REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 400 OF 2013

WINFRED MBAIKA KIMOTHO.....APPELLANT

VERSUS

LAWRENCE MWEBI.....1ST RESPONDENT

JOHN MWANGI.....2ND RESPONDENT

ELIJAH ANGWENYI SIMBA.....3RD RESPONDENT

(Being an appeal from the ruling of Hon. L.W. Kabaria (RM) delivered on 21st June 2013

in Milimani CMCC No. 6174 of 2011)

JUDGMENT

1. The appellant, *Winfred Mbaika Kimotho* was the plaintiff in CMCC No. 6174 of 2011. In her plaint dated 13th December 2011, she sued the three respondents seeking special and general damages as well as cost of future medical expenses following injuries she allegedly sustained in a road traffic accident involving motor vehicle registration number KAM 947E. The appellant also prayed for costs of the suit and interest.

2. In her claim, she averred that on or about 19th May 2010, she was travelling as a passenger in the aforesaid motor vehicle along Dunga Road when the 2nd respondent negligently drove, managed or controlled the said motor vehicle causing it to land in a ditch as a result of which she sustained injuries. She further alleged that the 1st defendant was the registered owner of the vehicle while the 3rd defendant was its beneficial owner. The particulars of the 2nd respondent's negligence were pleaded in paragraph 5 of the plaint.

3. In their joint statement of defence dated 1st February 2012, the respondents denied the appellant's claim in total and put her to strict proof thereof. In the alternative and without prejudice to the denial of liability, the respondents pleaded that if the accident occurred, it was solely or substantially caused by the appellant's negligence and further that her claim was fraudulent as it was based on a false claim that she was involved in the accident. The particulars of fraud and misrepresentation were pleaded in paragraph 7 of the defence.

4. After a full trial, the learned trial magistrate found that the appellant had failed to establish her claim against the respondents on a balance of probabilities and dismissed her suit with costs to the respondents.

5. The appellant was dissatisfied with the trial court's decision. She filed this appeal through a memorandum of appeal dated 19th July 2013 which was amended on 21st March 2016.

In the amended memorandum of appeal, the appellant advanced twenty three (23) grounds of appeal which were by and large a duplication of each other. In my view, in all those grounds of appeal, the appellant mainly complained that the learned trial magistrate erred in law and fact in arriving at her decision by taking into account irrelevant factors; by disregarding crucial evidence adduced by the appellant and submissions made on her behalf and by finding that the appellant had not proved her claim to the required standard of proof despite evidence on record to the contrary.

6. By consent of the parties, the appeal was prosecuted by way of written submissions. The appellant filed her submissions on 24th September 2019 while those of the respondents were filed on 23rd October 2019.

7. This is a first appeal to the High Court. It is thus an appeal on both facts and the law. I am fully conscious of my duty as the first appellate court which as summarized in ***Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR*** is to:

> **"….. re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."**

8. It is however important to point out at the outset that though the High Court has jurisdiction to interfere with findings of fact made by the trial court, this is a jurisdiction which should be exercised cautiously and in limited circumstances. This position has been reiterated in a plethora of authorities made by both the High Court and the Court of Appeal. The common thread running through those authorities is that an appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or it is based on a misapprehension of the evidence or that in making the finding, the trial court relied on the wrong legal principles. See: ***Jabane V Olenja, [1986] KLR 661***; ***Sumaria & Another V Allied Industrial Limited, [2007] 2 KLR 1; Makube V Nyamoro [1983] KLR 403***.

9. In **Kiruga V Kiruga & Another, [1988] KLR 348**, the Court of Appeal expounded on the above principle and stated as follows:

> **"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. Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed."**

10. I have considered the grounds of appeal, the rival written submissions made on behalf of the parties and the authorities cited. I have also considered the evidence on record and the judgment of the learned trial magistrate.

Having done so, I find that the only issue for my determination in this appeal is whether given the evidence on record, the trial court erred in its finding that the appellant had failed to prove her claim against the respondents to the required legal standard which was the basis of the decision to dismiss her suit with costs.

11. In order to determine the above, it is important to summarise the evidence that was tendered in the lower court. The record shows that the appellant testified in support of her case as PW1. She called two additional witnesses, a doctor and a police officer.

In her evidence, the appellant recalled that on 19th May 2010 at around 4 pm, she was travelling as a passenger in motor vehicle registration number KAM 947E; that the vehicle was being driven at a very high speed and on reaching Dunga Road, its driver lost control and the vehicle landed in a ditch. She stated that as a result of the accident, she sustained injuries on her back and left leg. She was treated and discharged at both Mater Hospital and Kenyatta National Hospital. She produced treatment notes issued by the two hospitals in support of her case.

12. In addition, the appellant further testified that she obtained a copy of records from the Registrar of Motor Vehicles proving that the 1st respondent was the registered owner of motor vehicle registration number KAM 947E. She however admitted that she did not know the identity of the person who was driving the vehicle when the accident occurred.

13. The appellant's other witnesses were *Dr. Washington Wokabi* (PW2) who examined the appellant on 10th March 2011 and produced in evidence his medical report dated 30th March 2011. PW3, *Cpl Joyce Osiri* produced a police abstract issued by Industrial Area Traffic Police as Pexhibit5. In her evidence, she claimed that according to the accident report received at the police station, one passenger described as *Winny Manda* was injured in the accident but the name was later corrected to read *Winifred Mbaika.* She did not know how or by who the correction was made. She confirmed that she did not investigate the accident. The investigating officer was one *PC Cherop* who was still available at the police station.

14. In their defence, the respondents called one witness, *Cpl Henry Onsoga* who worked in the Criminal Investigations Department. He testified that following complaints made to the Provincial Police Officer, he was assigned the duty of investigating a claim that an accident involving motor vehicle registration number KAM 947E had occurred on 19th May 2005. He supported PW3's evidence that the appellant's name as a passenger who was injured in the accident did not appear in the occurrence book entry in which the accident report was recorded; that her name appeared in the remarks column of the occurrence book which was not a valid entry as it flouted police procedures on recording of incidents reported in police stations.

15. After carefully considering the evidence on record and reading the judgment of the trial court, I find that the learned trial magistrate properly addressed her mind to the law on the burden of proof and noted that given the respondent's pleadings denying the appellant's involvement in the accident and their assertion that her claim was fraudulent, it was incumbent on the appellant to adduce concrete evidence to prove that she was actually involved in the accident in question and that the respondents either directly or indirectly through their agents negligently caused the accident in the manner in which they controlled the vehicle involved in the accident.

16. In her judgment, the learned trial magistrate found that the appellant had not sufficiently proved that she was involved in the accident given that the treatment notes from Mater Hospital and Kenyatta National Hospital where she claimed she received treatment after the accident did not bear her names.

17. The referral note from Mater Hospital described the patient treated there as *Winnie Matatia* while the treatment notes at Kenyatta National Hospital had the name of *Winfred Manga*. It is worth noting that the injuries for which the patient at Mater Hospital was treated

were different from those the appellant claimed she sustained in the accident. The referral note shows that the patient was treated for *inter alia* injury on the right hip while the appellant claimed that she was injured on her left leg and back. The note also indicates that the patient gave a history of having been involved in an accident involving a *matatu* and a trailer contrary to the appellant's evidence that the *matatu* she was travelling in just landed in a ditch and did not collide with any other vehicle.

18. While as I agree with the appellant's submissions that she did not have any control over how the police made entries in the Occurrence Book (O.B.) and cannot therefore be faulted for the entry of her name in the remarks column of the O.B., the appellant did not attempt to explain in her evidence how treatment notes allegedly issued to her confirming the injuries she was treated for after the accident bore the names of different people who were treated for different injuries from those she allegedly sustained in the accident.

19. In the absence of evidence filling this gaps in the appellant's case and considering that PW3 was not the police officer who investigated the accident and who completed the police abstract and was therefore not in a position to tell who was involved in the accident or how the accident occurred, I am unable to fault the trial magistrate's finding that in order to prove her case to the required standard, the appellant needed to avail either the investigating officer or an independent witness who witnessed the accident to collaborate her claim that she had sustained the injuries pleaded in her plaint in the accident subject matter of the suit.

20. After my independent analysis of the evidence on record, I find that though the appellant produced a copy of records showing that the 1st respondent was the registered owner of the vehicle involved in the accident, she failed to adduce evidence on the basis of which the 1st respondent and indeed any of the respondents could have been held liable in negligence for the injuries she claims to have sustained in the accident.

She failed to adduce evidence to prove that the 2nd respondent was indeed the driver of the vehicle at the material time and that he was the 1st respondent's authorized agent. There was also no evidence to link the 3rd respondent to the accident.

21. In view of the foregoing, I have come to the same conclusion as the learned trial magistrate that the evidence adduced by the appellant was insufficient to prove her claim against the respondents on a balance of probabilities.

I am thus satisfied that this appeal lacks merit and it is accordingly dismissed with costs to the respondents.

It is so ordered.

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

C. W. GITHUA

JUDGE

In the presence of:

Mr. Muthee for the respondents

No appearance for the appellant

Mr. Salach: Court Assistant