



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO. 136 OF 2019**

**BENARD ASWANI.....APPELLANT**

**-VERSUS-**

**REUBEN MBURU.....RESPONDENT**

(Appeal from the Judgment and decree of **Hon. H.I Mwendwa, SRM**

at Kikuyu Senior Principal Magistrates Court in Civil Suit No. 151 of 2013

dated 19<sup>th</sup> August, 2019)

**JUDGMENT**

1. **BENARD ASWANI**, the appellant filed a case before Senior Principal Magistrate's Court at Kikuyu seeking judgment for special and general damages for an accident where he alleged he was injured. The trial court after hearing the case by its judgment delivered on 19<sup>th</sup> August, 2019 dismissed the appellant's suit with costs. The appellant has filed this appeal against that dismissal.

2. This is the first appellate court. An appeal in the first instance is heard by way of retrial. This Court is required to reconsider the evidence, evaluate it and draw its own conclusion but this Court must bear in mind that it neither saw nor heard the witnesses testify: see ***SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) E.A. 123.***

**ANALYSIS**

3. By his plaint, the appellant pleaded that on 12<sup>th</sup> December, 2012, while in the course of his employment, the first defendant namely, **REUBEN MBURU**, the respondent herein, carelessly and/or recklessly drove managed and/or controlled motor vehicle registration No. KBJ 092F. That the respondent caused the vehicle to lose control and violently knocked appellant which caused the appellant to suffer severe bodily injuries.

4. The appellant particularised his injuries as:-

- a. Blunt head injury (tender)
- b. Blunt injury – right leg, knee
- c. Blunt injury – left hand.
- d. Blunt injuries – shoulder and back.

5. The respondent filed a defence and therein denied allegations of negligence on his part and also denied the claim for special and general damages.

6. The trial court in its judgment and in dismissing the appellant's case stated thus:-

**“The plaintiff (appellant) did not produce an independent witness to testify on the events of the night.**

The court find (sic) that it is more probable that the report made by the plaintiff to the police was false as claimed by the defendant (respondent). This is more compounded by the fact that the plaintiff (sic) statement filed in court with the pleadings which was knocked while walking was changed midstream.

In the end, this Court finds that the plaintiff has not proved his case to enable the court find liability against the defendant.”

7. The appellant by his written witness statement filed together with the plaint stated:-

**“That on the 12<sup>th</sup> day of December, 2012, I was lawfully walking at my working place at Kikuyu Township when motor vehicle registration number KBJ 092F lost control veered off the road and knocked me down. As a result thereof, I sustained severe bodily injuries endured and continues to endure pain and have suffered loss and damages.**

**I blame the driver of the said motor vehicle aforesaid for his negligent driving which caused the accident subject matter.”**

8. The appellant at the trial stated:-

**“On 12.12.2012, I was on duty at Imara Lodging as a watchman at around 12 midnight. A vehicle came in KBJ 092F. The driver of the said vehicle was drunk and found me standing on the gate. I told him not to park on the entrance and told him to take vehicle (sic) to the next parking but he insisted to park there and he refused he instead drove the vehicle and hit me and I fell down. I was injured on my leg. I then went to make a report at Kikuyu police station and they told me to go to hospital the following day.”**

9. Appellant on being cross examined acknowledged that there was a dispute between him and the respondent, as he directed the respondent not to park at the entrance. He stated further in cross examination:-

**“I was blocking him (respondent) from parking and he drove speedily and hit me.”**

10. It becomes very clear that the appellant’s evidence at the trial differed from the pleadings and the written statement filed together with the plaint. By his plaint, the appellant alleged far more injuries than he stated in his evidence and what he reported to the Kikuyu police station, in the Occurrence Book of that police station. The appellant also produced the medical note of Kinoo Medical Clinic dated 13<sup>th</sup> December, 2012. That medical note stated that the appellant sustained injuries at his place of work where a colleague hit him with a tyre. There was therefore contradictions in the evidence on the alleged accident and the alleged injuries.

11. The respondent in his evidence stated that on the date in question at 8.00 pm he was from his evening masters classes in Westlands. He drove his vehicle KBJ 092F to Kikuyu where he was to attend a meeting. This is what he further stated:-

**“When I got where I had a meeting, there was a free parking slot. When I was about to disembark, the security said there was no parking. I parked in the slot, went to the meeting in the opposite building where I had the meeting from about 9.00 pm to 11.00 pm. The security guard had asked me some money before parking. I drove off at 11.00 pm after meeting (sic).”**

12. The respondent stated that in January, 2013 he was stopped, by police officers, as he drove his vehicle and ongoing to the police station his vehicle was inspected. He was never charged with a traffic offence. He denied hitting the appellant. He further stated that where he had packed on the night in question, there were several security guards who did not testify in support of the appellant’s case.

13. The appellant had the burden to prove the claim he filed before the trial court. This is what is stated under **Section 107** of the Evidence Act. That 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.**

14. The appellant had the burden to establish the facts as pleaded in his plaint. In his plaint, he alleged the respondent caused the vehicle to lose control and violently knocked him down. By his written statement he alleged he was a pedestrian when the respondent’s vehicle veered off the road and knocked him down. When he went to Kinoo Medical clinic, he informed personnel there that he was injured when a colleague hit him with a tyre. It is not surprising that the trial court confronted with those contradicting statements made a finding that it was probable that the appellant’s report to the police was false and therefore concluded the appellant had not proved his case.

15. Undoubtedly, the appellant had a burden to prove his case which this Court just like the trial court also finds he failed to prove. The burden of proof appellant had was discussed in the case **ALICE WANJIRU RUHIU VS. MESSIAC ASSEMBLY OF YAHWEH (2021) eKLR** as follows:-

**“22. I also refer to *The Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14 describes it thus:-***

**“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the**

appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.’

[16] The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

16. It follows that the trial court’s finding is upheld in this appeal.

17. Before concluding this appeal, it is necessary to consider the objection raised by the respondent to this appeal. The respondent correctly stated that the appellant’s Memorandum of Appeal did not have any prayer and only contained grounds of appeal. As fittingly submitted by the respondent parties are bound by their pleadings. This was what the court stated in the case **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND ANOTHER VS. STEPHEN MUTINDA MULE & 3 OTHERS (2014) eKLR:-**

“The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

18. The appeal does also additionally fail because the appellant made no prayer in his memorandum of appeal for either the setting aside of the trial court’s finding nor was there a prayer for any orders to be issued by this Court. The memorandum of appeal was drawn such a way, that this Court was invited to consider the grounds of appeal without there being any prayer for this court to make any different determination to the one made by the trial court.

## CONCLUSION

19. This Court, in view of the above, is of the opinion that this appeal lacks merit. This appeal is dismissed with costs.

**JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 2<sup>ND</sup> DAY OF DECEMBER, 2021**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant **Maurice**

For the Appellant : No appearance

For the Respondent : No appearance

## COURT

Judgment delivered virtually.

**MARY KASANGO**

**JUDGE**