REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 155 OF 2016

SHADRACK KILONZO KAVOI.....APPELLANT

VERSUS

GACHERU PETER.....1ST RESPONDENT

GIDEON NZYUKO.....2NDRESPONDENT

MICHAEL SEMERA.....3RD RESPONDENT

ANTHONY MUINDE.....4TH RESPONDENT

(Being an appeal from the whole judgement delivered by the Honourable L. Simiyu, Senior Resident Magistrate in Machakos CMCC 923 of 2014 delivered on 22nd 18.1.2018)

BETWEEN

SHADRACK KILONZO KAVOI.....PLAINTIFF

VERSUS

GACHERU PETER.....1ST DEFENDANT

GIDEON NZYUKO.....2ND DEFENDANT

MICHAEL SEMERA.....3RD RESPONDENT

ANTHONY MUINDE.....4TH RESPONDENT

JUDGEMENT

1. The appellant herein, by way of a plaint filed in the lower court claimed general and special damages as well as the costs of the suit against the Respondents herein.

2. According to the Appellant, the 1st Respondent was the registered owner of motor vehicle registration number KAS 247S minibus *matatu* while the 2nd Respondent was its beneficial owner. The 3rd Respondent, on the other hand was the registered owner of motor vehicle reg. no. KAS 492 Toyota Station Wagon while the 4th Respondent was its beneficial owner.

3. It was pleaded that on or about 2nd March, 2014 the Appellant was lawfully travelling aboard Motor Vehicle Reg. No. KAS 247 (hereinafter referred to as "the *matatu*") along Machakos-Kitui Road when the said vehicle as a result of negligence of the 1st and 2nd Respondent or their driver caused the same to collide with motor vehicle reg. No. KAS 492S (hereinafter referred to as "the saloon") which was similarly being negligently driven.

4. The Appellant then pleaded the particulars of negligence of both drivers and also relied on the doctrine of *res ipsa loquitor*. It was his case that as a result of the said accident, he sustained bruises to both arms, blunt injury to the left shoulder with bruises, blunt injury to the left ankle and blunt injury to the left knee with bruises. He incurred special damages in the sum of Kshs 4,500/- which he claimed from the Respondents.

5. In his defence, the 2nd defendant denied ownership of the *matatu* and denied that the same was involved in the said accident. He accordingly denied that the accident was caused by the negligence on his part or his driver and contended that if there was such an accident, then it was caused by the negligence of the driver of the station wagon. He similarly challenged the particulars of injuries and special damages pleaded in the plaint and denied that he was liable. A similar defence was filed by the 4th Respondent who on his part attributed liability to the *matatu*.

6. Since the 1st and 3rd defendant failed to appear, a default judgement was entered against them.

7. In his evidence the Appellant testified as PW3 and stated that on 2nd March, 2014 he was travelling to Mwala from Machakos aboard the said *matatu* as a passenger when at Kalumoni the said *matatu* collided with the saloon. As a result of which he sustained the injuries pleaded. He was treated at Machakos Level 5 Hospital and later at Mwala Hospital and he produced treatment cards in that respect. He also produced the p3 form the receipts for the amount he spent on treatment. He also produced demand letters and statutory notices to the insurance companies concerned and prayed for damages. According to him, he carried out a search at the register of motor vehicles which revealed that the two vehicles were registered in the names of the 1st and 3rd Respondents.

8. In cross-examination, the Appellant stated that the saloon entered the road and it was knocked.

9. In support of his case, the Appellant called PW1, **Dr Judith Kimuyu**, who examined the Appellant herein on 6th September, 2014 and found that the Appellant had bruises on both arms, blunt injury to the left shoulder and blunt injury to the left ankle, joint and left knee. Although these injuries were classified as soft tissue injuries, it was his opinion that the Appellant had not fully recovered and he advised for physiotherapy as it was his opinion that the Appellant was pre-disposed to arthritis in future. He produced his report as exhibit.

10. The Appellant also called PW2, **John Knyungo**, who confirmed that there was an accident involving the Appellant herein who was aboard the said *matatu*. According to him, the saloon made an abrupt turn and was hit by the said *matatu* as a result of which the Appellant was injured. He produced the abstract in support of his evidence.

11. The Respondents did not adduce any evidence in support of their case.

12. In her judgement, the learned trial magistrate found that there was no evidence as to which of the drivers was negligent. It was her finding that the evidence of the investigating officer would have revealed the circumstances under which the accident occurred. It was her finding that since the evidence of the investigating officer varied from that of the plaintiff, it was not enough to state that the accident was caused by both the drivers but must prove which of the drivers caused the accident. It was therefore her finding that the Appellant failed to prove negligence and proceeded to dismiss the case.

Determination

13. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

14. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

15. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by**

a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

16. It was therefore held by the Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

17. In this appeal, it is clear that the determination of this appeal revolves around the question whether the appellants proved their case on the balance of probabilities. That the burden of proof was on the appellants to prove their case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."

18. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

19. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

20. Therefore, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the appellant chose to remain silent.

21. In this case the Appellant testified on how the accident took place. According to him, the saloon was entering the road when it collided with the *matatu*. However, PW2 stated that the collision took place when the saloon was making a u-turn.

22. In **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434,** it was held that:

"Negligence is not actionable *per se* but is only actionable where it has caused damage and in that regard the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage or injury complained of; and where the damage was caused by the negligent acts of different persons, to assess the degree of their respective responsibility and blameworthiness, and apportion liability between or among them accordingly…There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."

23. In that case the court further found that:

> **"When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his course at any time to avoid anything he sees after he has seen it…A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object…Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently…There may be occasions when criminal or traffic offences are committed without giving rise to civil liability."**

24. That was the position in **Tart vs. Chitty and co (1931) ALL ER Pages 828 — 829** where **Rowlat, J** had this to say.

> **"It seems to me that if a man drives a motor car along the road he is bound to anticipate that there may be in things and people and animals in the way at any moment and he is bound to go not faster than will permit his stopping or deflecting his course at any time to avoid any thing he sees after he has seen it."**

25. In **Karisa and Another vs. Solanki and Another [1969] EA 318** it was held that:

> **"The car driver, driving at a speed of about 65 mph which was not in itself negligent, when he saw the oncoming bus, whose presence on the road reduced the area available to take evasive action should any emergency occur and whose lights to some extent impaired the area of vision provided by its own lights, only reduced his speed to about 60 mph. This action was one which a reasonably careful driver, and the duty which the car driver owed to the plaintiff was that of being a reasonably careful driver, would not have taken, as the speed in those circumstances enormously increased the potential danger of an accident. While, therefore, a speed of 60 mph is not negligence, it is that speed in the particular circumstances which constitutes negligence; and the Judge was wrong in considering the question of speed separate from the other circumstances of the case…We are not satisfied that the car driver could not and should not as a reasonably careful driver, keeping a particular keen look-out, have seen the lorry in time to have swung to the left on the verge, no matter how uncertain his knowledge of the precise terrain there, rather than run straight into the stationary lorry…Looking at the facts of the case as a whole, the Judge tended to consider the two main circumstances of speed and a proper look-out separately and not part of a comprehensive whole, and it was this failure to look at the facts as a whole which led him into the manifest error of coming to the conclusion that there was no negligence on the part of the car driver. He was clearly wrong in failing to find negligence on the part of the car driver. Consequently the car driver found to have contributed to the accident to the extent of 20 per cent."**

26. In **Vyas Industries vs. Diocese Of Meru [1976-1985] EA 596; [1982] KLR 114**, it was held that an appellate court will not interfere with apportionment of liability unless the Judge has come to a manifestly wrong decision or based his apportionment on wrong principles and this was the case since the greater blame attaches to a driver who runs into an unlighted stationary lorry on a straight road.

27. In this case, from the judgement of the learned trial magistrate, it is clear that what influenced the decision was the evidence of the police officers. What was however not in doubt was that the two vehicles collided as a result of which the appellant got injured. **Madan, J** (as he then was) in **Welch vs. Standard Bank Limited [1970] EA 115** expressed himself as hereunder:

> **"When there is no material to generate actual persuasion in the court's mind, still the court cannot unconcernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability. Everyday, proof of collision is held to be sufficient to call on the two defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence enabling the Court to draw a distinction between them, they must both be held to blame, and equally to blame…Justice must not be denied because the proceedings before the court fail to conform to conventional rules provided, in its judgement, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardising the vital task of doing justice. Provided there is no transgression of this sacred duty, the court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion…There being nothing to enable the court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The court does hold so in this case."**

28. Similarly, in **Lakhamshi vs. Attorney-General [1971 EA 118** it was held that:

> **"A judge is under a duty when confronted with conflicting evidence to reach a decision on it and in most traffic accidents it is possible on a balance of probability to conclude that one or other party was guilty, or that both parties were guilty, of negligence. In many cases, as for example, where vehicles collide near the middle of a wide straight road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is, in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. It is usually possible, although often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but where it is not possible, it is proper to divide the blame equally between them."**

29. In **Anne Ndoti Mwololo & Another Vs. Telkom Kenya Limited & 2 Others Mombasa HCCS NO. 89 of 2005** it was held that:

> **"Since the deceased was a passenger, it is obvious that he had no role to play in driving of the motor vehicles which were involved in the accident. Therefore the principle of *res ipsa loquitor* applies in this case. As for apportionment of liability between the drivers of the two motor vehicles involved in the accident, there is no clear evidence as to how the accident occurred. What is certain is that two motor vehicles collided and as a result the deceased suffered fatal injuries. The police abstract form did not put blame on any of the drivers and the law is clear that the onus of establishing contributory negligence lies on the defendant. Unfortunately none of the defendants discharged that burden evidentially. From the circumstances of this case a fair order is to apportion liability equally between the 2nd and the 3rd defendants."**

30. It was similarly held in **James Wangugi Kigo vs. Waithaka Kahara Nairobi HCCC No. 598 of 1991** that where the plaintiff is a passenger in one of the vehicles involved in a collision failure by both drivers to counter allegations in the plaint means that they are negligent. In **Alfarus Muli vs. Lucy M Lavuta & Another Civil Appeal No. 47 of 1997** it was held that vehicles when properly driven on the road do not run into each other and from an act of collision a Judge would be perfectly entitled to infer negligence on the part of one or the other or both. It was therefore held by the Court of Appeal in **Farah vs. Lento Agencies [2006] 1 KLR 123** that:

> **"In our view, it was not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who was to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. Everyday, proof of collision is held to be sufficient to call the defendant 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 unhesitantly hold that both are to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them… The trial court...had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."**

31. In **Eliyaforo Hosea vs. Fraeli Kimaryo** (supra) the court found for the plaintiff and apportioned damages evenly between the two.

32. In this case, the fact of collision of the two vehicles was not challenged. In those circumstances, it is clear that one or bother the drivers was negligent. It cannot be that one of them was negligent. In the absence of an explanation coming from either of them, the learned trial magistrate ought to have found them both liable. The Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** held that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

33. By failing to appreciate that in those circumstances the Respondents could not wholly escape liability, the learned trial magistrate clearly failed to take account of the particular circumstances and probabilities material to the estimate of evidence and arrived at an incorrect decision in dismissing the suit.

34. In the premises, this appeal succeeds, the decision dismissing the case is hereby set aside. Judgement is hereby entered equally against the 1st and 2nd Respondents jointly on one hand and the 3rd and 4th Respondents jointly on the other hand. As no issue has been taken as regards the quantum of damages and having considered the same there is no reason to interfere with the award proposed by the learned trial magistrate. In the premises, I award the Appellant Kshs 180,000.00. and Kshs 4,540/- special damages with interest. The Appellant will have the costs of the proceedings in the lower court and the costs of this appeal.

35. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 4th day of February, 2020.

G V ODUNGA

JUDGE

Delivered the absence of the parties

CA Geoffrey