REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 28 OF 2018

JANICE NTINYARI.....APPELLANT

-VERSUS-

ATSUSHI INFORMATION SERVICES.....1ST RESPONDENT

SARUNI MATAPASH.....2ND RESPONDENT

(Appeal from the Judgment and decree (Hon. M. Chesang, RM) delivered on 31st July 2018 in CMCC No. 465 of 2016 at the Chief Magistrate's Court at Kajiado).

JUDGMENT

1. The appellant filed suit before the Chief Magistrate's Court at Kajiado claiming general and special damages arising from personal injuries he sustained in a road traffic accident that occurred on 7th February 2015 along Kajiado Isinya road involving motor vehicle registration No. KAR 824W in which he was travelling as a fare paying passenger. The vehicle was owned by the 1st respondent and was being driven by the 2nd respondent.

2. The appellant averred that the 2nd respondent negligently drove the vehicle and encroached onto the lane of motor vehicle KBF 614N causing a collision between the two vehicles and, as a result, he sustained bodily injuries, namely; cut wound to the nose; cut wound to the lower elbow; trauma to both legs and skin hypopigmentation on the right leg. He claimed special damages of **Kshs. 23,050** for medical report, search of copy of recoveries and medical expenses.

3. The respondents filed a defence dated 18th October 2016 on 27th October 2016, denying the appellant's claim that they were registered and beneficial owners in actual possession of the vehicle respectively. They also denied occurrence of the accident and particulars of negligence and put the appellant to strict proof. They pleaded, in the alternative, that the accident was solely caused or substantially contributed to by the appellant's negligence and set out particulars of his negligence.

4. The suit was heard by **Hon. M. Chesang (RM)**, and in her judgement delivered on 31st July 2018, she dismissed the appellant's suit. The appellant was aggrieved with the trial court's decision and filed a memorandum of appeal dated 28th August 2018 on 29th August 2018, raising the following grounds, namely;

> **1. The learned trial magistrate erred in fact and in law in ignoring the Plaintiff's evidence on Liability and Quantum.**
>
> **2. The learned trial magistrate erred in fact and in law in ignoring the evidence of the Plaintiff's witnesses.**
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> **3. The learned trial magistrate erred in fact and in law in failing to find liability against the Defendants/Respondents.**
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> **4. That the learned magistrate's decision on liability was unjust, against the weight of evidence and was based on points of fact and wrong principles of law and has occasioned a miscarriage of justice.**
>
> **5. The learned trial magistrate erred in fact and in law in dismissing the Plaintiff's case in the absence of any evidence disputing liability by the Defendants/Respondents**
>
> **6. The learned trial magistrate erred in fact and in law in dismissing the Plaintiff's case by holding that her case was based on fraudulent documents yet the same was not pleaded and the Defendants did not avail any evidence to the same**

7. The learned magistrate erred in law and in fact in failing to appreciate that the Defendants did not prove their case on liability as they failed to call any witnesses.

8. The learned trial magistrate erred in fact and in law in failing to hold the Defendants liable for the accident.

9. The learned trial magistrate erred in fact and in law in failing to assess the award of General Damages had the Plaintiff been successful contrary to the Law.

10. The learned trial magistrate erred in fact and in Law in failing to consider the Plaintiff's submissions on liability and quantum.

11. The learned trial magistrate erred in fact and in law in that he disregarded the Appellant's submissions and judicial authorities both on liability and quantum of damages with the resultant miscarriage of justice to the Appellant.

5. Parties filed written submissions which they relied on in disposing of this appeal.

6. The appellant submitted through her written submissions dated 12th February 2021, that the trial court erred in dismissing her case. She argued that the trial court was required to consider the evidence on record and make a determination on it. She relied on ***Eunice Wayua Munyao v Mutilu Beatrice & 3 Others*** [2017] eKLR on this point. The appellant argued that the trial court was in error when it dismissed her that she had not proved her case on a balance of probabilities.

7. According to the appellant, there was no dispute that an accident occurred on that day involving the two vehicles. She referred to her evidence and that of her witness PW2 that the 2nd respondent and driver of motor vehicle KAR 824W encroached onto the other vehicle's lane. She argued that it was the investigating officer's mistake not to capture her name in the occurrence book.

8. It was the appellant's case that PW1 told the court that the record in the occurrence book was made on the date of the accident and that it indicated that there were other victims though not mentioned since they had been rushed to hospital. She maintained that a P3 and police abstract could not have been issued to her if she was not a victim in the accident. She stated that she had been rushed to Sukos Hospital immediately after the accident where she was admitted for one day and later referred to Athi River Shalom Community Hospital and admitted from 8 to 10 February 2015 and her treatment notes showed that she was involved in the accident. She stated that she went to report the accident after she recovered.

9. Regarding liability, she argued that the trial court did not adequately address the issue. She argued that the respondents were to blame for the accident and there was evidence (copy of records) that the vehicle was owned by the 1st respondent and was being driven by the 2nd respondent (Police abstract) the vehicle was also being negligently driven. She relied on ***Stapley v Gypsum Mines Ltd (2)*** [1953] AC 663-Page 681 on how to determine what caused an accident. She therefore submitted that she proved her case on a balance of probabilities.

10. Regarding the trial court's view that her suit was fraudulent, she submitted to the contrary arguing that even the respondents' defence did not plead fraud. It was her case that where fraud is to be alleged, it must be pleaded and particulars thereof provided and strictly proved. She relied on ***Kuria Kiarie & 2 Others v Sammy Magera*** [2018] eKLR.

11. The appellant further argued that the trial court was in error for failing to assess damages it would have awarded had she succeeded in her suit. She also argued that the trial court's judgment fell short of the contents of a judgement and relied on Order 21 Rule 4 of the civil Procedure Rules on the contents of a judgement.

12. According to the appellant, an award of Kshs. 500,000 would be appropriate, taking into account the injuries she sustained. She relied on ***Patrick Kinoti Miguna v Peter Mburunga G. Muthamia*** [2014] eKLR where the respondent had sustained similar injuries to those she sustained and was awarded Kshs. 400,000; ***Joseph Mutua Nthia v Fredrick Moses M. Katuva*** [2019] eKLR where an award of Kshs. 400,000 was made for less severe injuries to those she sustained and ***Dr. Adolf Muyoti & Another v Thomas Micha Sawe*** (HCA No. 101 of 2005 – KSM) where an award of Kshs. 180,000 was upheld on appeal. She urged that her appeal be allowed, she be awarded damages of Kshs. 500,000; special damages Kshs. 23, 050; costs and interest.

13. The respondents filed written submissions dated 2nd February 2021 which they relied on. They submitted that the appellant did not prove that she was involved in the accident on a balance of probability. It was the respondents' submission that evidence of existence or non-existence of facts in issue should be advanced and if the evidence does not support the facts pleaded, the party with the burden of proof should fail. They relied on ***Anthony Francis Warehem t/a AF Warehem & 2 Others v Kenya Post Office Savings Bank*** [2004] eKLR.

14. The respondents contended that although the appellant testified that she was sitting behind the driver's seat, her name was not among those listed to have been involved in the accident. She did not adduce evidence to prove that she was in the vehicle and she could not therefore be assumed to have been part of the unknown passengers.

15. The respondents further contended that although the appellant testified that she was immediately rushed to Sukos Hospital, no record was produced to authenticate that assertion. The discharge from Shalom Hospital was dated 10th February 2015 and treatment notes or documents availed were from County government of Kajiado Health Services Department dated 6th May 2015. The respondents relied on ***Timsales Ltd v Wilson Libuywa*** [2008] eKLR to argue that a treatment card will not prove that a plaintiff indeed suffered an injury on the day and place he claimed he did.

16. They supported the trial magistrate finding and urged that the appeal on liability be dismissed and relied on ***East Produce (K) Ltd v Christopher Astiado Osiro*** (CA No. 43 of 2001), that onus of proof is on he who alleges and that in matters where negligence is alleged, the

plaintiff must prove some negligence against a defendant where the claim is based on negligence.

17. The respondents also relied on ***Stapack Industries v James Mbithe Munyao*** (CA 152/2003) that a plaintiff must prove a causal link between someone's negligence and his injuries on a balance of probability.

18. On quantum, they argued that assessment of damages is a discretionary matter and that case law has set principles on the exercise of such discretion and when an appellate court should interfere with exercise of discretion. They cited ***Kanga v Manyoka*** [1961] EA 705**;** ***Lukenya Ranching and Farming Coop society v Kavoloto*** [1979] EA and ***Paul Kipsang & Another v Titus Osule Osore*** [2013] eKLR.

19. The respondents argued that the injuries the appellant sustained were categorized as soft tissue injuries secondary to a road traffic accident (RTA) (Documents from Shalom hospital dated 10th February 2015), documents from the County Government Health Department dated 6th May 2015 showed injuries as injury to the nose, mouth, lower limbs; while the medical report by Dr. A O Wandugu dated 1st July 2016 showed the injuries as cut wounds on the nose, cut wound to the lower lip, trauma to both legs and blood loss. All these show that the respondent sustained cut wounds.

20. The respondents proposed an award of Kshs. 100,000 and relied on ***PF (Suing as next friend and father of SK (minor) v Victor Kamadi & Another*** [2018] eKLR where an award of Kshs. 50,000 was enhanced to Kshs. 100,000 for soft tissue injuries; ***Hantex Garments (EPZ) Ltd v Haron Mwasala Mwakawa*** [2017] eKLR where Kshs. 100,000 was awarded and ***Ndungu Dennis v Ann Wangari Ndirangu & Another*** [2018] eKLR where Kshs. 300,000 was awarded.

21. I have considered this appeal; submissions made on behalf of the parties and the authorities relied on. I have also perused the record and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to re-evaluate the evidence, reconsider it afresh and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.

22. In **Gitobu Imanyara & 2 others v Attorney General** [2016] eKLR, the Court of Appeal held:

> **This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.**

23. In **Nkube v Nyamiro** [1983] KLR 403, the Court of Appeal again held that:

> **A court on appeal will not normally interfere with the finding of fact by a 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 his conclusion.**

24. And in **Selle and another v Associated Motor Boat Company Limited and others** [1968] EA 123, the East African Court of Appeal held that:

> **An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appears either that he failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.**

25. PW1 a police officer attached at Kitengela police station traffic department, testified that they received a report of an accident on 7th February 2015 at about 18 hours that had occurred along Kitengela Isinya Road involving motor vehicles KBF 614M and KAR 824 W. The accident had been recorded in the OB on 6th February 2015 and motor vehicle KAR 824 W was blamed for the accident. He produced the abstract as pex1. In cross examination, he told the court that three people who had been injured were in the OB and the plaintiff was not one of them He stated that the matter was still under investigation. In reexamination, he stated that it was the fault of the investigating officer for not capturing the name of the plaintiff in the OB; that the entry was made on the day of the accident and there was an entry that there were unknown passengers who had been rushed to hospital.

26. The plaintiff who testified as PW2, adopting her witness statement that she was passenger in motor vehicle KAR 824 W when it was involved in the accident. After the accident, she lost consciousness and found herself at Sukos hospital where she was admitted for two days. She was later referred to Shalom hospital for better treatment. She had cuts on her nose, mouth (inner lip) and both legs which have scars. She produced documents in her list of documents as exhibits except the police abstract which had been produced as pex1. After discharge, she continued to attend clinic by taxi as she was unable to walk. She later on obtained a police abstract.

27. The trial court dismissed the appellant's suit on ground that she did not report the accident in time, treatments notes presented to court were issued more than a month after the accident and that she reported the accident more than a month after the accident. In the view of the court, this was a case of a fraudulent claim.

28. The appellant faulted the trial magistrate on various grounds. In my view, the issues that arise for determination are; whether the trial court was wrong in dismissing the appellant's suit and, depending on the answer to the above issue, whether the appellant should have been awarded damages.

29. I have considered the evidence on record and the grounds of appeal and the trial court's judgment. The appellant's evidence was that she

was a passenger in motor vehicle KAR 824 W when the accident occurred. She was taken to Sukos hospital and later transferred to Shalom hospital where she was admitted for two days. She was then discharged and continued with follow up clinic. She later reported the accident and was issued with a police abstract.

30. PW1, the police officer who produced the police abstract told the court that he was not the investigating officer, that the appellant's name was not in the OB as one of the people who had been involved in the accident and that the report in the OB had only three names. He blamed the investigating officer for not including the appellant's name in the OB.

31. A perusal of the police abstract, (Pex1) was issued to the appellant on 3rd August 2015. There was no mention of the date she reported the accident and why the police abstract was issued six months after the accident. The appellant stated that she was first admitted at Sukos hospital before she was transferred to Shalom Hospital for better management. She did not produce a single document from that facility to show she was admitted there and that she was transferred from that hospital to Shalom.

32. The record of appeal contains documents from Shalom hospital showing that the appellant was attended in that hospital on 10th February 2015, 15th February 2015, and 12th March 2015. The discharge summary from the hospital shows that she was admitted on 8th February 2015 and discharged on 10th February 2015. Apart from those documents, the appellant again produced documents from County Government Health Services-Kajiado issued on 6th May 2015 for treatment for injuries sustained on 6th February 2015. There was no explanation again why. The appellant again produced a P3 form issued **on 6th May 2015** referring to OB 6/7/2015 for the accident the subject of the suit before the trial court and this appeal. The the OB was issued three months before the police abstract was issued on 3rd August 2015.

33. The discrepancies in the medical documents were not explained. Similarly, there was no explanation why the appellant was reporting the accident on 6th May 2015 when the accident had occurred two months earlier (6th February 2015). The appellant stated that she reported the accident after she recovered. The injuries pleaded in the plaint were cut wounds that were not life threatening. This was confirmed by the medical report by **Dr. A O Wandugu** that the injuries were cut wounds. It could therefore not have taken the appellant up to 6th May 2015 to report an accident that occurred on 6th February 2015.

34. The evidence by PW1 that the investigating officer made a mistake by not including the appellant in the list of those who were injured in the accident was without basis. This was because there was no evidence when the report was made that the appellant had been involved in an accident. Her report appears to have been made in May while the report was recorded in the OB on 7th February 2015. There was no report about the appellant then and therefore it could not have been a mistake that her name was wrongly omitted.

35. It is possible that the appellant was involved in that accident. However, her people should have reported to the police who would even have visited her in hospital to check on her condition and if possible document her. This did not happen because there was no report about her.

36. In **Mwanasokoni v Kenya Bus Services Ltd & Others** [1985] eKLR, the Court of Appeal stated that an appellate court should not interfere with the trial court's findings on fact unless it is based on no evidence or on misapprehension of evidence or the trial court is shown demonstrably to have acted on wrong principles in reaching that finding.

37. In **Timsales Ltd v Wilson Libunywa** (supra) the court observed that in any alleged accident which is disputed, it is the duty of the Plaintiff, to prove on a balance of probabilities that he indeed suffered the alleged accident. A medical report [also treatment notes] by a doctor who examines 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, it will not prove that the plaintiff indeed suffered an injury on the day and place he claimed he did.

38. I agree with the trial court that the appellant's evidence, including documentary evidence, could not prove on a balance of probability that she was a victim in the accident on that day. The fact that she had hospital treatment notes and receipts, could not on their own, be evidence that she was involved in that accident on that day and at that time and place. I find no fault with the trial magistrate's finding of fact in that regard.

39. The appellant argued that the trial court fell into error for not assessing damages even when it dismissed her suit. On this, I agree with the appellant. It is settled law that a trial court is under duty to assess damages it would have awarded had the appellant succeeded before it. This is so because not being the final court, the assessment would show the level of damages the trial court would have settled for had the suit succeeded and may aid the appellate court should the appeal turn the other way.

40. The appellant suffered what were multiple cuts with no significant physical infirmities. Considering the decisions cited by parties, this court would have assessed general damages at the level of Kshs. 150,000. Special damages would have been what was paid in hospital and the medical report. Cost of travel by Taxi was not substantiated and justified given the nature of injuries the appellant sustained.

41. In the end, I do not find merit in this appeal. It is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 16TH DAY OF JULY 2021

E C MWITA

JUDGE