REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL 446 OF 2012

(being an appeal from the original civil suit Githunguri SPMCC No. 19 of 2010 delivered by Hon. R.A. Otieno on 30th July 2012)

CAROLINE WAITHIRA KAGO..…… APPELLANT

VERSUS

STEPHEN MUIRURI NJAU

NJERU DAVID…….…….....RESPONDENTS

JUDGMENT

The Appellant was injured in a road traffic accident involving a car owned by the Respondents. The accident took place along Kibichoi Road on 13th January, 2010. The Appellant was a passenger in motor vehicle registration No. KAQ 728F when it lost control, overturned and rolled causing the Appellant to suffer the injuries complained of in the plaint.

At the time of the accident the motor vehicle was being driven by the 1st Respondent as the agent and/or driver of the 2nd Respondent who was sued as owner of the motor vehicle. After a full trial where three witnesses testified for the Appellant and one witness for the Respondents, the lower court found that the Appellant had not proven her case and proceeded to dismiss it with costs to the Respondents.

The Appellant was aggrieved by the said judgment and lodged this appeal raising several grounds as set out in the memorandum of appeal dated 24th August and filed on 27th August, 2012. The summary thereof is that the learned trial magistrate erred in law and fact in failing to take into consideration her claim- more specifically that she was not a victim of the accident against the weight of evidence; that she failed to appreciate the degree of proof required in civil cases; that there was a discrepancy in the appellant's name on the face of documentary evidence produced in evidence on her behalf and in the process finding against her.

In this appeal, I am required to go through the entire evidence adduced before the lower court, evaluate the same and come to an independent conclusion. This I have done. The evidence on record shows the accident took place at about 3 p.m. There is no dispute that the accident actually took place and that PW2, a Corporal J. Muendo the investigating officer, confirmed that she issued the Appellant with a police abstract and P3 Form which she produced in evidence. The witness proceeded to name the

Appellant as one of the victims he found in Ngewa dispensary as others had been transferred to Kiambu District Hospital. She confirmed that while the names of the victims were not indicated in the Occurrence Book (O.B.), they were contained in the investigations diary which is part of the police file.

In a twist, the Defence called a Jane Muiya CIP who produced a letter dated 17th August 2011 written by her predecessor Regina Mbithi in response to an inquiry carried out by Direct Line Assurance Company Limited on behalf of the Respondents. After conducting investigations, it was discovered that the Appellant was not involved in the said accident. That the name did not appear in the occurrence book as is customary in accident cases. According to the witness, she could not understand how the Appellant's name appeared in the police accident file as the contents of the file ought to correspond to the initial report recorded in the Occurrence Book. She maintained that as the O.B. entry did not contain the name of the Appellant, she was giving false information and was not involved in the said accident. She however insisted that a party involved in an accident should tender proof to show that the matter was reported to a police station and that an abstract was issued to that effect.

In determining liability the learned trial magistrate said as follows,

> **"I have considered the evidence in its totality. A party who claims or alleges the existence of a fact has the onus to prove the fact which is within his/her knowledge as required under section 112 of the Evidence Act (Cap 80 L.O.K). Indeed the Plaintiff was put on notice by the defence on that issue in their Amended Defence filed on 3.5.2011 where they claimed fraud. Her testimony that she sustained injuries as a result of the road traffic accident of 13.1.2010 the basis of her claim in court was not in my view adequately corroborated as she failed to produce crucial supporting medical documents. She testified that she was at first treated at Ngewa Health Centre yet she did not produce any treatment notes or medical card from that health institution and did not offer any reason for her failure to do so. She alleged she was treated at Guru-Nanak hospital on the same day 13.1.2010 and produced a prescription bearing her name from the said hospital. She did not produce any treatment notes or medical report from that hospital and claimed she was not given any. The prescription she produced (exhibit 2) does not indicate what she was treated for if at all and court cannot be expected to presume that it was for her alleged involvement in a road traffic accident. Her testimony that she was referred to Kiambu Hospital after being attended to at Ngewa Heatlh Centre was contradicted by the evidence of PW2 Copl. Muendo the Investigating Officer who testified that the Plaintiff was one of the alleged road traffic accident victims he found at Ngewa Health Centre and that only two of the victims were referred to Kiambu Hospital. Accodring to the plaintiff she reported the road traffic accident at Kibichoi Police Station two weeks after the road traffic accident but she produced a P3 form exhibit 8 was filed by a medical officer on 30.3.2010 while the police abstract produced (exhibit 9) was issued on 14.5.2010. Clearly both the crucial documents were filed after this suit had been filed in court on 3.3.2010 and one wonders how the plaintiff instituted the suit without them. These inconsistence in evidence and failure to produce primary treatment documents which Dr. Mwaura (PW1) who filled the medical report (exhibit 1A) relied upon leave me unconvinced that she was indeed on the material day 13.1.2010 a passenger in the motor vehicle registration No. KAQ 728F and therefore a victim of the road traffic accident."**

This appeal was argued by way of written submissions by the parties. For the appellant it was contended that the issue of liability was determined in her favour as captured in the judgment of the lower court –

> **"…her testimony that the motor-vehicle lost control and rolled as a result of over speeding by the driver was not controverted or rebutted by the defence. I would therefore find and hold the driver (1st Defendant) wholly liable for the road traffic accident. I would not apportion liability to the plaintiff as she was merely a fare paying passenger. It was proved that the 2nd Defendant was the owner of the motor-vehicle KAQ 728F. The driver was therefore at the time acting as his employee or agent. He is therefore equally 100% vicariously liable for the actions of his employee."**

The Appellant averred that the Learned Magistrate contradicted herself when she stated that she (the Appellant) did not produce treatment notes in one instance and in the other she stated –

> **"she produced a receipt and prescriptions from Guru-Nanak as exhibit 2. She also identified police abstract and P3 form issued to her from Kibichoi Police Station (Exhibit 8 and 9) and produced copy of records from KRA exhibit 3A."**

The Appellant also stated that the Magistrate's holding that the Appellant's failure to file her Plaint with a P3 Form and a Police Abstract was a grave misdirection as then there was no legal requirement that before filing suit in a claim of this nature one had to have obtained such documents.

It was argued that the Learned Magistrate totally ignored evidence of PW2- Cpl Muendo the investigating officer who confirmed that the appellant was involved in an accident and that she was one of the victims she found at the Ngewa dispensary. The following authorities were relied on to buttress the appeal -

In **Nairobi High Court Civil Case No. 4045 of 1988 Kabugu Mutua vs Kenya Bus Services** Justice Ringera pronounced himself thus –

> **"Although I am of the opinion that lack of medical evidence is not fatal to a claim for damages for personal injuries, it is nonetheless manifest that only such evidence can clarify and substantiate the nature and extent as well as the sequels of alleged injuries."**

In **Nairobi Civil Appeal No. 77 of 1982 Ephantus Mwangi & Anor vs Duncan Wambugu [1984]eKLR**

> **"A Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown, demonstrably, to have acted on wrong principles in reaching the findings he did."**

The appellant was of the view that the Magistrate in this case clearly misdirected herself on material facts as the Appellant proved her involvement in the accident on a balance of probability.

According to the Respondents, the law is clear that burden of proof lies on he who alleges according to Section 107 and 108 of the Evidence Act Cap 80. They contended that it is clear from the evidence on record that the claim against the Respondents was a sham and thus the appeal ought to be dismissed in its entirety.

The analysis of the learned trial magistrate as to the inconsistencies in the Plaintiff's case cannot be faulted for the following reasons. The abscence of the appellant's name in the O.B. entry where the names of the victims of the accident in question were recorded leave a lot of questions in the mind of the court. DW1 was categorical that the first entry after a report is made in a police station is done in the O.B. whether immediately or as a late entry.

PW1 the medical practitioner who examined the Appellant stated that he relied on treatment notes from Ngewa Health Centre (which were not produced in evidence) and prescriptions from Guru-Nanak Hospital. PW2 and PW3's testimonies also exhibited some inconsistencies. While PW2 stated that after the accident was reported, he proceeded to Ngewa Health Centre and found the Appellant, the Appellant averred that she was referred to Kiambu Hospital but proceeded to Guru-Nanak Hospital.

While the Learned Magistrate stated that the Defence did not produce any evidence to rebut that of the Appellant, it is nevertheless not incumbent upon the Court to fill gaps for the Appellant's case or make conclusions in her favour. Whereas the Appellant asserts that in civil cases, the standard of proof is on a balance of probabilities, it is upon a claimant in such a case to support his/her claim with consistent evidence which was not done in this case. In the event, I am unable to fault the learned trial magistrate in liability.

Had I found the Respondents liable, I would have made the same award with respect to damages as recommended by the learned trial magistrate. .

The end result is that this appeal is therefore dismissed with costs to the respondents.

Dated and delivered at Nairobi this 12th Day of October, 2016.

A.MBOGHOLI MSAGHA

JUDGE