REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.205 OF 2015

IRENE NYANCHAMA ACHIMBA.....APPELLANT

VERSUS

NAIROBI CITY WATER & SEWERAGE COMPANY.....RESPONDENT

JUDGMENT

A. Introduction

1. This appeal is against the judgement delivered in **Milimani CMCC No. 4750 of 2012** delivered on the 20th June 2014.

2. The appellant sued the respondent vide plaint dated 13.08.2012 for injuries suffered due to an accident caused by the respondent's agent. Judgement was delivered on the 20.06.2014 dismissing the appellant's suit with costs.

3. The appellant being aggrieved by the decision preferred this appeal on the following grounds: -

> **1)** ***That the learned trial magistrate erred in law and in fact in holding the appellant 100% liable not considering the documentary evidence adduced namely the Police Abstract.***
>
> **2)** ***That the learned trial magistrate erred in law and in fact in holding the appellant 100% liable and chose to believe the defence witness without any explanation.***
>
> **3)** ***The learned trial magistrate erred in law and fact in not analyse the facts as presented by the parties to the case and apportion liability accordingly.***
>
> **4)** ***The learned trial magistrate erred in law and in fact in recording evidence that was not adduced by the appellant.***
>
> **5)** ***The learned trial magistrate erred in law and in fact in not considering the motor cyclist (DW1) was inexperienced and was over speeding and hold him 100% liable for the accident.***

B. Appellant's Submissions

4. The appellant submitted that the trial court erred in finding her 100% liable as the police were yet to establish who was to blame for the accident. The appellant further submitted the trial court further erred in its finding on liability as both parties called one witness and the respondent did not proof their case on a balance of probabilities.

5. The appellant further submitted that the respondent's defence were mere allegations as it was not proven by evidence as required by section 107 of the Evidence Act. The appellant further submitted that the fact that she suffered impact on the left side of her body was not evidence that she was crossing the road as she might have gotten injured while trying to evade the motorcycle.

6. The appellant further argued that the court should hold the respondent 100% liable or in the alternative apportion liability 50/50.

C. Respondent's Submission

7. On grounds 1, 2 & 3, the respondent submitted that the appellant failed to prove any negligence on the part of the respondent as the evidence from the police abstract exonerated it. The respondent further submitted that for the issue of balance of probability to apply, the respondent had to be proven liable and further that direct evidence must be led by a litigant from which the court may base its decision on contribution. The respondent quoted the case of **Kerugoya HCCA No. 18 of 2013 Michael K. Kimaru v Margaret Waithera Waina**

[2015] eKLR which he urged the court to consider.

8. The respondent further submitted that the trial magistrate considered the facts of the case, analysed the evidence that was adduced and arrived at the decision and as such urged this court not to interfere with the trial court's finding. They relied on the case of **Ephantus Mwangi & Geoffrey Nguyo v Duncan Mwangi Wambugu [1982-1988] 1 KLR, 278.**

9. The respondent submitted that the trial magistrate considered all the evidence tendered before her during the hearing and as such the trial court's judgement was well reasoned and fair. The respondent urged this court to dismiss the appellant's appeal.

D. Analysis & Determination

10. The applicable principles in so far as the appeal is concerned were restated by the Court of Appeal in the case of **Simon Muchemi Atako & Another -Vs- Gordon Osore [2013] eKLR** as follows: -

> ***"Since this is a first appeal, we are required to consider the evidence adduced before the trial court, evaluate it ourselves and draw our own conclusions, but always bearing in mind and making allowance for the fact that we did not have the opportunity which the trial court had to see and hear the three witnesses who testified. See SELLE AND ANOTHER -VS- ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS [1968] EA 123, RAMJI RATNA AND COMPANY LIMITED VS WOOD PRODUCTS (KENYA) LIMITED, Civil Appeal NO. 117 OF 2001 and HANH -VS- SINGH, (1985) KLR 716. We also bear in mind that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on a wrong principle in reaching the findings that he did. Nevertheless, we are entitled to and will interfere if it appears that the trial judge failed to take account of particular circumstance or probabilities material to an estimate of the evidence or where his or her impression, based on the demeanour of a material witness, is inconsistent with evidence in the case generally. See EPHANTUS MWANGI AND ANOTHER -VS- DUNCAN MWANGI WAMBUGU, [1982-88] 1 KAR 278)."***

11. The issues for determination are as follows:-

a) Whether the appellant proved his case on the balance of probability.

b) If so, the assessment of quantum.

12. The determination of liability in road traffic accident cases is not a scientific affair as acknowledged by **Lord Reid's** graphic presentation in **Stapley – Vs – Gypsum Mines Ltd (2) [1953] A.C. 663 P. 681** and as cited with approval by the Court of Appeal in **Michael Hubert Koss & Another – Vs – David Seroney & 5 Others [2009] eKLR** that: -

> ***"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it …***
>
> ***The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history, several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."***

13. The appellant testified that on 1/03/2012 around 3.00 pm she was standing at a bus stage waiting for a vehicle when a speeding motor cycle registration No. KMCP 729 H came and hit her. She sustained serious injuries as described in the medical report.

14. In cross-examination the appellant said that she was on the left side of the road and that the motorcycle was headed to the opposite direction. According to her, the motor cycle was on the opposite side of the road.

15. The motor cyclists DW1 said it was around 5.00 pm when the accident occurred. He said he was on the road when the appellant dashed therein and collided with the motor cycle.

16. DW1 further stated that the appellant was crossing the road facing the opposite direction. As much as DW1 tried to apply emergency brakes, it was impossible to avoid contact with the appellant. There was no bus stage at the scene but a jurisdiction.

17. It is notable from the evidence that the appellant contradicted herself on where she was in relation to the road at the time of the accident. She said she was at the bus stage waiting for a vehicle. DW1 said, the appellant was crossing the road at a junction and that she was not at the not at the bus stage. DW2 said he was on the opposite side of the road at the time of the accident. From the evidence of both parties, it is more probable that the appellant crossed the road to meet with the motor cyclist in the middle of the road. The evidence of DW1 was supported by DW2, a pedestrian at the scene.

18. The trial magistrate weighed the evidence from both sides and found the evidence of DW2 credible. The appellant was not able to explain how she was hit at the bus stage if at all. There must have been other people at the bus stage in a populated area like Kawangware. The question is whether there were other people who were affected by the accident. PW1 did not testify on such involvement. The version of

DW2 makes sense in the manner the accident occurred compared to the appellant's version which was not adding up.

19. I have looked at the police abstract and noted that it does not blame DW2 for the accident. The appellant failed to call the investigating officer who would have cleared the air as to who was to blame for the accident following investigations by the police.

20. The appellant had a duty to prove her case on the balance of probabilities which she failed to do. I am of the view that the analysis of the evidence shows that the appellant fell short of proving the allegations of blame against the motor cyclist.

21. It is noteworthy that in civil cases involving traffic accidents, the standard of proving who was to blame for the accident is on a balance of probabilities. And the burden of proving that standard is upon the party who alleges as espoused in Section 107 of the Evidence Act Cap 80 Laws of Kenya that:

> ***"whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."***

22. There was no independent eye witness to this accident presented before the trial court and further to this, the police abstract provided by the appellant did not blame any of the parties. As such, it was and is the appellant's version as against that of the respondent on how the accident took place.

23. From this evidence, the court must determine who was to blame, on a balance of probabilities. Section 107 and 108 of the Evidence Act provides that he who alleges must prove the fact alleged to exist.

24. In **Muthuku – Vs – Kenya Cargo Services Ltd([1991) KLR 464**, the court observed that

> ***"… in my view, it was for the appellant to prove, of course upon a balance of probabilities, one of the forms of negligence as was alleged in the plaint. Our law has not yet reached the stage of liability without fault…"***

25. As stated herein I am inclined to believe the respondent's rider as the injuries sustained by the appellant match those likely to be suffered in the respondent's driver's version of events.

26. I am also aware of the decision in the case of **Karanja – Vs – Malele (1983) KLR 142** and **Berkeley Steward Ltd, David Coltel & Jean Susan Colten - Vs – Lewis Kimani Waiyaki [1982-88] 1KAR 101-108** that where there is no crucial evidence on who was to blame between the two parties, both should be held equally to blame. This is not the case in this appeal. The argument by the appellant that the blame be apportioned equally between the parties is not supported by the evidence on record.

27. The decision of the learned magistrate on liability is free from error in my considered opinion. It was based on the evidence on record which was properly evaluated.

28. I find no merit in this appeal and I hereby dismiss it with costs.

29. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2019.

F. MUCHEMI

JUDGE