



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 31 OF 2017

JOSEPH MWANGI.....APPELLANT

VERSUS

JOSEPH OUMA OLUOCH.....RESPONDENT

(Being an appeal from the Judgment of the Hon. Karani D. G (PM) delivered on the 16th February, 2012 at Gatundu PMCC No. 282 of 2009)

J U D G M E N T

1. This appeal emanates from the judgment of Karani D.G., Principal Magistrate in **Gatundu PMCC No. 282 of 2009**. By the plaint filed on 30/10/2009, the Plaintiff in the lower court and now the Respondent herein had sued the Defendant, now the Appellant, claiming compensation for the severe injuries he sustained on or about 15th August, 2009. He averred that he was lawfully walking along **Ruiru-Kiambu Road** when motor vehicle registration number **KBA 003C Nissan Sunny** was so carelessly driven by the Appellant that it knocked him down occasioning serious injuries and as a result the Respondent has suffered pain and loss .

2. The Appellant filed his defence on 8th June, 2010, denying any liability for the accident. In particular, the Appellant denied that an accident occurred on the date and place mentioned.

3. The matter proceeded to a full hearing. Liability was found against the Appellant. On quantum, the trial Magistrate entered judgment as follows:

a. General damages	Kshs.	200,000/=
b. Special damages	Kshs.	10,000/=
TOTAL	Kshs.	210,000/=

4. The Appellant is dissatisfied with the lower Court's judgment and has preferred the present appeal based on the following grounds:-

- a) **"The learned trial Magistrate erred in fact and in law in the way he weighed the evidence before the court to determine the issue of liability.**
- b) **The Learned trial Magistrate misdirected himself by taking into account hearsay evidence regarding who saw the registration number of the vehicle that allegedly hit the Plaintiff.**
- c) **The Learned trial Magistrate erred in fact and in law by putting into consideration extraneous and irrelevant factors in his judgment and appearing to place the burden of proof on the defendant.**
- d) **The Learned trial Magistrate erred in law by awarding too high an award in damages that it amounted to a totally wrong estimate in view of the injuries sustained."**

5. The Respondent's case, as it emerged at the trial was that on the material morning he was walking along Ruiru-Maua Road, on the left side facing Kiambu direction; that a vehicle approaching from behind hit a bump and lost control, veering off the road; that he tried to run but the left side of the motor vehicle hit him and that he sustained a fracture on his right hand and chest. That he was taken to Ruiru Sub District Hospital then to Thika District Hospital. An x-ray showed that he had suffered a fracture. He blamed the driver of the accident vehicle for knocking him down as he was speeding

6. **Dr. George Karanja (PW1)** prepared the medical report in respect of the Respondent's injuries. He stated that he relied on physical examination, oral history and initial treatment notes to compile the report. **PC Cleophas Juma (PW2)** of Ruiru Police Station testified that an accident that involved a pedestrian and motor vehicle registration number **KBA 003C** was reported at the station and an abstract was issued to the Respondent.

7. The Appellant testified as **DW1**. To the effect that that on the material day he was headed to Wangige while driving the subject vehicle. He denied having caused any accident as asserted by the Respondent. He called one witness, his alleged companion on the material date.

8. The Court directed that the appeal be canvassed by way of written submissions. Through his counsel, the Appellant submitted that the good Samaritans who allegedly attended to the Respondent after the accident and made a report were not called as witnesses; that the Respondent did not see the registration number of the accident vehicle and therefore the evidence of the vehicle particulars comprised hearsay evidence and therefore, inadmissible. Counsel submitted that the Respondent did not prove that it was the Appellant's motor vehicle that was involved in an accident and therefore failed to discharge the burden of proof. Reliance was placed in the case of **Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR** on the burden of proof.

9. Also cited was the case of **Kennedy Nyangoya v Bush Hauliers (2016) eKLR** where the Plaintiff's case was dismissed due to his failure to prove the case on a balance of probability. It was contended that since the Respondent did not prove liability, the claim for damages did not lie. Alternatively that, if this court is inclined to award damages the award of Kshs. 200,000/= should be substituted with an award of Kshs. 100,000/=. Reliance was placed in the case of **Francis Mwangi Muchune vs Francis Kimani Mbugua HCCC No. 2637 of 1994**.

10. The Respondent submitted that he did prove his case on a balance of probabilities through his evidence during trial. On quantum, the case of **Butt vs Khan (1977) KAR** was relied upon as laying down the principles governing an appellate court in dealing with a challenge to an award of damages. The Respondent defended the award of Kshs. 200,000/= by the lower court as justified. In conclusion, the Respondent reiterated that the assessment of general damages was a matter of the discretion of the trial court and the appellate can only interfere if it is satisfied that the trial court applied the wrong principles. To support this proposition counsel quoted the case of **Kemfro Africa Ltd. t/a Meru Express Services & another vs A. M. Lubia & another (1985) eKLR**.

11. The court has considered the evidence adduced at the trial and submissions made on this appeal by the respective parties. That duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See **Peters v Sunday Post Limited (1958) EA 424; Sele and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123, Williams Diamonds Limited v Brown (1970) EAI I**.

12. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR 278** stated that:

“A court of Appeal 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 Judge is shown demonstrably to have altered on wrong principles in reaching the findings he did”

See also **Jabane v Olenja [1986] KLR 664 and Mwanasokoni v Kenya Bus Service (1982 – 88) 1 KAR 870**.

13. On this appeal, the Appellants challenge the lower court's finding on liability and the award of damages. Concerning the question of liability, the Respondent had averred at paragraph 4 & 5 of his plaint that he was injured on 15.08.09 while walking along the **Ruiru/Kiambu (Maua) road** after the vehicle owned by the Appellant, namely **KBA 003 C Nissan Sunny** lost control, veered off the road and knocked him down.

14. These and other key averments were denied in the defence filed by the Appellant. The Respondent's evidence at the trial was that the Appellant's vehicle approached him from the rear and hit him despite his efforts to escape from the approaching vehicle. In cross-examination the Respondent admitted that he obtained the particulars of the vehicle from good Samaritans who took him to hospital, none of whom testified. It is admitted that the accident vehicle did not stop after the accident. The further claim that the Respondent was also able to read the details of the vehicle at the time of the accident appeared an afterthought as indeed, **PC Cleophas Juma (PW2)** also asserted that the particulars of the vehicle were supplied by a “reportee”. PC Juma said the case involved a hit and run vehicle.

15. It was not possible in my opinion, in the circumstances of the accident described by the Respondent, for him to take note of the registration particulars of the hit and run vehicle. Thus, it was crucial in order to pin liability on the Appellant to call the good Samaritans or reportees who witnessed the accident to testify.

16. Rather than subject the Appellants' evidence to a proper analysis, the trial court in its judgment appears to have shifted the burden on the Appellant to disprove the rather shaky evidence of the Respondent as regards the actual vehicle involved in the accident. 17. In the case of **Antony Francis Wareham t/a A.F. Wareham & 2 Others v Post Office Savings Bank [2004] e KLR**, the Court of Appeal held that:

“[W]e are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings and the issues of fact or law framed by the parties or the court on the basis of those pleadings pursuant to order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden should fail”

17. The burden of proof lay with the Respondent to establish liability, which was disputed in pleadings and the evidence tendered by the Appellant. Section 107 of the Evidence Act provides that:

“(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”.

18. Reviewing the evidence adduced by the Respondent, it is my considered view that the trial court relied on doubtful testimony by the Respondent, hearsay evidence in part, as well as surmises to conclude that the Appellant’s vehicle caused the Accident. Had the trial court properly analysed the Respondent’s evidence, it would have come to the conclusion that the Respondent had not discharged the onus of proving that it was the Appellant’s vehicle which knocked him down.

20. In the circumstances, this appeal must be allowed on the question of liability, and consequently the challenge to damages must also succeed as negligence has not been established against the Appellant. In the result, the court sets aside the entire judgment of the lower court and substitutes therefor a finding that the Respondent’s case is dismissed with costs. The Appellant is also awarded the costs of this appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 13TH DAY OF JUNE 2019

C. MEOLI

JUDGE

In the presence of:

Mr. Ruiru holding brief for Mr.Njuguna for Appellant

Respondent – No appearance

Court Assistant – Nancy/Kevin