own independent conclusions on the validity or otherwise of the trial court's decision but in so doing, i should be careful to remember that unlike the trial court, i did not have the benefit of hearing or seeing the witnesses. I am thus required to give due allowance for that disadvantage- See: ***Selle & Another v Associated Motor Boat Company Limited & others (1968) EA 123; Peters v Sunday Post (1958) EA 424.***

10. It is however trite that an appellate court's mandate to interfere with findings of fact made by the trial court is limited to certain circumstances. An appellate can only reverse the trial court's findings of fact if it is satisfied that they were based on no evidence or on a misrepresentation of the evidence or if they were based on wrong legal principles- See: ***Kiruga vs Kiruga & Another (1988) KLR 349; Makobe V Nyamoro (1983) KLR 403 ; Sumaria & Another V Allied Industrial Limited (2007) 2 KLR 1***

11. From the grounds of appeal and the submissions made by the parties, it is clear that the only aspect of the trial court's decision that is challenged on appeal is the learned magistrate's finding that the appellant had failed to prove her case to the required legal standard as she had not proved that she was injured in

the accident in question. That being the case, I find that the only issue which falls for my determination is whether the trial magistrate erred in dismissing the appellant's claim on the aforestated grounds.

12. In order to determine this issue, it is important to revisit the evidence adduced before the trial court. The record shows that the appellant and the 1st and 2nd respondents each called one witness. The 3rd & 4th respondents did not call any witness.

13. The appellant testified as PW1. Her evidence was brief and straight forward. She recalled that on 15th July, 2011, she was travelling as a passenger in motor vehicle registration number KAR 048N. She did not get to her destination as the vehicle developed mechanical problems on the way. Its driver stopped it partly on the road and partly off the road. This is when a lorry registration number KBD 544W rammed into its rear and as a result of the collision, she sustained injuries on her head, nose and the left side of her chest. She went to Moi Teaching and Referral Hospital where she was treated and was given a prescription note. She was also issued with a P3 form and a police abstract after the accident was reported to the police.

14. The 1st and 2nd defendant's witness (DW1) testified that on the material day, he was working as a conductor in motor vehicle registration Number KAR 048N. He admitted that an accident occurred involving the aforesaid two motor vehicles and that some of his passengers were injured and taken to hospital. He however did not disclose and was not cross-examined on the identities of the passengers who had been injured and whether the appellant was one of them.

15. In finding that the appellant had failed to prove that she sustained any injury in the accident as pleaded, the learned trial magistrate stated as follows:-

> ***"The plaintiff produced a prescription note dated 18th July, 2011 as exhibit 1 and a P3 form as exhibit 2. The P3 form is dated 7th September, 2011, the approximate age of injuries are stated to be about a month and one week old. The P3 form having been filled over a month from the date the accident occurred. There ought to be treatment notes that were relied upon on filling the P3 form. The prescription note produced as exhibit one had no injuries sustained by the plaintiff. It only states the medication given. The plaintiff has not proved that the injuries enumerated on the P3 form are the once suffered on the 15th July 2011, the date of the accident…".***

16. A reading of the trial court's record shows that apart from the appellant's oral testimony, the only other evidence availed to the trial court to prove that she sustained injuries in the accident were the prescription note and the P3 form. I have perused the prescription note produced as Pexhbt 1 and the P3 form produced as Pexhbt 2. Having done so, I am unable to fault the finding made by the learned trial magistrate for the following reasons; The appellant's evidence is at variance with the content of the prescription note. In her evidence, she stated that after the accident, she went to Moi Teaching & Referral Hospital where she was given a prescription form (referring to the prescription note). But the prescription note is dated 18th July, 2011 three days later. And as is usually the case, the prescription note only stated the medication prescribed without disclosing what the medication was meant to treat. It is therefore open to question whether the prescription note was issued to treat the injuries the appellant claims she sustained in the accident on 15th July, 2011 or for an ailment or other injuries which were unrelated to the accident.

17. The P3 form, just like the prescription note and the police abstract were produced in evidence by consent of the parties without calling their makers. This means that the doctor who filled the P3 form on 7th September, 2011 which was over one and a half months after the accident occurred was not called as a witness to clarify whether or not in indicating the injuries allegedly sustained by the appellant, he made reference to any treatment notes or whether he was the doctor who may have treated the appellant soon after the accident. The doctor who filled the p3 form ought to have been called as a witness to generally lay a basis for the findings made in the P3 form. The P3 form appears to have been based on what the appellant told the doctor and not on any official records. It was thus unreliable.

18. In a situation like this where the doctor or health professional who treated an accident victim or filled the P3 form long after the accident had occurred is not availed as a witness, production of the treatment notes recorded by the doctor who first saw the victim, in this case the appellant when she first sought treatment was critical to prove not only the nature of the injuries sustained if any but also the date they were sustained.

19. It is worth noting that the appellant did not offer any explanation for failure to tender in evidence the treatment notes. In the absence of such primary evidence and considering that the p3 form was filled over a month after the accident, it was impossible for the trial court to make a finding of fact that the injuries noted in the P3 form were indeed sustained in the accident as pleaded and not on any other subsequent date.

20. The significance of production of treatment notes in a case such as the one that was before the trial court was emphasized by Maraga J (as he then was) in ***Timsales Limited V Wilson Libuywa Nakuru HCCA No. 135 of 2006*** who when considering allegations of injuries sustained in a factory accident stated as follows;

> ***"Dr. Kiamba's report does not help the Respondent. In any alleged factory accident which is disputed by the employer it is the duty of the employee, as the plaintiff, to prove on a balance of probabilities that he indeed suffered the alleged accident. A medical report by a doctor who examined him much later is of little, if any, help at all. Although it may be based on the doctor's examination of the plaintiff on whom he may, like in this case, have observed the scars, unless it is supported by initial treatment card it will not prove that the plaintiff indeed suffered an injury on the day and place he claimed he did. The scars observed on such person would very well relate to injuries suffered in another accident altogether".***

21. It is trite law that the burden of proof in any case lies on the person who alleges the existence of certain facts or the person whose case would fail if no evidence was given – *See Section 107* and *108* of the *Evidence Act.* In order to prove her claim, it was incumbent upon the appellant to prove on a balance of probability that not only did the respondents negligently cause the accident subject of the trial but that she sustained the injuries pleaded as a result of the accident for which he was entitled to compensation. Given the evidence on record, I find that the appellant totally failed to discharge that burden.

22. For all the foregoing reasons, I am satisfied that the finding by the trial court dismissing the appellant's claim was based on the evidence on record. It was not based on any error or misdirection on the part of the learned trial magistrate. I therefore find no reason to interfere with the trial court's decision and the same is hereby upheld.

23. The upshot is that I find no merit in this appeal. I consequently dismiss it with costs to the respondents.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 28th day of July, 2016

In the presence of:

Miss Biwott for the 1st and 2nd Respondents

Mr. Odhiambo holding brief for Mrs. Opinde for 3rd and 4th Respondents

No appearance for the appellant

Naomi Chonde – Court clerk