



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KERUGOYA  
CIVIL APPEAL NO.12 OF 2015

ISAAK MUTETI KISUA.....APPELLANT

VERSUS

FELIZ MWANGI NDEGWA.....RESPONDENT

(Being an appeal from the Judgment of the Honourable Senior Resident Magistrate Jalango (Ms) delivered on the 19<sup>th</sup> March 2019 in Baricho PMCC No.66 of 2015.)

J U D G M E N T

This appeal arises from the Judgment of the Senior Resident Magistrate at Baricho Court Civil Case No.66/2013. The suit arose out of a road traffic accident. There were two suits which were consolidated, i.e Civil Case No. 66/2013 John Nyaga Wanja the plaintiff -v- Isaac Muteti Kigua and Civil Case No.65/2013 Felix Mwangangi Ndegwa -v- Isaac Muteti Kigua. The accident involved a motor vehicle registration number KAD 136 L and a motor cycle registration number KMCS 751. The accident occurred at night. The motor vehicle KAD 136 L was reversing to join the main road when the motor cycle which was coming from Wanguru direction towards Gathigiriri rammed into the motor vehicle. The driver of the motor vehicle lost control and hit two pedestrians namely John Nyaga Wanja and Felix Mwangi Ndegwa. The two pedestrians sustained serious injuries and were rushed to Kimbimbi Sub-District Hospital in serious conditions. The motor cycle rider and his pillion passenger were also seriously injured and were rushed to the same hospital. The owner of motor vehicle KAD 136 L was blamed for the accident. The two pedestrians John Nyaga Wanja and Felix Mwangangi who were the plaintiffs in the Magistrate's court were claiming special and general damages against the defendant. The trial magistrate found the defendant 100% liable for the accident.

1. Felix Mwangi Ndegwa had sustained the following injuries:-

- Fracture of the right mandible
- Dislocation of the left temporal mandibular joint
- Abrasion on the anterior chest wall.
- Abrasion on the back of right wrist and hand.
- Bruises on the right ankle
- Fracture of seven teeth

The trial magistrate awarded the plaintiff Felix Mwangi Ndegwa Ksh.1,000,000/- for pain and suffering and Kshs.61,205/- as special damages.

2. The appellant was dissatisfied with the Judgment of the trial magistrate and has raised the following grounds:-

- a. That the judgement was against the weight of the evidence
- b. That an award of 100% liability was without sufficient evidence
- c. That the defendant's ownership of the motor vehicle was not proved
- d. In not finding contributory negligence of the plaintiff
- e. In failing to appreciate the totality of the evidence before him and in not considering the submissions on behalf of the

appellant

**f. By failing to take into account the evidence and the submissions on quantum of damages given on behalf of the appellant while considering her judgement**

**g. By giving an extremely high award without regard to decided cases**

**h. By disregarding the evidence of the appellant's thus failing to judiciously exercise discretion**

The appellant seeks orders that the appeal be allowed, the Judgment be set aside and he be awarded the costs of the suit and the appeal.

3. The appeal was disposed off by way of written submissions. For the appellant, the submissions were filed by Kinyanjui Njuguna & Co. Advocates. The Appellant has raised three issues which are, liability, doctrine of *res-ipsa loquitor* and *Quantum*.

4. On liability, it is submitted that the plaintiff failed to prove the allegations of negligence as against the appellant as he failed to prove that the vehicle which rammed them was owned by the defendant. He relies on **Section 107 of the Evidence Act** for the proposition that he who alleges must prove. The section provides:-

**“ (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.**

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

The contention is that the onus of proof in civil cases is on a balance of probabilities and relies on *Kanyungu Njogu -v- Daniel Kimani Maingi [2000] eKLR and Mount Elgon Hardwares -v- United Millers C.A No. 19/1996* and *Miller -v- Minister of Pensions (1947) 2 All ER 5* where it was held that:-

**“ that degree is well settled, it must carry a reasonable degree of probability, but not so high as required in Criminal cases, 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 than it is not....”** While relying on the case of *Ramadhan Yusuf -v Ruth Achieng Onditi & Another (2010) eKLR* where it was stated that **“it is always absolutely necessary and vital that a party who sues for damages based on the part of negligence must prove that negligence with cogent and credible evidence as he who asserts must prove.”**

He asserts that the fact that an accident occurred does not follow that a particular person has driven negligently. It is the contention by the appellant that the burden was on the plaintiff to prove negligence and relies on the case of *Treadsetters Tyres Limited -v- John Wekesa Wepukhulu [2010] eKLR*.

5. The appellant submits that the plaintiff failed to prove that the vehicle that rammed into them was owned by the defendant and or their agent or employees or deny that the alleged accident occurred. That the plaintiff failed to discharged the burden of proof that the defendant was the driver and owner of the motor vehicle. He relies on *State Pack Industries Limited -v- James Mbithi Munyao Nairobi H.C.CA 152/2003, Thurairara Karauri -v- Agnes Nchechi Nyeri High Court C.A 192/1996 East Produce (K) Limited -v- Christopher Astiado Osera C.A No.43/2001 and Kiema Mutuku -v- Kenya Cargo Hauling Services Ltd 1991 KLR* where it was stated that **“there is yet no liability without fault in the legal system in Kenya and the plaintiff must prove some negligence against the defendant where the claim is based on negligence.”**

## **6. Res Ipsa Loquitur**

It is the contention by the applicant that the evidence as adduced by the investigating officer that the appellant appeared drunk and was even arrested for carelessly reversing onto the road, veering off the road and hitting the pedestrian was not supported by evidence. He submits that the doctrine of *res ipsa loquitor* is an evidentiary rule that shifts burden to the defendant minus shifting burden from the Plaintiff. He relies on the case of *Muthuku -v- Kenya Cargo Handling Services Ltd (1991) KLR*. It is the contention by the appellant that he discharged the burden cast upon him under this doctrine by showing that the accident was solely as a result of both the plaintiff carefree attitude in walking in the middle of a busy road riddled with pot holes at 9.00 pm in the night and in total disregard to other road users while walking against traffic. That the doctrine is only applicable where the facts are known which is not the case. He relies on *Jeremiah Maina Kangema -v- Kenya Power & Lighting Co Ltd [2011] eKLR*.

## **7. Liability:**

**On liability the appellant submits that not every accident is as a result of someone's negligence.** The case of *Statpac Industries -v- James Mbithi Munyao (2005) KLR*. It is submitted since the Plaintiff failed to prove ownership of the motor vehicle that allegedly rammed into him was owned and/or driven by the appellant at the time the accident occurred, the claim for negligence ought to fail. That the plaintiff did not prove that the appellant owed him a duty of care. That the trial magistrate erred in law and fact by finding the appellant 100 liable.

## **8. Quantum:**

The appellant relies on the case of *Kenfro Africa Ltd -v- Lubia & Another (N0.2) (1987) KLR 30* where it was held that;

**“The principle to be followed by an appellate court in deciding whether it is justified in disturbing award by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either Judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that short of this the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages.”**

He has also relied on *Johnson Evan Gicheru -v Andrew Morton & Another Court of Appeal No. 314/2000*. He further submits that in awarding damages the person is compensated for the loss and of for physical injury. He relies on *Jobhing -v- Associated Dairies Ltd (1983) 3 WLR 1972*. He submits that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar case. He refers the court to *H. West and Son Ltd -v- Shepherd (1964) A.C 326*. He submits that a sum of Kshs.200,000/- would suffice to compensate the plaintiff.

#### **9. Special damages:**

It is submitted that special damages must be specifically pleaded and proved. He submits that the claim for special damages has not been adequately proved. On costs he submits that they should follow the event. He prays that the appeal be allowed.

10. For the Respondent it is submitted that on issues raised by the appellant, the claim of liability is none starter as it was made in *Baricho PMCC No.65/2015* which suit the appellant has not appealed. He further submits that the appellant has not demonstrated that the trial court erred. On Quantum, it is submitted that the award was not excessive and that the trial magistrate correctly directed himself to the law and facts in arriving at the award.

11. The respondent submits that the appeal is defective as the appellant attached the plaint in *Baricho PMCC 65/2013* whereas the appeal relates to *Baricho PMCC No. 66/2013*. He submits the record of appeal is defective and erroneous. It is the contention by the respondent that although the appellant was given an opportunity to amend the record of appeal, he failed to do so. That the record of appeal is defective as it does not contain the mandatory documents. He relies on *Municipal Council of Kitale -v- Nathan Fedha (1983) KLR, C.A* where the Court of Appeal struck an appeal for failure to comply with mandatory requirement. See also *Kiraitu-v- Kiraitu (2004) KLR*. It is submitted that the application to strike out the appeal must succeed as the appeal is incompetent.

12. On liability it is submitted that the appeal on the issue does not lie as the decision on liability was made in *Baricho PMCC 65/2013* and so he cannot raise the issue in this appeal. The appellant relied on the decision of the *Court of Appeal in Thurania Karauri -v- Agnes Ndeche 1977 KLR* for the proposition that the police abstract is not conclusive proof of ownership. However, the Court of Appeal in *Joel Muga Apija- East African Sea Food Limited [2013] eKLR* set out the correct position with regard to prove of ownership of motor vehicle while relying on a police Abstract. The court stated as follows:-

**It is noteworthy, that Bosire JA. Sat in Thurania's case (supra). Wandera's case (supra) and in the Lake Flower's case. It would appear that like us, he treated he comments in Thurania case as orbiter. It is clear to us that there has been a move from the rigid position that was pronounced, albeit as orbiter, in the Thurania case. In any case in our view an exhibit is evidence and in this case, the appellant's evidence that police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect that the learned judge in failing to consider the depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied (emphasis supplied)**

The Respondent submits that since the appellant did not adduce any evidence to rebut or counter the contents of the Police Abstract and never objected to its production its content must be believed. The respondent submits that there is uncontroverted evidence to prove that the appellant was to blame for the accident. He relies on the Court of Appeal decision in *John Wainaina Kagwe -v- Hussein Dairy Limited [2013] eKLR* where the Court of Appeal rendered itself thus-

**“ As already stated, the respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify, meaning, that the allegations in its defence with regard to the blameworthiness of the accident on the appellant wither wholly or substantially remained just that, mere allegations. The respondent thus never tendered any evidence to prop up its defence. Whatever the respondent gathered in cross-examination of the appellant and his witnesses could not be said to have built up its defence. As it were therefore, the respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tendered to exonerate it fully from culpability. It was thus substantially to blame for the accident.”**

It is submitted that the appellant did not prove that the trial magistrate acted on wrong principles and there is therefor no basis for this court to interfere with the decision of the trial magistrate.

13. On quantum the respondent submits that the award was reasonable and there is no basis for this court to interfere with the award. The respondent relies on the decision of the Court of Appeal in *Kemfro Africa Ltd & Another -v- Lubia and another* (Supra). He also relies on *Catholic Diocese of Kisumu -v- Sophia Achieng Tet Court of Appeal Kisumu* where the court stated-

**“ It is trite law that the assessment of genral dmages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that thee trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived**

**at a figure so inordinately high or low as to represent an entirely erroneous estimate.” (emphasis added)**

It is submitted that the trial magistrate properly applied the principles set out above. He submits that the award was not excessive.

14. On special damages it is submitted that they were pleaded and proved with production of receipts. It was also submitted that the respondent was allowed to amend the claim for special damages. The respondent submits that liability was proved and therefore the appeal should be dismissed.

I have considered the appeal. This is a first appeal and as it has been well articulated by the parties, the role of the 1<sup>st</sup> appellate court is to re-evaluate the evidence tendered before the trial court and come up with its own independent finding. This court must therefore re-evaluate the proceeding before the trial court not with a view of upholding the decision of the lower court but to come up with its own finding.

**Section 78(2) Civil Procedure Act** provides:

**“ Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”**

This duty has been stated by the Court of Appeal in **Abok James Odera T/A Odera & Associates -v- John Patrick Muchira T/A Muchira & Co. Advocates (2013) eKLR** where the court stated that –

**“This being a first appeal we are reminded of our primary role as a first appellate court, namely to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”**

The Court of Appeal summarized this duty in the case of **Kenya Power & Lighting Company Limited- v- E.K. ) & Another (2018) eKLR** as follows:-

**“ a) First on first appeal, the court is under a duty to re-consider and re-evaluate the evidence on record and draws its own conclusions;**

**b)In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give the due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her,**

**c) It is not open to the first appellate court to review the findings of the trial court simply because it would have reached different results if it were hearing the matter for the first time”. See *Sake -v- Associated Motor Boat Company (1908) EA 123*. The issues which arise in this appeal are:-**

1. Liability
2. Quantum of damages
3. Defective record of appeal

**1. Liability:**

The contention by the appellant is that the respondent did not prove that he (appellant) owned the accident motor vehicle and that the police abstract could not be relied on to prove ownership. It is also the contention by the appellant that the respondent did not prove negligence on the part of the appellant.

15. On prove of ownership of the motor vehicle, the appellant in his statement of defence denied that he owned the motor vehicle KAD 136L. The appellant did not adduce any evidence. The evidence tendered by the respondent that the appellant owned the motor vehicle was not controverted. The respondent called PW1 Inspector Agnes Magiri who produced a police abstract as exhibit. The abstract shows that the owner of the motor vehicle at the time of the accident was Isaac Muteti.

The Court of Appeal in the case of **Joel Muga Opija v East African Sea Food Limited (2013) eKLR**, it was held that **“ We agree that the best way to prove ownership would be to produce to the court a document from the registrar of motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”**

The appellant has relied on the case of *Thuranira Karauri -v- Agnes Ndeche*. The Court of Appeal in the above decision found that it was wrong to rely on the case of *Thuranira (supra)* in so far as proof of ownership of motor vehicle is concerned.

In this case the respondent relied on the abstract to prove ownership of the motor vehicle. The abstract was produced in court without any objection from the appellant. The appellant did not adduce any evidence to counter that evidence.

16. The denial by the appellant in the statement of defence remains a mere allegation and denial. The appellant failed to offer evidence to rebut or counter the police abstract. The evidence tendered by the respondent was uncontroverted. The respondent discharged the burden to prove ownership of the motor vehicle which in civil matters is on a balance of probabilities. The police abstract provided sufficient evidence to prove that the vehicle was owned by the appellant.

17. On proof of negligence, the appellant submits that the doctrine of *res ipsa loquitur* does not apply. The respondent had pleaded a raft of particulars of negligence against the appellant. The appellant denied the allegations and blamed the respondent. No evidence was tendered by the appellant to prove the particulars of negligence.

18. On the doctrine of *res ipsa loquitur*, it applies in situation where, simply stated, the case speaks for itself. Under the common law of negligence, it implies that a breach of a party's duty of care may be inferred from the manner in which the events happened or occurred.

19. It implies that the fact of negligence is so obvious that it shows with high probability that the person was negligent. The evidence adduced by the respondent shows that the vehicle was being reversed from the opposite side of the road and hit him as he walked off the road. The evidence is clear and shows that the appellant was negligent in the manner he drove the vehicle at that material time. The respondent was lawfully walking off the road and did not in any way contribute to the cause of the accident. There is no doubt that the appellant was wholly to blame for the accident. The doctrine of *res ipsa loquitur* applies.

20. The appellant did not challenge the evidence. It is well settled by various authorities that uncontroverted evidence bears a lot of weight and a statement of defence which is not supported with evidence amounts to mere statements of facts which a party has failed to substantiate.

21. They are not subjected to cross examination to test their credibility and are therefore not adequate to discharge the burden imposed on a party who alleges under **Section 107 and 108 of the Evidence Act**. Failure by the appellant to offer an explanation on his manner of driving inevitably calls on the court to draw an inference and presume that the appellant was negligent. See *Uziel Cohen v Kenya Power and Lighting Co. Ltd (2010) eKLR, and Shaneebal Limited v County Government of Machakos (2018) eKLR*. The trial magistrate determined the issue of liability in a test suit which was **Baricho P.M CC 65/2013**. The trial magistrate adopted the finding on liability in this suit. The appellant did not prefer an appeal against the finding by the trial magistrate. The issue of liability is *res judicata* and the appellant cannot litigate it in this appeal. The appellant's liability in the test suit was held to be 100% after liability is determined in the test suit what remains to be done in the related suit is the assessment and determination of the quantum of damages. The court of Appeal in *South Nyanza Sugar Company Ltd v David Ojwang' Okebe & Others* the court declined to consider issues of liability as there was no appeal preferred against the decision reached in the test suit on liability.

22. It follows that the appellant could not raise the issue of liability in this appeal. On quantum of damages it has been well submitted by both sides that the principles on when an appellate court may disturb a trial court's award of damages are well settled in the case of *Kemfro Africa Ltd & Another v Lubia & another (1982-88) KLR (Supra)*. The court exercises discretion while awarding damages and therefore the appellate court will not interfere with the award unless it is satisfied that the court took into account an irrelevant factor or left out a relevant factor. It will also interfere if the award is inordinately too low or so inordinately high that it must be a wholly erroneous estimate of the damages. The court of appeal reiterated the same principle in Catholic diocese of *Kisumu v Sophia Achieng' Tete, Kisumu C.A 284/01*.

23. The respondent has pleaded the injuries sustained and called **Doctor Okere** who confirmed the injuries and in his opinion classified the injuries as grievous harm. The respondent adduced evidence on how he sustained the injuries. He confirmed the injuries were sustained when he was hit by the appellant's motor vehicle. The trial magistrate in his judgement considered the injuries which the respondent sustained, relied on *Ndibu v Kinyanjui & Another* where Kshs. 750,000.00 was awarded for similar injuries in 1994 and assessed the general damages at Kshs. 1,000,000.00. The trial magistrate applied the correct principles by considering the injuries and comparable awards.

24. In my view, the award is not excessive nor can it be said to be inordinately high. I have no reason to interfere with the award of damages. The appellant had submitted an award of Kshs. 200,000.00 and relied on *Daniel Nyanduka Kimori v Monica Achieng' (2016) eKLR, Joseph Chege Milimani v J.K. Kamunge & Ano. 2723/1988 H.C.* The respondent cited *Alphonse Mwatsuma Mwanyamchi v Joseph Mwanzia Mwanju & Ano 2005 eKLR* where the plaintiff had sustained similar injuries. The award by the trial magistrate was in line with awards where plaintiffs had sustained similar injuries. The principle that similar injuries should attract similar awards was adhered to.

25. On special damages, it is trite law that they must be specifically pleaded and proved. The respondent had pleaded special damages of Kshs. 57,206.00. He however amended the special damages with leave of the court to include the treatment and medical expenses. The amount came to Kshs. 61,205.00 which the court eventually awarded in its judgement. The appellant did not suffer any prejudice as the special damages were pleaded and it is only the amounts which were not added up correctly. The law allows corrections of errors, see section 100 Civil Procedure Act.

26. The proceedings before the trial magistrate at page 89 shows that all the receipts were served and no objection had been raised. In any case, the receipts in the record of appeal bears a revenue stamp. The special damages pleaded were properly awarded. I find no reason to interfere with the award of special damages.

27. On competence of the appeal, the appellant is supposed to comply with the requirements under **Order 42 rule 13(4)** of the Civil Procedure Rules which provides:

**28. (4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:**

**(a) the memorandum of appeal;**

**(b) the pleadings;**

**(c) the notes of the trial magistrate made at the hearing;**

**(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal: Provided that—(i) a translation into English shall be provided of any document not in that language;

(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

These provisions clearly show that pleadings must form part of appeal. A plaint is a pleading which contains the statements of the claim. It is therefore a critical document in a suit as well as in a record of appeal. Where a suit is supposed to be instituted by a plaint, there can be no valid suit if the plaint is not filed with other necessary pleadings. Failure to include the plaint in a record of appeal renders the appeal incompetent. I have considered the line of authorities cited by the respondents which demonstrates that court have struck out appeals for being defective owing to the failure to include central documents in the record of appeal.

See *Angel Nyawira Ngugi v Sarah Njoki Kihara (2008) Eklr*, *Municipal Council of Kitale v Nathan Fedha (1983) Eklr* where record did not contain a decree; *Kiraitu v Kiraitu(2004)Eklr and East Africa Ltd & 2 others v Masosa Construction Co. Ltd (2005)Eklr* where the Court of Appeal held that failure to include documents in the record of appeal renders the appeal incurably defective.

A plaint is a primary document which must be included in the record of appeal and failure to include it renders the appeal incompetent. In this appeal, the appellant has not included the plaint relating to the appeal. The plaint which is included is for **Baricho PMCC 65/2013** and not for PMCC 66/2013 which relates to this appeal. The appellant was given the opportunity to amend the record of appeal to no avail. As it stands, the record of appeal is incurably defective for failure to include a primary document namely the plaint as well as other documents like exhibits and submissions.

In conclusion, I find that the appeal lacks merit and also is incurably defective. I therefore dismiss the appeal with costs.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 8<sup>TH</sup> DAY OF APRIL 2021**

**L.W . GITARI**

**JUDGE**

**8/4/2021**

Judgment has been read out virtually.

**L.W. GITARI**

**JUDGE**