REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 70 OF 2013

JAMES KINOTI DANIEL..APPELLANT

VERSUS

KIMANI ZIPPORAH..1ST RESPONDENT

DAVID NJUGUNA NGOTHO..........................2ND RESPONDENT

(Being an appeal from the decision and decree of the Hon. Cheruto C. Kipkorir R.M.

Delivered on 15th January, 2015 in CMCC No. 3439 of 2011

at Milimani Commercial Courts)

JUDGMENT

The appellant sued the respondents in the lower court following injuries he sustained as a result of a road traffic accident that took place on 23rd September, 2008 along Kirinyaga road Nairobi. The appellant was allegedly knocked down by motor vehicle registration No. KBA 127 A owned by the 1st respondent and driven by the 2nd respondent at the time of the accident.

The appellant blamed the accident on the negligence of the driver who knocked him down resulting to injuries pleaded in the plaint. The respondents in the statement of defence denied the appellant's claim and in particular that the accident occurred at all as alleged and in the alternative that, if indeed it did occur, all allegations of negligence on the part of the driver were denied further that, the appellant was wholly to blame or substantially contributed to the accident. After hearing the matter, the lower court dismissed the appellant's suit leading to the present appeal.

The summary of the memorandum of appeal dated 12th February, 2013 is that the lower court was wrong to have reached the conclusion to dismiss the suit against the weight of evidence adduced. Crucial evidence was said to have been ignored and the witness statements in court were not considered. Further, the court was accused of not taking into account the submissions and authorities cited and also not considering the evidence of the traffic officer who gave evidence.

In effect, the lower court was faulted for not finding the respondents liable for the accident. Both parties have filed submissions and cited some authorities which I have considered. As the first appellate court, I am required to consider the entire record of the lower court with a view to arriving at independent conclusions. In so doing, I must bear in mind the fact the lower had the advantage of seeing and hearing the witnesses testifying which advantage I do not have. Further, an appellate court may not interfere with the findings of the trial court unless it is apparent such findings were against the flow of evidence leading to injustice on the offended party.

The appellant herein gave evidence in support of his pleadings and called Dr. wokabi who examined him and prepared a medical report produced in evidence. The defence called the police officer who produced a copy of OB and police abstract. Both respondents also gave evidence in support of the statement of defence. In his evidence, the appellant told the trial court that following the accident he was not unconscious neither was it a hit and run accident. On the contrary, it was the driver of the motor vehicle who took him to hospital and left him there. That evidence was contrary to the records from Kenyatta National Hospital which showed the accident was a hit and run, which is also reinforced by the evidence of D.W. 1 PC Benjamin Tuya, the police officer who gave evidence for the defence. Further it was the appellant's case that a good Samaritan by the name Gerald Gichaga took the details of the motor vehicle and made a statement with the police. However, this person's name was not in the police abstract neither was he called to give evidence.

It is a cardinal principle which is also provided in the Evidence Act Cap 80 Laws of Kenya Section 107 that, he who alleges must prove.

Further, proof in civil proceedings is on a balance of probability. It was therefore the burden on the part of the appellant to prove his case against the respondents on a balance of probability for his case to succeed.

In dismising the appellant’s case, the trial court stated as follows,

> **“I have read through the documents produced in evidence and I have noted that the 1st time the registration number of the motor vehicle is outlined is in the accident and emergency record from KNH. The name and identification name of the driver is not outlined. It was recorded that the plaintiff was involved in a hit and run accident. This is also what is recorded in the occurrence book and it follows the police abstract. The plaintiff on cross examination was asked how he knew the motor vehicle that hit him he stated that a Good Samaritan by the name Gerald Gichaga told him…….the only evidence that the plaintiff was hit by the motor vehicle aforesaid as per the plaintiff’s own admission is hearsay evidence. He himself did not see the registration No. of the motor vehicle that hit him and neither did he provide the same to the person who attended him at the hospital…….the plaintiff it must be noted made the report to the police himself. There are before me two versions of events that happened after the accident. The complete denial by the defendants in the defence and the evidence of the occurrence of the accident made it imperative that the plaintiff must prove this head sufficiently. It would have been prudent for the plaintiff to ensure attendance of the said good Samaritan or that the evidence by the police outlined reason after investigations done by them for them to blame the defendants. In a nutshell, I find the plaintiff has not proved his case under this head on a balance of probability and I hereby dismiss his case with costs to the defendants.”**

The above lengthy quotation of the judgment of the lower court is deliberate. It is intended to show the lower court appreciated the facts and evidence presented before reaching any conclusion. In so doing, there is no doubt whatsoever that trial court considered all the material presented, analysed the same and reached the conclusion that the appellant did not achieve the threshold required to justify a decision in his favour.

In my assessment of the record, I am unable to fault the trial court and therefore find that the respondents were not liable for the accident complained of by the appellant. The trial court went ahead to assess damages that would have been awarded to the appellant had he proved his case against the respondents. This is the correct procedure.

I have looked at the medical report prepared by Dr. Wokabi and the injuries sustained by the appellant. I have also looked at the cited authorities and bearing in mind that comparable injuries should attract should attract comparable awards, the trial court was correct in assessing general damages at Kshs. 350,000/=. In the end however, there is no merit in this appeal which is hereby dismissed, but each party shall bear their own costs in this appeal.

Dated, signed and delivered at Nairobi this 7th day of May, 2020.

A. MBOGHOLI MSAGHA

JUDGE