REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 7 OF 2011

GEOFREY KIIKU .....APPELLANT

VERSUS

FRANCIS NJUGUNA.....RESPONDENT

(Appeal from the judgment of Honourable S N Odero (Ms.) delivered on 30th November, 2010 in CMCC NO. 9591 of 2007 as well as a cross-Appeal)

JUDGEMENT

1. The Appellant herein was the Plaintiff in the lower court where he filed a Plaint dated 25th October, 2007 as amended on 22nd April, 2008. In the lower court, the Appellant had sued the Respondent as the 2nd Defendant being the beneficial owner of motor vehicle registration number KAC 665 Y jointly with one Jared Muga Onuonga as the 1st Defendant as the registered owner of the said vehicle. The Appellant claimed that on or about 25th June, 2005 he was lawfully driving motor vehicle registration number KAS 984F along Outering Road at Mutindwa, Nairobi, when the Respondent herein negligently drove motor vehicle registration KAC 665Y along the said road that he caused the same to collide into the Appellant's said motor vehicle and as a result, the Appellant's motor vehicle was extensively damaged.

2. The Appellant listed the Respondent's particulars of negligence to include failing to give way to the Appellant's motor vehicle which had a right of way, driving at an excessive speed in the circumstances, failing to keep proper look out, overtaking when it was dangerous so to do and colliding into the Appellant's motor vehicle.

3. As a result of the accident, the Appellant avers that his vehicle was extensively damaged and he suffered loss in terms of repair cost of Kshs. 286,861, Assessment Fees of Kshs. 4,640, police Abstract Kshs. 200 and Tracing fees of Kshs. 15,600 all totaling to Kshs. 309,041. The Appellant therefore claimed the said amount together with interest from the date of filing the suit until payment in full, costs of the suit together with interest thereon at courts rate from the date of judgment and any other relief deemed fit by the court.

4. The claim was denied by the Respondent who filed a Defence dated 23rd October, 2008 and denied the Appellant's claim. The Respondent averred that the accident was caused by the Appellant who drove the vehicle registration number KAS 984F negligently, that he caused and/or permitted the same to collide with motor vehicle KAC 665Y. The Respondent lists the particulars of negligence to include that the Appellant failed to give way to motor vehicle KAC 665Y and driving at an excessive speed.

5. Upon hearing the case, the trial magistrate found the Appellant and the Respondent equally liable for the accident and apportioned liability equally. On damages, the trial magistrate found the Appellant had proven the particulars of special damages and awarded the sum of Kshs. 309,041. Aggrieved by the judgment of the lower court, the Appellant filed this Appeal on seven (7) grounds contained in the Memorandum of Appeal dated 12th January, 2011. Basically, the Appellant's appeal is against the finding on liability in that the trial magistrate erred in law and in fact in failing to find that the Respondent was 100% liable for the accident and that the trial magistrate erred in not finding that the Appellant had proven his case on a balance of probability.

6. From the grounds of Appeal, the Appellant's Appeal is only against the finding on liability. Therefore, the issue for determination herein is whether the Appellant proved his case on a balance of probability.

7. At the hearing of this case, the Appellant called three witnesses whereas the Respondent called one witnesses. However it is only the Appellant and the Respondent who were at the scene of accident. The other two Appellant's witnesses were a motor vehicle assessor and an insurance officer.

8. The Appellant **GEOFFREY MWANZIA KIIKU** testified as PW2. It was his evidence that on 26th June, 2005, he was driving his motor vehicle registration number KAS 984F from Umoja II estate along Outering Road when motor vehicle registration number KAC 665Y which was coming from the opposite direction rammed into his vehicle. He testified that motor vehicle KAC 665 Y was being driven at a high speed and there was no indication that it was going to turn. That they called the police who came to the scene of accident and they blamed the

driver of KAC 665Y for the accident.

9. PW 1, GEORGE ONZERE assessed motor vehicle KAS 984F and produced his report with photographs of the vehicle after the accident. PW3, AUSTINE MACHARIA GITHINJI, an insurance officer with ICEA testified that they paid the repair costs of motor vehicle KAS 984F to Hasi motors as well as the other related costs.

10. The Respondent **FRANCIS NJUGUNA** testified as DW1 and told the court that on the material day at around 10.30 pm near Mutindwa stage, he was driving motor vehicle KAC 665Y when a vehicle that was driving from the opposite direction veered to his side and hit his motor vehicle head on. That the other driver did not indicate anything and when they came out they agreed that he (the other driver) was on the wrong and he paid him Kshs. 20,000/= for the damage to his vehicle. On cross examination the Respondent did not have any proof of such payment.

11. The Appeal was canvassed by way of written submissions. The appellant filed submissions dated 22nd September, 2015 which I have considered. The Respondent did not file any submissions.

12. An appellate court is tasked with re-evaluating the evidence before the lower Court and in so doing, it will not interfere with the exercise of discretion by a lower court unless the exercise of that discretion was erroneous in law. This is well captured in **Mbogo & Another -v- Shah (1968) EA 93 at 96**, where it was stated that *an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which the court should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion*.

13. This appeal is against liability. The standard of proof in civil cases is on a balance of probability. Therefore in this case, all that the Appellant ought to have proven is that is it probable that the Respondent was liable for the accident which resulted to the damages to his car. It was upon the Appellant to adduce evidence to show that indeed the Respondent is the one who encroached to his lane and caused the accident.

14. The evidence of the Appellant and that of Respondent contradicts each other as to the manner in which the accident occurred. The appellant's testimony is that the Respondent rammed into his vehicle and hit his vehicle at an angle from the right side whereas the Respondent's evidence is that the Appellant is the one who entered into his lane without indicating and hit his vehicle from the right side. The Respondent proceeded to testify that they both moved out and viewed the vehicles and agreed that the Appellant was the one on the wrong and as such the Appellant paid the respondent Kshs. 20,000/= to repair the vehicle. In the contrary, the Appellant's evidence was that the police visited the scene and blamed the Respondent for the accident.

15. I have reviewed the evidence on record. The Appellant and the Respondent were the only parties who testified as eye witnesses in the case. Neither of them called other witnesses to collaborate their evidence. The police officers who visited the scene of accident did not produce sketch plan of the scene. In fact, if the said sketch plan had been taken and produced in court, it would have been easier to establish who between the Appellant and the Respondent encroached into the other's lane. In the absence of the said sketch plan and in absence of witnesses to collaborate the evidence of the Appellant and the Respondent, it is not possible for this court to ascertain who between the Appellant and the Respondent was responsible for the accident.

16. In a civil case, the Plaintiff must prove his case on a balance of probability. In the case of **Ignatius Makau Mutisya Vs Reuben Musyoki Muli [2015] eKLR** the court referred to the case of **Miller –vs.- Minister of Pensions [1947]2 All ER 372** in establishing the standard of proof required in civil cases, where **Lord Denning** held that:-

> ***"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (UN) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."***

17. In the case before the court, the probabilities are equal and it would amount to what Lord Denning described in the case of Miller (supra) as a "draw" which is not enough. The Appellant heavily relied on the police abstract which indicates that the driver of motor vehicle KAC 665Y as the one to blame for the accident. The Appellant did not call the police officer who visited the scene to guide the court on the extent to which and why the driver of motor vehicle KAC 665Y was to blame. In the absence of such evidence, it cannot be assumed that the blame was 100%. The court cannot therefore assume the extent of liability to attach to the Respondent. In my view it is not enough for the police Abstract to reflect that the Respondent was to blame. I find that the learned magistrate erred in apportioning liability between the Appellant and the Respondent equally. He ought to have dismissed the case as the appellant failed to prove negligence on a balance of probability. The judgment by the learned magistrate is hereby set aside and its replaced with an order dismissing the Appellant's claim against the Respondent.

Let me also mention that the Respondent in this Appeal filed a cross-Appeal wherein he has raised three grounds of Appeal. It is noteworthy that the Respondent did not file submissions as ordered by the court on 8th May 2015 and never took advantage of subsequent indulgencies by the court to do so. The Appellant's Appeal can therefore be said to have proceeded exparte.

18. The upshot of the above is that this Court finds no merit in the Appeal and the same is hereby dismissed but with no orders as to costs as the Respondent neither defended the Appeal nor prosecuted his cross Appeal..

Dated, Signed and Delivered at Nairobi this **20th** day of **September, 2018**

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L. NJUGUNA

JUDGE

In the presence of:

……..*For the Appellant*

……*For the Respondent*