REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 592 OF 2010

LILIAN AKOTH OTIENO…….....…….. APPELLANT

VERSUS

JANE NDUKU KIVUVA……...…….....….. RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. L. M. Njora, PM at the Chief Magistrates Court at Nairobi in Civil Case No. 13937 of 2006 dated 13th May 2014*)

JUDGMENT

On 20th December 2004, the Respondent sustained injuries when the motor vehicle she was riding in, KAN 537Z collided with Motor Vehicle KAC 693N owned or driven by the Appellant. She then filed suit seeking damages against the appellant and her co-defendants claiming negligence.

After hearing the matter, the learned magistrate found the appellant and the co-defendants fully liable for the accident. The respondent was awarded Kshs. 80,000/- general damages and Kshs. 2,700/- in special damages. The appellant contests the decision on the issue of liability.

In the memorandum of appeal filed on 23rd December 2010, the appellant challenges the finding on the issue of liability on the ground that the learned trial magistrate failed to apportion liability as among the Co-Defendants considering they were driving two Motor-Vehicles. The Appellant also contended that liability against her was not proved as ownership of the motor-vehicle was not conclusively proved.

The respondent supported the decision of the lower court. She contended that the Magistrate's finding was sound in law; that since the claim was against all the defendants who were the owners of the motor vehicles, the court was entitled to enter judgment against all of them as it is proper in law to find joint and concurrent tortfeasors jointly and severally liable to their common victim, the percentages of contributory negligence notwithstanding. She contended that the appellate Court should not interfere with apportionment of liability unless the trial court came to a manifestly wrong decision; That she was found liable in negligence regardless of how small her contributory negligence was; Counsel for the respondent further submitted that it was enough that the decision was correct in law and urged this Court to dismiss it.

As this is a first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see ***Selle v***

Associated Motor Boat Co.* [1968] EA 123**). In ***Kiruga v Kiruga & Another [1988] KLR 348, the Court of Appeal observed -

> ***"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution."***

In the lower court, the Respondent's case was against four Defendant but only the Appellant entered appearance and defended the suit. Interlocutory Judgment was entered against the 1st, 2nd and 4th Defendants as they neither entered appearance nor filed defence. Two witnesses testified on behalf of the respondent. The appellant testified on her own behalf and did not call any witnesses.

The principal witness on the issue of liability was the Respondent (PW 1) who testified that on 20th February 2004, she boarded the a Nissan at Industrial Area which was headed to country bus station. From where she sat she could see the front and spotted two ladies in the Motor-Vehicle in front which according to her suddenly braked leading to the Motor-Vehicle she was in ramming into the car in front.

According to the Appellant who testified as DW1, her motor-vehicle KAC 693U was hit from behind by a 'matatu' yet the traffic was slow. According to her, the 2nd Defendant was responsible for the accident. She didn't hit the car in front of her as she kept a distance.

The learned magistrate considered the evidence and found that all the defendants were jointly and severally liable for the accident. The main issue raised by the appellant is that the trial court failed to apportion liability as between the defendants. As pointed out by Counsel for the Respondent the question on apportionment of blame will not be interfered with on appeal unless the Judge has come to a manifestly wrong decision or based the apportionment on wrong principles. This court is also not bound to follow the trial Court's finding of fact if it appears that the said court failed on some point to take account of particular circumstances or probabilities while estimating the evidence.

So in this case, was it established that the Appellant had been negligent or that she contributed to the accident occurrence?

Denning LJ in Baker vs Market Harborough Industrial Co-op. Society Ltd [1953] 1 WLR 1472 stated -

> "**Every day, proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them**…."

The Respondent's testimony in the lower court was inconclusive on how the accident occurred; that is, whether it was the appellant who braked suddenly or whether the driver in the motor-vehicle she was travelling in was not diligent and did not keep a safe distance. The Appellant testified and gave her version of events on the day of the accident whereas the other Defendants chose not to give their version of the events. It is a presumption in the law of evidence that a party who has in his possession evidence which he fails to call, that evidence is presumed to have been adverse to him. It cannot be right to apportion blame there being no evidence on which apportionment could be based.

As was stated in **Lakhamshi V Attorney General (1971) EA** It is difficult to appreciate how a party can be held to have been negligent if there is no evidence that he was in fact negligent.

As a result, the Appeal is allowed. The orders against the Appellant in the lower court are hereby set aside. Parties shall bear their own costs of this appeal.

Dated and delivered at Nairobi this 21st Day of October, 2015.

A.MBOGHOLI MSAGHA

JUDGE