REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 129 OF 2017

ALI RAMADHAN .... APPELLANT

VERSUS

ISAAC BOSIRE .... RESPONDENT

(from the judgment and the decree of Hon. C. C. Kipkorir, SRM, in Mumias SPMC Civil Case No. 215 of 2014 dated 8/11/2017)

JUDGMENT

1. The appellant sued the respondent at the lower court claiming general and special damages after the appellant was injured while travelling in the respondent's motor vehicle as a result of which he received injuries. The appellant blamed the respondent's driver for driving the motor vehicle carelessly thereby causing it to roll out the road. After a full hearing the learned trial magistrate found that the appellant had not proved negligence on the part of the respondent and accordingly dismissed the suit. The appellant was aggrieved by the finding of the trial magistrate on liability and lodged this appeal. The grounds of appeal are that:-

1. The learned trial magistrate erred in law and in fact when she held that the appellant had not proved his case on a balance of probability.

2. The learned trial magistrate erred in law and in fact in her finding that an eye witness was needed to testify for liability to be apportioned when the accident was self- involving.

3. The learned trial magistrate erred in law and in fact in dismissing the appellant's case when the Appellant's testimony had not been controverted as the Respondent did not tender any evidence.

4. That the learned trial magistrate erred in law and in fact in analyzing the evidence as to how the road traffic accident occurred and what caused the accident.

5. The learned trial magistrate erred in law and in fact in failing to appreciate the evidence that the appellant was a lawful passenger in the respondent's motor vehicle registration number KBU 989 Q and that he did not in any way contribute to the occurrence of the accident.

6. The learned trial magistrate after analyzing the evidence before her arrived at a wrong decision which amounted to a miscarriage of justice.

7. The learned trial magistrate failed to consider all the evidence presented before her by the appellant.

8. The learned trial magistrate failed to consider the submissions and the authorities of the appellant hence arriving at wrong decision.

The Evidence –

2. It was the case for the appellant that he is a cane cutter. That on the 10th February, 2014 he and other people were hired as casual workers and picked at Mumias by a motor vehicle registration number KBU 987 Canter to go and cut cane at Butere. He was standing at the back of the vehicle. That on the way the vehicle veered off the road and landed on its side. He was injured. He was treated at St. Mary's Hospital, Mumias. He reported the accident at Mumias Police Station and was issued with a police abstract, P.Ex 4 that indicated that the vehicle belonged to the respondent. He was examined by Dr. Andai who prepared his medical report, P.Ex 5. He sued. The respondent did not call any evidence in the case.

3. It was the evidence of the appellant that the motor vehicle was speeding which caused the driver to lose control thereby veering of the road

and fell over. In cross-examination the appellant however stated that he did not know what caused the accident as he did not see what occurred. That he was told by other passengers who were sitted at the front of the vehicle that the driver of the vehicle was overtaking when it was not safe to do so as a result of which he veered off the road. He did not call any of these people to testify in the case.

4. In her judgment the learned trial magistrate dismissed the case on the grounds that the evidence of the appellant showed that he did not see how the accident occurred. That in that case the respondent cannot be blamed for the accident. That the fact that an accident occurred does not automatically mean that the driver of the vehicle is to blame. That though the evidence was not controverted it did not show that the driver of the vehicle was negligent. The magistrate accordingly dismissed the appellant's case.

Submissions –

5. The advocate for the appellant, **C. M. Mwebi Advocate**, submitted that the trial magistrate erred in not holding the respondent liable for the accident. That the appellant stated that the driver of the motor vehicle was at high speed and that he veered off the road and rolled. That the fact that the appellant was behind the vehicle would not prevent him from realizing that the vehicle was moving at high speed, lost control and veered off the road. That the accident was self-involving. That if this was to the contrary the respondent did not tender evidence to explain the cause of the accident. Counsel urged the court to find that the cause of the accident was as a result of negligence on the part of the respondent's driver and therefore that the respondent was 100% liable for the accident.

6. The advocates for the respondent, **L. G. Menezes & Company Advocates**, on their part submitted that the appellant stated in his evidence-in-chief that the cause of the accident was that the driver was speeding and that he was overtaking when it was not clear to do so as a result of which he veered off the road. That in cross-examination he stated that he did not see how the accident occurred which was a contradiction to his evidence-in-chief. That the appellant did not call eye witnesses to the accident. That the burden of proof was on him to prove negligence on the part of the respondent which he failed to do. That the trial court was right in dismissing the case.

Analysis and Determination –

7. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that the appellate court did not have an opportunity to hear the witnesses first hand and test the veracity of their evidence and demeanour. In the case of **Ngigi Kuria & Another (suing as the legal representatives of the Estate of Joan Wambui Ngigi) –Vs- Thomas Ondili Oduol & Another [2019] eKLR** and **Julius Vana Muthangya –Vs- Katuuni Mbila Nzai [2009] eKLR,** the courts adopted the holding in **Oluoch Eric Gogo -Vs- Universal Corporation Limited [2015] eKLR**, where the court restated the duty of an appellate court as follows:-

> ***"As a first appellate court the duty of court is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of*** **Selle & Another v Associated Motor Boat Co. Ltd &Another** ***(1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect …. From the above decisions which echo section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally."***

8. The main issue for determination by this court is whether the appellant proved his case to the required standards.

9. The standard of proof in civil cases is on a balance of probabilities. Sections 107, 108 and 109 of the Evidence Act provide that:-

> *107. "(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."*
>
> *108. "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."*
>
> *109. "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."*

10. The Court of Appeal expounded these provisions in the case of **Anne Wambui Ndiritu –Vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334** and held that;-

> ***"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in sections 109 and 112 of the Act."***

11. The appellant's claim is based on the tort of negligence. The burden of proof in a case of negligence was illustrated by Ibrahim J. (as he then was) in **Treadsetters Tyres Limited –Vs- John Wekesa Wepukhulu (2010) eKLR** where he stated that:-

> ***"In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1)***

whether on that evidence, negligence may be reasonably inferior(?) and (2) whether, assuming it may be reasonable inferred, negligence is in fact inferred."

12. The Court of appeal in **East Produce (K) Limited –Vs- Christopher Astiado Osiro in Civil Appeal No. 43 of 2001** held that:-

> ***"It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku –Vs- Kenya Cargo Hauling Services Ltd 1991 where it was held that "there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."***

13. The appellant in the instant case stated in his evidence that he did not see the cause of the accident because he was at the back of the vehicle. He did not call the passengers who were at the front of the vehicle to testify on what caused the accident. If the court were to go on that basis alone the appellant would not have proved negligence on the part of the respondent.

14. The respondent however testified that though he did not see the cause of the accident the vehicle all the same veered off the road and overturned.

15. The fact of the vehicle veering off the road and overturning was not challenged. I therefore accept the evidence of the appellant that the vehicle veered off the road and overturned. In the circumstances the evidential burden had shifted to the respondent to give an explanation as to why the vehicle overturned. It is a well known fact that well driven vehicles do not just veer of the road and overturn. There has to be an explanation for such an eventuality and if there is no explanation an inference will inevitably be drawn that the driver of the motor vehicle was negligent.

16. In **Jacquiline Mueni Muasya –Vs- Kenya Power & Lighting Co. & Kimunya Julius (2019) eKLR** Odunga J. cited the case of **Chao –vs- Dhanjal Brothers Limited & 4 Others (1990) KLR 482** where it was held that:-

> ***"Where the circumstances of the accident give rise to the inference of negligence, then the defendant, in order to escape liability, had to show that there was a probable cause of the accident which does not connote negligence or that the accident was consistent only with the absence of negligence ….."***

17. In the same case the learned Judge cited the case of **Mumbi Mugi –Vs- The Co-operative Bank of Kenya Limited & Others Civil Appeal No. 214 of 2004** where the Court of Appeal opined that:-

> ***"If a "matatu" is driven in a normal and at reasonable speed, there would be no reason why it would run into a hippopotamus or veer off the road and smash into a tree. If a vehicle does any of these things, some explanation ought to be offered by the driver of the vehicle ….. vehicles, when normally driven at reasonable speed, do not just do certain things. Though the vehicle is being driven on a wet road by itself would not make the vehicle swerve onto the path of on-coming vehicle. If something of the kind happens there must be an explanation as to the reason for the particular event happening. Vehicles when normally driven on the correct side of the road and at reasonable speed do not run into each other."***

18. The appellant in this appeal testified that the vehicle was moving at high speed whereupon it veered off the road and overturned. There was no explanation from the driver of the motor vehicle as to why the motor vehicle veered off the road and overturned. The reason why the vehicle veered off the road and overturned was something in the knowledge of the driver of the motor vehicle. The fact that the vehicle overturned and no explanation was offered as to why it did so invites an inference of negligence on the part of the driver of the motor vehicle. In the premises I find that the driver of the motor vehicle was negligent. The finding of the trial magistrate is therefore set aside and replaced with a finding that the respondent was 100% liable for the accident.

19. The medical report by Dr. Andai indicates that the appellant sustained –

- Fracture of the left clavicle.

- Blunt injury to the chest.

The doctor examined the appellant a week after the accident and noted that the left upper limb was in an armstring. He opined that the patient had sustained moderately serious soft tissue and skeletal injuries that were expected to heal within one-and-a-half years from the time of examination.

20. The advocates for the appellant made submissions in support of a sum of Ksh. 600,000/= in general damages and cited the case of **Josephat Mwaniki Kireru –Vs- Peninah Ndiru (2014) eKLR** where the respondent had sustained bruises, swellings and tenderness on the forehead, blunt trauma to the chest which was tender, swellings and tenderness on the left shoulder, fracture of the left clavicle, swellings on the left elbow with multiple cut wounds and tenderness, degloving wound on the left foot and swollen and tender knee. An award of Ksh. 400,000/= was upheld on appeal.

21. The advocates for the respondent urged the court to award a sum of Ksh. 200,000/= and cited the case of **Hassan Noor Mahmoud –Vs- Tae Youn Ann (2001) [2017] eKLR** where the plaintiff had sustained fracture in the lower 1/3 of the left tibia and fibula and fracture of the left clavicle. Ksh. 200,000/= were awarded in the case.

22. The trial magistrate suggested an award of Ksh. 450,000/= in general damages and Ksh. 6,900/= had the appellant proved his case. She

cited the following authorities:

- **Jaldessa Dida t/a Dikus Transporters & Another –Vs- Joseph Mbithi Isika (2013) eKLR** where an award of Ksh. 350,000/= was upheld for blunt back injury, blunt injury right shoulder joint, blunt injury right clavicular region with fractured and dislocated right clavicle.

- **George Kinyanjui t/a Climax Coaches & Another –Vs- Hassan Musa Agoi (2016) eKLR** where the respondent suffered fracture of the left clavicle; fractures of 4th and 5th left ribs mid shaft; dislocation of the left shoulder joint and multiple soft tissue injures. On appeal the award was reduced from Ksh. 800,000/= to Ksh. 450,000/=.

23. In my view the authorities cited by the advocates for the appellant and those cited by the trial magistrate captured a proper estimate for quantum on general damages in relation to the injuries sustained by the appellant. The authority cited by the advocates for the respondent was on the lower side. I award Ksh. 400,000/= in general damages.

24. The appellant produced receipts of Ksh. 5,000/= paid to the doctor who prepared the medical report and Ksh. 1,900/= paid for treatment at St. Mary's Hospital Mumias. Special damages of Ksh. 6,900/= were proved and is thereby awarded.

25. The upshot is that the judgment of the lower court is set aside. I enter judgment for the appellant against the respondent as follows:-

Liability	- 100% against the Respondent
General Damages	- Ksh. 400,000/=
Special Damages	- Ksh. 6,900/=
Total	- **Ksh. 406,900/=**

with costs of the suit and interest at court rates.

The respondent also to bear the costs of the suit at the lower court. Orders accordingly.

Delivered, dated and signed at Kakamega this 5th day of June, 2020.

J. N. NJAGI

JUDGE

Representation:

By consent of Mr. Mwebi through e-mail for Appellant

No appearance for the Respondent

Appellant - Absent

Respondent - Polycap

Court Assistant - Polycap

30 days right of appeal.