REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 243 OF 2006

ALEX KARIUKI .....APPELLANT

VERSUS

DAVID KIPSANG SIRIA..... RESPONDENT

(Being an appeal from the ruling of Hon. C.W. Meoli (CM) delivered on 21st March 2006 in Milimani RMCC No. 1584 of 2003)

JUDGMENT

1. The appellant *Mr. Alex Kariuki* was the defendant in CMCC No. 1766 of 2001. He was sued by the respondent, then the plaintiff who was seeking special and general damages for injuries sustained in a road traffic accident on or about 7th June 2001 whose occurrence he blamed on the negligence of the appellant and/or his driver.

2. In his plaint dated 16th October 2001, the respondent pleaded that he was a pedestrian along Racecourse Road when the appellant or his agent negligently controlled or managed motor vehicle registration number KYH 546 as a result of which it hit him and knocked him down. The particulars of the appellant's alleged negligence were pleaded in paragraph 4 of the plaint.

3. In his statement of defence dated 30th November 2001, the appellant denied the allegations of negligence attributed to him or his agent and put the respondent to strict proof thereof.

4. After a full trial, the learned trial magistrate rendered her decision on 21st March 2006. She entered judgment on liability in the ratio of 50:50 and awarded the respondent damages in the total sum of KShs.259,795 together with costs of the suit and interest.

5. The appellant was dissatisfied with the trial court's entire judgment hence this appeal. In his memorandum of appeal dated 20th April 2006, the appellant basically complained that the trial magistrate's decision on liability was not supported by the evidence on record particularly because the respondent had not proved his claim that the appellant was the driver of the aforesaid motor vehicle. On quantum, the appellant complained that the general damages awarded to the respondent were so high and that the trial court erred in awarding special damages which were not proved.

6. By consent of the parties, the appeal was prosecuted by way of written submissions which both parties duly filed and which I have carefully considered together with the authorities cited.

7. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am fully aware of the duty of the first appellate court which as succinctly summarized by the Court of Appeal in ***Selle & Another V Associated Motor Boat Company & Others, [1968] EA 123***, is to:

> ***"… 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…''***

8. The evidence on record shows that the respondent called two witnesses while the appellant was the only witness who testified in support of the defence case.

In his evidence, the respondent testified that on 7th June 2001, he was on duty on patrol duties along Kirinyaga Road. He was working as a city constable with the Nairobi City Council. He recalled that as he was crossing Racecourse Road, a vehicle appeared at high speed and hit him as it was overtaking another vehicle which had stopped on the road ahead of it. He lost consciousness.

9. In cross examination, he admitted that he did not know the person who was driving the offending motor vehicle; that he was not able to identify the vehicle which hit him but the people who had been in his company were able to see and note it's registration number.

10. In his evidence, the appellant claimed that he witnessed the accident in which the respondent was injured since he was a passenger in the vehicle which hit him. He denied having been either the driver or the owner of the said vehicle.

11. In her judgment on liability, the learned trial magistrate considered the appellant's defence that he was not the driver of the offending motor vehicle and stated as follows:

> ***"…. I agree with the plaintiff's submissions that the defendant did not specifically plead on the issue of whether or not he was the driver in my view his denial of paragraphs 3 and 4 of the plaint cannot necessarily mean that he was denying being the vehicle driver. If that was his defence and that appears the case he ought to have sufficiently pleaded it to avoid ambushing the plaintiff. Be that as it may the plaintiff's advocate failed to alert the court on this anomaly while the evidence of the defendant was being led. I find that the defendant's evidence that he was not the driver of the accident vehicle unacceptable for the above reasons."***

12. From the trial court's judgment, it is apparent that the learned trial magistrate held that the appellant was the driver of the aforesaid motor vehicle at the material time and proceeded to find him partially liable for the accident just because he had not specifically denied having been the vehicle's driver in his statement in defence.

13. In my view, this was a serious misdirection on the part of the learned trial magistrate because having specifically denied in his defence paragraphs 4 and 5 of the plaint which founded the respondent's claim, the appellant had effectively denied having been the driver of the motor vehicle in question or having been responsible for the respondent's injuries.

14. Further, it is a cardinal principle of the law of evidence that he who alleges must prove. This is the import of the provisions of *Sections 107 to 109* of the *Evidence Act*. Having alleged that the accident in which he was injured was caused by the negligent manner in which the appellant and/or his agent managed or controlled the aforesaid vehicle, the burden of proof lay on the respondent to prove those allegations by tendering tangible and credible evidence to that effect. The general denial of liability by the appellant was sufficient for purposes of denying the respondent's claim. The fact that he did not specifically deny having been the vehicle's driver at the material time did not absolve the respondent from his duty of proving his claim as pleaded in the plaint.

15. In his evidence, the respondent admitted that he could not identify the appellant as the person who was driving the vehicle when the accident occurred. He also admitted that he became unconscious after the accident and that the vehicle's registration details were picked by his colleagues who witnessed the accident. However, none of those colleagues was called as a witness to confirm to the court that indeed the appellant was the driver of the vehicle which caused the accident.

16. The only evidence on record which linked the appellant to the accident is the police abstract which named him as the owner of the vehicle. Even though the best evidence to prove ownership of a motor vehicle is a copy of records from the Registrar of Motor Vehicles, a police abstract produced without any objection by the opposite party may as well be considered evidence of ownership in appropriate cases.

17. However, proof of ownership by itself cannot be a basis of imposing liability in an accident claim. An owner of a motor vehicle can only be found liable in a road traffic accident claim if it is proved that he was either the person who directly caused the accident by negligently driving his vehicle or if it is proved that the driver of the vehicle at the material time was his authorised agent and he was thus vicariously liable for his agent's negligent acts or omissions.

18. It is instructive to note that in this case, the appellant was sued as the only defendant. It may be true that he was the owner of the vehicle but in the absence of proof that he was the motor vehicle's driver at the material time, I find that the respondent totally failed to discharge his burden of proving his claim against the appellant to the required standard.

19. The law is that there cannot be any liability without fault. There was no evidence on record on which any liability could lawfully be attributed to the appellant. The learned trial magistrate therefore erred when she apportioned 50% liability to the appellant and proceeded to award the respondent damages when there was no legal basis for her to do so.

20. In view of the foregoing, I find merit in the appellant's entire appeal and it is hereby allowed. The judgment of the trial court is consequently set aside and is substituted with an order of this court dismissing the respondent's suit with costs.

21. On costs of the appeal, the order that best commends itself to me is that each party shall bear its own costs.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 5th day of December, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Wanyonyi for the appellant

Ms Githui holding brief for Ms Cherono for the respondent

Mr. Salach: Court Assistant