REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 44 OF 2017

AMOS GATHENYA GATHII .....APPELLANT

VERSUS

CHARLES MUTHURA .....1ST RESPONDENT

CHARLES WACHIRA WARUTUMO.....2ND RESPONDENT

(Being an appeal from the judgment and decree in Nyeri Chief Magistrates Court Civil Case No. 381 of 2015 (Hon. P. Mutua Senior Principal Magistrate) dated the 10th day of October 2017)

JUDGMENT

The appellant sued the respondents for damages, both special and general, as a result of the injuries he sustained in what he alleged to have been a road traffic accident involving the 1st respondent's vehicle registered as No. KBK 618 D and which was being driven by the 2nd respondent at the material time. According to his plaint dated 10 December 2015 and filed on the even date, the plaintiff was a fare-paying passenger and travelling in that capacity in the 1st respondent's vehicle on 25 January 2013 when he fell from the vehicle as he was disembarking at Kimathi along Nyeri-Nyahururu road. He was injured in the process; more particularly, he sustained a fracture on his right leg and right hand. He attributed the accident to the negligence of the 2nd respondent in controlling, managing or driving the motor-vehicle. As the owner of the vehicle, the 1st respondent was impleaded under the doctrine of vicarious liability.

The respondents filed a joint statement of defence denying the appellant's claim; in particular, they denied that the 1st respondent owned motor-vehicle registration number KBK 618 D or that it was involved in a road traffic accident as alleged. They also denied that the 2nd respondent was negligent and that the appellant sustained any injuries for which they were to blame.

In his judgment, the learned trial magistrate dismissed the appellant's suit and held, inter alia, that it is quite unlikely that one would fall from a moving vehicle and sustain only a single injury without any sort of bruises; again, it was improbable that the appellant would fall from a moving vehicle without spilling the contents of the paper bag and a jerrican he was carrying. The learned magistrate also opined that the 2nd respondent would probably not have driven on had he realised that the appellant had fallen off the vehicle and had been hurt. In any case, so the learned magistrate concluded, neither the plaintiff nor his witness recorded any statement with the police concerning the accident.

Being dissatisfied with the learned magistrate's decision, the appellant appealed against it; he impugned the decision on grounds that the learned magistrate erred in law in failing to find that the appellant sustained injuries as a result of the negligence of the respondents; that he erred in law and in fact in failing to hold that the appellant proved his case on a balance of probabilities but instead raised the standard of proof in civil cases to that standard of proof of beyond reasonable doubt which is only applicable in criminal cases; that he erred in law in disregarding the appellant's evidence which, in any case, was not controverted by the respondents.

The record shows that apart from the appellant himself, four other witnesses testified in support of his case. His own evidence was that he was a regular traveler in the respondents' vehicle; he would board it everyday at 5. AM on his way to Kimathi University where he used to prepare and sell tea to the students in that institution. On the material date, he boarded the vehicle as usual and sought to alight at the usual bus stage at Kimathi University. However, as he alighted, the vehicle drove off. He fell down because he hadn't completely alighted when the vehicle started moving. He broke his right hand in the process.

It was his evidence that though the bus conductor was aware that he had fallen down, the vehicle drove on without stopping. This conductor, according to him, was new. The conductor he was familiar with would always alight first, whenever the appellant reached his destination and would only get back into the vehicle after the appellant had disembarked; only then would the vehicle start moving again. The new bus conductor did not alight at all when the appellant reached the Kimathi University bus stage.

The appellant testified that a good Samaritan came to his aid; he also called his brother who took him to hospital where he was subsequently referred to a specialist. He attended Mathari and Consolata hospitals in Nyeri apparently as an out-patient. He also testified that he reported

the accident to the police on the same day he was injured. He denied the suggestion by the respondents' learned counsel that he was attacked by robbers.

The appellant's brother Martin Gechaga testified that at about 5.30 AM on 25 January, 2013 he received a call from a stranger using the appellant's phone to the effect that the appellant had been involved in a road traffic accident at Kimathi. He rushed to the scene and found his brother there. He took him to the police who referred the appellant for treatment. He was treated at Nyeri Provincial General Hospital and later at Mathari Hospital.

The good Samaritan that the appellant referred to in his testimony was one Kagathu Kariuki whose evidence was that on 25 January 2013 at about 5.30 AM he was on his way to Mweiga. He saw the bus in which the appellant had been travelling, amongst two other vehicles at the Kimathi stage. It is this bus that he intended to travel in to Mweiga but, apparently, it left shortly before he arrived at the bus stage. He shouted for it to stop but his frantic efforts did not bear any fruit.

He saw someone at the stage calling for help; it turned out that he was the appellant. He asked him to call his brother, Gechaga, using the appellant's phone. The brother came in a taxi and took the appellant.

This witness admitted that he had been robbed at that particular stage many times.

Police constable Wilson Waiganjo of Nyeri police station testified and confirmed that indeed a report of a road traffic accident involving the appellant and the respondent's vehicle was reported at the police station and entered in the occurrence book as No. 2 of 25 January, 2013. He confirmed that police abstract to that effect had been issued to the 2nd respondent; however, the case had been investigated by police constable Kasitet who had been transferred and for that reason he had not been able to locate the relevant file. The abstract issued to the 2nd respondent showed that the 2nd respondent was to blame for the accident.

Finally, Dr Eliud Mwangi Wanganga produced a medical report in respect of the appellant's injuries, his treatment and, of course, the doctor's opinion; in that report he established that the appellant sustained a comminuted fracture of the right humerus and was treated as an out-patient at the Nyeri Provincial General Hospital and Mathari hospital. At the time of examination, the appellant had a surgical scar, 20 CM long. The injury according to the doctor was serious and there was limitation of joint movement of the right elbow. The doctor opined that there was a possibility of post traumatic arthritis.

The 2nd respondent admitted that he was the driver of the vehicle in question more so on the material date. He also admitted that he drove to Nyahururu from Nyeri on the particular date and that indeed a passenger alighted at Kimathi stage. He stopped at the stage when the conductor rang the bell and only drove off after he rung the bell again. On his way back, he was informed that a passenger had fallen from the vehicle; however, his conductor denied this allegation.

Their vehicle was subsequently inspected by the traffic police. He was bonded to attend court to answer to a charge of careless driving but apparently the police file was never availed and so no charges were ever preferred against him. He admitted that he could not use side mirrors at the time because it was 5 AM, when apparently it was still dark.

The bus conductor Joseph Karuma admitted that he was the conductor of the 1st respondent's vehicle on 25 January 2013 and that the bus used to leave Nyeri at 4.50 AM. On that day a passenger alighted at Kimathi University stage. The passenger was known to him and that he usually travelled in that bus from Nyeri to Kimathi. He rung the bell for the vehicle to stop and after it stopped the appellant alighted. He denied that the appellant fell from the vehicle. The witness also testified that the appellant had carried with him 10 litres of milk and a paper bag.

This evidence represents, in large measure, the facts out of which the learned magistrate came to the ultimate conclusion that it was less likely that the appellant's injuries were occasioned by the negligence of the 2nd respondent in driving, controlling or managing motor vehicle registration number KBK 618 D as alleged.

Ordinarily, an appellate court would be hesitant to disturb factual conclusions of a trial court unless it is satisfied that those conclusions are either not based on any evidence or are as a result of a misrepresentation of the evidence. The court will also interfere if those conclusions are informed by erroneous interpretation of legal principles. The Court of Appeal reiterated this in **Kiruga v Kiruga & Another [1988] KLR 348** where it was observed that:

> ***An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.***

However, as much as it may appear that the appellate court has only a limited window of opportunity to disturb the trial court's factual findings, it still has the obligation to consider the evidence afresh and come to its own conclusions as long as it is conscious that the trial court had the advantage of seeing and hearing the witness first hand and, for that reason, was best disposed to evaluate such aspects of the evidence as to the credibility and demeanour of the witnesses. **(See Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126)**

Although the respondents denied all allegations of fact in their statement of defence, they admitted at the hearing that motor vehicle registration No. KBK 618 D belonged to the 1st respondent; that the vehicle was a public service vehicle which plied the Nyeri-Nyahururu route and used to leave Nyeri for Nyahururu between 4 AM and 5 AM. They also admitted that they were not only familiar with the appellant but also that he was a regular passenger in their vehicle. Crucially, it was admitted that he travelled in their vehicle on 25 January

2013 and alighted at Kimathi university bus stage which was his usual stop.

As the learned trial magistrate rightly held, these facts were uncontroverted since, as noted, the respondents admitted them. The learned magistrate went further to find and hold that the fact of the appellant's injury on the material day was also either admitted or proved. Again, I agree with him on this score because when one considers the evidence of the appellant himself, that of Martin Gichaga, the appellant's brother, the evidence of Kagathi Kariuki, the good Samaritan, and that of the doctor, Dr. Eliud Mwangi, one cannot not possibly come to any other conclusion other than that the appellant was injured on 25 January 2013 to the extent ascertained in the medical report admitted in evidence in proof of the facts of the injury, its nature and extent.

The bone of contention is whether the appellant was injured as he alighted from the respondents' vehicle and whether the 2nd respondent was to blame because he was not patient enough to wait for the appellant to completely disembark before he drove off.

One of the reasons why the learned magistrate did not believe the appellant was because, in his view, the appellant ought to have sustained more injuries than just one major injury; this is what he opined:

> ***It is highly improbable that a person will fall from a moving vehicle and sustain only one injury. The plaintiff sustained only a fracture of the right humerus. He had no bruises or any other form of injury on any other part of the body. Although PW5 in his evidence and medical report purported to have seen bruises from treatment notes from Nyeri PGH no notes from PGH were produced. Treatment notes from Consolata Hospital (P. Exh 1) do not show any other injury. Even according to PW5 the bruises were on the same elbow which was later found to have fractured. Taking into account the seriousness of the injury sustained by the plaintiff it is highly improbable that he fell from a vehicle and sustained such a serious injury meaning that the impact was high but failed to sustain any other injury.***

PW5 which the learned magistrate made reference to is Dr. Eliud Mwangi who examined the appellant and produced his report on his findings and opinion in court. He testified that he was a consultant physician; the pertinent part of his report as far as the issue at hand is concerned read as follows:

> ***The patient was taken to PGH Nyeri where on examination he was found to have bruises and bleeding on the right elbow. Compound fracture of the right humerus was suspected, he was transferred to Mathari Mission Hospital on a patient's request.***

The medical examination report (P3) form, on the other hand, shows the appellant was diagnosed with a comminuted fracture of the right elbow with severe bleeding.

Based on the evidence of the doctor and the details of the injuries represented in the P3 form it is fairly obvious that the appellant not only sustained a fracture of the right elbow but that he was also bleeding from what must have been obviously an open wound. This bleeding was described by an expert as being 'severe' thereby implying that appellant suffered a far more serious injury than superficial bruises that the learned magistrate was apparently looking for.

The injury was described as having been caused by a blunt object.

Taken in its totality, this evidence is consistent with the appellant's contention that his injuries were as a result of his falling from a moving bus. It is possible, as the learned magistrate suggested, that a person falling from a moving bus may suffer bruises and other injuries on various parts of the body but it can also not be ruled out that depending on the speed at which the bus is moving and such other factors as the positioning of the alighting passenger, the manner he lands on the ground and the nature of the place he lands, he may as well suffer just one major injury. In the present instance the appellant landed in such a way that he only had elbow fractured not forgetting that he tore his skin and also bled profusely.

There is no scientific proof, and none was ever suggested at the hearing, that a person falling from a moving bus can only suffer from certain injuries and on particular or various parts of the body. Without such a proof there was no basis for the learned magistrate to question the medical doctors' observations and opinion and effectively introduce what, in my humble view, was his own hypothesis of how the appellant ought to have been injured.

It must also be noted that the respondents did not question the P3 form and the medical report. Neither was the appellant cross-examined on how he only got his right elbow injured without injuring any of his other parts of the body. In my view, it was enough for him to say that he fell on the right hand side of his body and injured his right elbow which testimony was corroborated by the medical evidence; if the respondent had any contrary evidence of how he was injured, for instance, if, as it was suggested by their learned counsel, that he was attacked by robbers, nothing stopped them from presenting such evidence. At the very least, there was no basis for such factual conclusion and this being the case, it was not open to the learned magistrate to proceed on such a presumption that the appellant could probably have been so attacked.

In the same breath, the cause of the appellant's injuries could not be doubted merely because his belongings, in particular the milk and the paper bag contents, remained intact after the fall. With due respect to the learned trial magistrate, the retention in or spillage from their containers of any of these items could not determine whether the appellant sustained any injuries as a result of his fall from a moving bus. It may only be that they were secure; properly sealed or capped. In any case, these are inanimate items whose impact on the ground cannot be compared to life tissues. A milk container may not necessarily be damaged if it fell on a hard ground such as a tarmac but a human being falling with the same thud will be injured the extent of which will depend on how he falls.

As to whether the 1st respondent's driver and conductor saw the appellant fall but ignored him, the driver of the vehicle admitted that he couldn't use the side mirrors at the material time and therefore he couldn't see the appellant after he alighted or fell from the bus. According to the appellant, the conductor saw him fall but he ignored him. The learned magistrate's interpretation of these events was that if at all the

conductor saw the appellant fall the bus would not have driven on because there was every chance that the bus would be arrested.

Here, I would respectfully disagree with the learned magistrate for three reasons; first, it is possible that though the second respondent saw the appellant fall, he never informed the driver perhaps because he underestimated the consequences of the appellant's fall or he simply ignored him. Either way the driver could not have possibly stopped unless he was told of the appellant's misstep. Secondly, irrespective of whether the bus stopped or not, there was case for negligence on the part of the bus driver. Stopping the bus would not have absolved the respondents from liability that accrued as soon as the appellant fell and was injured. Thirdly, the conductor and his driver may have deliberately driven on to feign ignorance of what may have just happened.

In dismissing the appellant's claim, the learned magistrate also found as a fact that the appellant and his witnesses did not record statement with the police and that no reason was given for such failure. This finding is obviously against the weight of evidence. The appellant and his brother testified that they reported the accident to the police; as a matter of fact, they went to the police first before they proceeded to the hospital. It is at the police station that the appellant was issued with a P3 form that was later filled by a doctor. The appellant himself testified thus:

I reported to the police the same day. I recorded statement with police.

This evidence was not controverted. Again, police constable Wilson Waiganjo confirmed in his testimony that the accident was reported on the material date that it occurred and was entered in the occurrence book as OB 2 of 25 January, 2013. Based on that report, the 2nd respondent was even issued with a police abstract in which he was blamed for the accident.

In any event, whether the appellant recorded a statement with the police or not should not have been the concern of the trial magistrate; what was necessary was whether the claim as pleaded had been proved. The cause against the respondents ought not to have been confused with a criminal trial.

In the ultimate, I have to come to the conclusion that the learned magistrate misapprehended the evidence and came to the erroneous conclusion. Based on the material on record, I am satisfied that the appellant proved his case on a balance of probability. His evidence was appropriately corroborated and there was no basis to doubt his credibility.

I would therefore allow his appeal on liability and substitute the dismissal order with the holding that the respondents were solely responsible for the accident out of which the appellant was injured.

As far as quantum of damages is concerned, the learned magistrate assessed general damages at Kshs. 300,000/= and special damages at Kshs. 92,200/=. These are the awards he would have made if the appellant's suit had succeeded at the trial stage.

Neither of the parties have appealed against the learned magistrate's award and for this reason I am entitled to assume that both of them are comfortable with the awards as assessed by the trial court. The appellant shall therefore be awarded the sum of Kshs 392,200/= made up as follows:

(i) General damages	Kshs 300,000/=
(ii) Special damages	Kshs 92,200/=
Total	Kshs 392,200/=

The appellant shall also have costs (both in the subordinate court and this court) and interest which shall be calculated at court rates from the time of filing suit to such time that the decretal sum will be settled. It is so ordered.

Dated, signed and delivered in open court this 18th day of October 2019

Ngaah Jairus

JUDGE