IN THE HIGH COURT OF KENYA

AT KIAMBU

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 147 OF 2017

BETWEEN

PATRICK MUHIA GIATHI .....APPELLANT

AND

JOSEPH KINGIRI MWANGI.....1ST RESPONDENT

LYDIA WAMBUI KARIUKI .....2ND RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. J. Kituku, PM dated 4th September 2017 at Kiambu Magistrates Court in Civil Case No. 288 of 2010)*

JUDGMENT

1. The appellant claimed special damages and damages for loss of user arising from an accident involving his motor vehicle registration number KAK 384G and that of the 1st respondent, registration number KBH 542S which occurred on 17th May 2010 at Kiu River junction along the Kiambu – Nairobi road. The subordinate court dismissed his claim for want of proof hence this appeal.

2. Although the appellant has raised 16 grounds of appeal in the memorandum of appeal dated 18th September 2017, the issue is simply whether the appellant proved his case on the balance of probabilities. This is a question of fact which this court must address as the first appellate court whose duty is to re-appraise the evidence on record, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Company Ltd* [1968] E.A. 123, 126**).

3. The respondents did not call any evidence at the trial. Three witnesses testified on behalf of the appellant. Peter Owiti (PW 1), a motor vehicle assessor, PC Ndiege Iddi (PW 2), a police officer and the appellant (PW 3). PW 2 and PW 3 were the main witnesses on the issue of liability. PW 3 told the court that he was called on the night of 17th May 2010 and informed that his vehicle had been involved in an accident. When he went to the police station on the next day, he was issued with a police abstract and informed that the driver of the other vehicle was to blame. When cross-examined, he confirmed that he did not witness the accident. PW 2 was called to produce the police abstract which stated that the driver of motor vehicle KBH 542 J was to blame for the accident.

4. The issue for resolution is a question of fact and in dealing with it I must bear in mind the duty of the first appellate court to appraise the evidence on record and come up with an independent conclusion making an allowance for the fact that it is the trial court that heard and observed the witnesses testify (see see ***Peters v Sunday Post Limited* [1958] EA 424** and ***Selle v Associated Motor Boat Co.* [1968] EA 123**).

5. The duty of the plaintiff in any case is to prove its case on the balance of probabilities. Under **section 107** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. **Sections 108** and **109** of the ***Act*** further provide that the evidential burden is cast upon any party with the burden of proving a particular fact which he desires the court to believe in its existence. It is also well established that the standard of proof in civil claims is on the balance of *probabilities*. This means that the Court will assess all the evidence advanced by each party and decide which case is more probable (see ***Palace Investments Ltd v Geoffrey Kariuki Mwenda and Another* NRB CA Civil Appeal No. 127 of 2007 [2007]eKLR**).

6. Since the appellant's case was one of negligence, the appellant had to prove that the accident was caused by the negligence of the respondents or establish certain facts that would compel the court to infer negligence unless the respondents shows otherwise. This position is summarised by the Court of Appeal in ***Nandwa v Kenya Kazi Ltd* [1988] KLR 488** as follows;

In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference.

7. PW 2 and PW 3 did not witness the accident hence they could not give direct evidence on how it happened. In other words, there was no direct evidence to support the particulars of negligence pleaded by the appellant. For example, there is no evidence that the vehicle was being driven too fast or that it failed to keep a proper look out for the other road users or that it failed to apply brakes in time or that it failed to slow down, swerve or in any way avoid the accident. PW 3 was not the investigating officer and he produced the police abstract which confirmed the particulars of the accident. He could not tell how the accident happened and even if he did, he testimony was inadmissible hearsay.

8. The appellant advanced the argument that the police abstract supported its case as it stated that the driver of motor vehicle registration number KBH 542S was to blame. The question then is whether the contents of a police abstract constitute proof of negligence. As the name suggests, a police abstract is an abstract or summary of information contained in the police record. It contains factual matter like the parties involved in an accident, the date and time of accident, whether a party has been charged, person injured and such information. A statement contained therein that a party is to blame is a statement of opinion as it is based on the writer's perception of a certain set of facts. It is therefore inadmissible unless it is admitted under **section 48** of the ***Evidence Act***. Moreover, the set of facts which it is based on must be proved. In other words, the appellant through PW 2 did not show or establish any facts upon which the court could conclude that indeed the respondents were to blame.

9. Finally, the appellant did not lay before the court any fact which would prima facie lead to an inference of negligence. For example, PW2 did not produce any sketch plans, he did not tell the court the relative position of the vehicles where the accident took place, the nature and extent of damage on both vehicles and any other facts upon which the court could infer negligence.

10. Having evaluated the record, I agree with the trial magistrate that the appellant failed to establish its case on the balance of probabilities and I affirm that finding.

11. Despite dismissing the suit, the trial magistrate correctly proceeded to assess damages. He awarded special damages but dismissed the claim for loss of user on the ground that the appellant had failed to prove it. The appellant claim was that as a result of the damage caused to the vehicle, he suffered loss of user for 38 days at a cost of Kshs. 8,000/- per day. In his testimony, PW 3 testified that he had been contracted by *Frigoken Limited* to transport goods and was earning Kshs. 8,000/- per day. He did not produce the contract but produced receipts and bank statements to support his case. He also relied on the evidence that his motor vehicle was Isuzu NKR with a closed body which was used to ferry goods.

12. A claim for loss of user is a claim for special damages which, under our law, must be pleaded and proved. In ***Ryce Motors Limited and Another v Elias Muroki*** **MSA CA Civil Appeal No. 119 of 1995 [1996] eKLR** where the Court of Appeal remarked as follows in relation to the nature of proof required to support a claim for special damages that had been allowed by the trial court:

The learned judge had before him by way of plaintiff's evidence Exhibits 2 and 3 as proof of alleged loss of profits. Exhibit 2 consisted of figures jotted down on pieces of papers showing dates and figures. Nothing about these pieces of paper can be accepted as correct accounting practice to enable the court to say these are the accounts upon which the court can act.

These pieces of paper do not show at all if the alleged accounts were in respect of 'the matatu', or the two matatus owned by the plaintiff, or included the business of the plaintiff as a shop-keeper. The said pieces of paper in our view, do not go to prove special damages. There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of Shs. 4500/= per day. He did not support such claim by any acceptable evidence. There was absolutely no basis on which the learned judge could have awarded the sum of Kshs. 2,830,500/= for special damages and we set aside the award in its entirety.

13. In this case I have looked at the document produced being primarily receipts and the bank statements. While there is evidence that there was a relationship between the appellant and *Frigoken*, it is not clear how much the appellant was earning monthly. He did not, either in his testimony or witness statement, relate those receipts and bank statements to the income he claimed hence I find and hold that the claim was not proved along the lines stated in ***Ryce Motor Case*** **(Supra)**. The following warning by Lord Goddard CJ said in ***Bonham-Carter v Hyde Park Hotel Ltd*** **[1948] 64 TLR 177** is as relevant today as it was 70 years ago:

Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying "This is what I have lost, I ask you to give me these damages'. They have to prove it.

14. For the reasons I have set out I dismiss the appeal with costs to the respondents.

DATED and **DELIVERED** at **KIAMBU** this 10th day of **JANUARY** 2020.

D.S. MAJANJA

JUDGE

Mr Muthee instructed by Kairu and McCourt Advocates for the appellant.

Mr Njuguna instructed by P. K. Njuguna and Company Advocates for the respondents.