REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO.188 OF 2018

MWANASI RIGHA..APPELLANT

VERSUS

MWAKIDOI ARCHPAS MWAMENGI.........RESPONDENT

(Being an appeal against the judgment of the Senior Resident Magistrate IN Mombasa by Honourable A. S. Lesootia delivered in 6th September 2018 in SRM CC NO. 21 79 of 2017.)

JUDGMENT

1. The appellant herein, who was the plaintiff in the primary suit before the lower court, sued the respondent seeking the following orders:

> ***i. Special damages Kshs 292,640/=.***
>
> ***ii. General damages.***
>
> ***iii. Cost of the suit.***
>
> ***iv. Interest on (i) and (ii) above.***
>
> ***v. Any other and further relief this honourable court deems fit to grant.***

2. The plaintiff's/Appellant's case was that on or about 25th May 2016, his motor vehicle registration No. KAZ 224V Nissan Matatu was lawfully being driven along Mshomoroni Road when it was knocked by the defendant's motor vehicle Registration No. KBY 832V. The Appellant's claim is that the Respondent's driver drove the said motor vehicle recklessly and negligently thereby causing the accident that resulted in the appellant's loss and damages in respect to repair charges and loss of user.

3. The respondent denied the appellant's claim through a written statement of defence dated 24th January 2018 wherein he claimed that if indeed the accident took place, then it was solely caused and/or substantially contributed to by the negligence of the appellant's driver of motor vehicle registration No. KAZ 244V.

4. After hearing of the case in which only the appellant and his sole witness testified, the trial court concluded that the appellant's case was not proved to the required standards and dismissed it with costs thereby triggering the instant appeal in which the appellant set out the following grounds of appeal in the Memorandum of Appeal:-

> ***1. That the learned magistrate erred in law and fact by the failing to properly evaluate the evidence on record thereby arriving at a wrong conclusion.***
>
> ***2. That the learned magistrate erred in law and fact by finding that the plaintiff has failed to attribute and prove particulars of negligence to the defendant, thereby occasioning a miscarriage of justice.***
>
> ***3. That the learned magistrate erred in principle by failing to apply the principles of evidence law in the circumstances thereby arrives at a wrong conclusion.***
>
> ***4. That the learned magistrate erred in law and fact by finding that the plaintiff is not entitled to any damages.***

5. Both parties filed their written submissions to the appeal which I have considered.

6. At the hearing of the appeal, **Miss Khalifa** learned counsel for the appellant submitted that the trial court erred in law in imposing a higher burden of proof on the appellant than is expected in a civil suit. It was submitted that the evidence presented by the appellant on the issue of negligence was not controverted and that the particulars of negligence were spelt out in the plaint.

7. Counsel submitted that the appellant's witness PW2, attributed blame for the accident on the respondent and that since the respondent did not tender any evidence before the lower court; it meant that the respondent had conceded the issue of negligence.

8. Counsel for the respondent did not attend court to highlight the respondent's submission. However, as I have already stated in this judgment, I have carefully perused the written submissions filed by both parties herein and I note that the main issue for determination is whether the lower court properly evaluated the evidence on record in arriving at the finding that the particulars of negligence were not proved. In other words, did the appellant prove that the accident in question was caused by the negligence of the respondent's driver/agent?

9. As a first appellate Court, this court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that the court did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another v Associated Motor Boat Co. Ltd. & others*** **(1968) EA 123** in the following terms:

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

10. Similarly the Court of Appeal for East Africa had the following to say in ***Peters v Sunday Post Limited*** **[1958] EA 424**:-

> ***"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs-Thomas (1), [1947] A.C. 484.***
>
> ***"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."***

11. The jurisprudence arising from the above cited authorities on the appropriate standard of review, on appeal, can be stated in three complementary principles:

> (a). First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
>
> (b). In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and lastly,
>
> (c). It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.

12. The elementary principle of law is that he who alleges must prove the allegations. This is stipulated in **Section 107(1)(2)** of the **Evidence Act** which provides as follows:

> ***"(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."***

13. **Section 112** of the **Evidence Act** provides thus:

> ***"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."***

14. In the instant case, it was not disputed that an accident occurred involving the motor vehicles of the Appellant and the Respondent. The Appellant and the Respondent blamed each other for causing the accident and it was therefore incumbent upon the appellant to discharge the burden of proving the fact that the accident was caused by the negligence of the Respondent's driver.

15. In the case of ***Securicor Security Service Kenya v MFK & Another*** [2016] eKLR, it was held:

> ***"In an action or negligence the burden is always on to the plaintiff to prove that the accident occurred due the negligence of the defendant. However if in the cause of trial there is proved set of facts which raise a prima facie inference that the accident was caused by the negligence on part of the defendant, the issue will be decided in favour of the plaintiff unless the defendant's evidence provides some answers adequate to displace that inference."***

16. In the instant case, the appellant contended that negligence was proved through the testimony of PW1, a police officer who testified that he conducted investigations and arrived at the conclusion that the defendant was to blame for the accident. The appellant further stated that the Police Abstract produced by PW1 as plaintiff's **Exhibit 1** indicated that the respondent was to blame for the accident. The appellant's case was that since the particulars of negligence were enumerated in the plaint and the testimony of PW1 was not challenged through cross examination burden of proof placed on the appellant was discharged.

17. I have considered the Record of Appeal in respect to the testimony of PW1 which was as follows:

> ***"No. 79850 PC. Johnson Yegon Nyali traffic base. On 25th May 2016 at 9.30 am, an accident was reported at our station. The same was along Mshomoroni road involving motor vehicle registration No. KAZ 244V and KBY 832V. We issued a police abstract to the plaintiff on 18th August 2016 and the motor vehicle KBY 832V was blamed for the accident."***

18. From the above testimony, I note that the witness does not indicate that he investigated the accident in question and arrived at a finding that the respondent was to blame for the accident. Indeed, all that the witness said was that the respondent's vehicle was blamed for the accident without specifying who arrived at that conclusion and the facts that informed that finding.

19. My finding is that in a claim of negligence it was not enough for the witness, in the position of a police officer, to state that a person was to blame for the accident without explaining what made him arrive at such a finding. In the same breath, I find that a mere statement, contained in a police abstract attributing blame to a particular person, is not sufficient proof of negligence as the claimant in still under a duty to present facts that support the alleged negligence.

20. The appellant submitted that having listed the particulars of negligence in the plaint, it meant that such negligence had been established as pleadings form the bedrock of the case.

Black's Law Dictionary 9th Edition defines pleading as

> ***"A formal document in which a party to a legal proceeding especially Civil Law suit, set forth on responds to allegations, claims, denials and defences."***

21. From the above definition of pleading, it therefore follows that a pleading is not evidence. Further, Section 3 of **the Evidence Act Cap 80 Laws of Kenya** defines evidence as follows:

> ***"Evidence denotes the means by which an alleged matter of fact the truth of which is submitted to investigation is proved or disproved; and without prejudice to the foregoing generally includes statements by accused persons, admission and observation by the court in its judicial capacity."***

22. In the case of ***Douglas Odhiambo & Another v Telkom Kenya Ltd*** **CA 115/2006**, the Court of Appeal was presented with a similar case and noted that there was no evidence that the 1st defendant was even faulted by the police for the occurrence of the accident as the police abstract produced did not show that anyone was charged with a traffic offence. It thus follows that even where there is no rebuttal, in a matter that requires proof, Section 107 of the Evidence applies, that whoever desires the 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.

23. Courts have further taken the position that even where there is interlocutory judgment and the matter is listed for formal proof, the claimant is still under a duty to prove negligence through cogent evidence. This was the finding by Aburili J. in the case of ***ZOS & COA (suing as the legal representatives of the Estate of SAO (deceased) v Omollo Stephen*** [2019] eKLR, wherein she observed that;-

> ***"42. I have cited the Court of Appeal decision in which is clear that even if the case proceeds by way of formal proof, the plaintiff is under legal duty to prove negligence and liability of the defendant as particularized in the plaint. Liability is not like special damages. In the latter case, judgment would be final where there is no defence as opposed to the former and hence the requirement for formal proof to prove negligence or liability of the defendant and the general damages suffered as a result of the alleged acts of negligence."***

24. My humble view therefore is that it was not enough for the appellant to merely assert that since the respondent did not tender any evidence or cross examine his witness, then he did not need to prove how the accident happened and hence the respondent's liability. I am guided by the decision of Madan JA in ***CMC Aviation Ltd Cruise Air Ltd* (1) [1978] KLR 103** wherein he observed:

> ***"Pleadings contain the averments of the facts concerned and until they are proved or disapproved or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence."***

25. Averments are matters the truth of which is submitted for investigation until their truth has been established or otherwise they remain unproven. Averments in a plaint in no way satisfy for example, the definition of Evidence under Section 3 of the Evidence Act. Since the averments as to the particulars of negligence against the respondent were not admitted, which admission would have become evidence and as evidence is normally given on oath or by affirmation, averments depend on evidence for proof of their contents(see **Cassells English Dictionary page 394).**

26. Having regard to the definition of pleadings and evidence, it is clear that a plaint is simply a document in which a claim is set out in which case, the claimant is still under a duty to prove his claim through evidence. I find that the appellant ought to have testified on how the accident occurred and proved each or any of the acts of negligence attributed to the respondent. No such evidence on the circumstances under which the accident occurred was presented in court upon which liability on the part of the respondent could be founded. Furthermore, the appellant did not rely on the doctrine of res ipsa loquitor or present facts upon which the court could infer that the respondent was to blame for the accident.

27. Having found that liability was not proved, I find no reason to venture into arena of whether the appellant was entitled to the special and general damages claimed.

28. For the above reasons, I find that the instant appeal is not merited and I therefore dismiss it with costs to the respondent.

Dated, signed at Nairobi this 28th day of October 2019.

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Mombasa this 14th day of November 2019

ERIC OGOLA

JUDGE

<u>In the presence of:</u>

Mr. Omondi holding brief Khatib for appellant

No appearance for respondent

Mr. Kaunda – Court Assistant