REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 178 OF 2006

NAHASHON CHEGE....................APPELLANT

VS

STEPHEN MAKABILA..........1ST RESPONDENT

A.O. BAYUSUF SONS LTD...2ND RESPONDENT

(Appeal from the judgment of the Senior Resident Magistrate's Court delivered on 21/9/2006 in CMCCC No. 256 of 2003 at Machakos by Hon. S.A. Okato, SRM)

JUDGMENT

Introduction

1. The appellant had sued the respondents in the lower court; the 1st respondent was sued as a driver of Motor Vehicle Registration No. KAK 963Q, Scania Trailer whereas the 2nd respondent had been sued as a Limited Liability Company, being the owner of the trailer and thus vicariously liable for the tort committed by the 1st respondent. The plaintiff's case was dismissed by the trial magistrate on 21/9/2006. This dismissal led to the filing of this appeal, which is before court for determination.

2. The appellant's Memorandum of Appeal raised specific grounds of appeal as follows:

> "1. *The trial Senior Resident Magistrate erred in law and in fact by holding that the Appellant did not prove his case on a balance of probabilities when the Appellant had called two other witnesses whom he appreciated were corroborative with the testimony of the Appellant.*
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> *2. The trial Senior Resident Magistrate erred in law and in fact by holding that there was no independent evidence presented by the Appellant to the court when there is no such requirement in law and decided the matter on a higher burden of proof required in Civil Proceedings.*
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> *3. The trial learned Senior Resident Magistrate erred in law and in fact by holding that there was no proof of a Log book or a certificate of search when no evidence was led to deny the ownership and the 1st respondent did not deny that he was not employed by the 2nd Respondent and when there was evidence of a police abstract which was admitted by consent.*
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> *4. The trial Senior Resident Magistrate erred in law and in fact by being influenced by the fact that, no police officers were called as independent witnesses to support the case of the Appellant.*
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> *5. The trial Senior Resident Magistrate erred in law and in fact by being influenced by the fact that by looking at the Police Abstract and stating that by the time the Pw2 was testifying and who was an Advocate of the court had not bothered to produce the results of the investigations, which was not his duty to do.*
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> *6. The trial Senior Resident Magistrate erred in law and in fact by holding that since investigations at the police station were pending, the 1st respondent would not be blamed for the accident and by such holding declined to do his duty by deciding who was to blame when all the necessary evidence was before him.*
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> *7. The trial Senior Resident Magistrate erred in law and in fact by failing to assess the special damages and general damages due to the Appellant and the trial Senior Resident Magistrate was wrong in his holding on liability and thus declined his duty as required by the law.*

8. The trial Senior Resident Magistrate erred in law and in fact by deciding the case against the overwhelming weight of evidence.

Wherefore *the Appellant prays this Honorable court to allow the appeal set aside the Senior Resident Magistrate's judgment made on 21/9/2006 and enter judgment in favor of the plaintiff on special and general damages that it deems fit and just with interest on special damages on the date of filing this suit and on general damages from 21.9.2006 when the suit was dismissed and costs be awarded in this Appeal and the lower court."*

The pleadings

The Amended Plaint

3. The appellant in his amended plaint dated 24.08.2006 had stated that on or about the 14/9/2001 the plaintiff was a lawful passenger in Motor Vehicle Registration No. KAM 464K Toyota Saloon along Nairobi – Mombasa road when the vehicle was hit by Motor Vehicle No. KAK 963Q, Scania Trailer that was being driven by the 1st defendant and he sustained injuries. The particulars of negligence were as follows:

a. Driving the said vehicle without due regard and safety of other road users;

b. Failing to make proper or any observation of other road users; and

c. Failing to control, brake, manage or take any other necessary measure to avoid the accident.

4. The appellant had sustained soft tissue injuries on the interior chest, soft tissue injuries of the right shoulder, bruises below the right knee, fracture on the left lateral malleous and bruises posterior on the left foot.

The defence

5. The respondents on the other hand filed a joint defence and in particular the 2nd defendant denied being the registered owner of Motor Vehicle Registration No. KAK 963 and further that the 1st defendant was not its employee, servant and or driver, and the plaintiff was put to strict proof thereof. Further, they averred if the accident ever occurred it was as a result or cause of the negligence of the driver of Motor Vehicle Registration No. KAK 464M.

Submissions

Appellant's submission

6. The appellant urged that the trial court erred by finding he had not proved his case yet it had stated the other two witnesses PW2 & PW3 evidence was corroborative. The court was referred to ***Ignatius Makau Mutisya v. Reuben Musyoki Muli,*** Civil Appeal No. 192 of 2007 where the Court of Appeal held that an appellant has to discharge his burden of proof on a balance of probability citing Denning J. in ***Miller v. Minister of Pensions*** [1947] AII ER 373.

7. As regards the ownership of the Motor Vehicle, it was urged that the court erred in finding that he did not prove ownership, while the respondents had produced a police abstract, which made an inference that the motor vehicle belonged to the 2nd defendant. Further, it was urged in ***Joel Muga Opinja v. E.A Seafood Ltd*** (2013) eKLR the court held as follows:

> *"We agree that the best way to prove ownership would be to produce to the court a document from Registrar of Motor Vehicles showing who the registered owner is but when the abstract is not challenged and is produced in court without any objection on the contents cannot be denied."*

The court was also referred to ***Zakaria Nachari v. Cleopas Waswa,*** Civil Appeal No. 100 of 2011.

8. Further, it was urged that the court erred in stating that the police officer who investigated the case ought to have been called to adduce evidence and that PW3 ought to have produced in court the police investigations to prove who was to blame for the accident.

9. It was further urged that the court had failed to assess both the general and special damages when it was under a duty to do so, in ***Gladys Wanjiru Njaramba v. Glode Pharmacy*** & ***Anor*** [2014] eKLR the High Court held that it was trite law that the trial court was under duty to assess the general damages payable to the plaintiff even after dismissing the suit. The position was confirmed by the Court of Appeal in ***Mordekai Mwangi Nandwa v. Bhogas Garage Ltd*** [1993] eKLR and by the Supreme Court of Uganda in ***Matiya Byabaloma & Ors v. Oganda Transport Co. Ltd.,*** Supreme Court Civil Appeal No. 10 of 1993. Finally he urged the court to find the respondents 100% liable and award a sum of ksh.400,000/= as general damages and ksh.58,600/= as special damages

Respondent's submission.

10. The appellant relied on section 107(1) & (2) and section 108 of the Evidence Act, that the burden of proof lies with the one who alleges the existence of some facts has to prove if he wants the court to believe him. The appellant was to prove that the respondent owed him a duty of care and it was because of their negligence that the accident occurred. The appellant failed to prove ownership of motor vehicle reg. no. KAK 963Q by failing to avail a copy of the record from the registrar of motor vehicles. The police abstract produced by the appellant did not

contain any information as to ownership of the said motor vehicle. The abstract was only evidence and it could not prove negligence on the respondent. In ***Robinson Ochola Awuonda v. House of Manji*** [2015] eKLR the High Court held the appellant was under obligation to avail the investigation officer who would inform the court on any issues in the case.

11. It was further urged that the appellant had failed to avail evidence in support of the actual injuries suffered since there was a contradiction between the injuries pleaded in the plaint and those stated by Dr. Wambugu P.M. They urged that the appellant had sustained soft tissue injuries and an award of Ksh.50,000/= would be adequate. They referred to ***Shalima Flowers v. Noah Muniango Matianyi*** [2011] eKLR**,** ***Kreative Roses Limited v. Olpher Kerubo Osumo*** [2014] eKLR and ***Crown Foods Ltd v. Emily Wangui*** [2011] eKLR where the respondents had sustained soft tissue injuries and they had been awarded ksh50,000/=, Ksh.50,000 and Ksh.40,000/=, respectively.

12. The appellant had failed to discharge the burden of proof on a balance of probabilities as was held in ***Wareham t/a A.F. Wareham & 2 Ors. v. Kenya Post Office Savings Bank*** (2004) 2 KLR 91 by affirming that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.

13. It was their further submission that the driver of motor vehicle registration no. KAM 464K in which the appellant was a passenger was to blame for the accident and urged this court to dismiss the appeal with costs.

Issues for Determination

14. The following issues arise for determination:

a. Whether Motor Vehicle Registration No. KAK 963Q, Scania Trailer was to blame for the accident.

b. If so, whether the 2nd respondent is vicariously liable for the act of the 1st respondent who is sued as the driver of the said motor vehicle.

c. How much compensation is adequate for the injuries, if any, suffered by the appellant.

Determination

15. As a court of first appeal, this court has a duty to re-evaluate and analyze the evidence on record and make it's own independent conclusion considering that it did not see the witnesses. See ***Peters v. Sunday Post Ltd.*** (1958) EA 424, 429 where Sir Kenneth O'Connor, P. said:

> "*It is a strong thing for an appellate court to differ from the findings of fact of a 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 v. Thomas*** *(1947) AC 484…."*

16. The main issue here is whether Motor Vehicle Registration No. KAK 963Q Scania Trailer caused the accident. The 2nd respondent in it's defence dated 13/06/2003 denied the ownership of the Motor Vehicle. It was then upon the appellant to adduce evidence in the contrary. Section 107 and 108 of the Evidence Act (cap 80 Laws of Kenya) places the burden of proof as follows:

> "*107. (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 these 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*
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> *108. The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."*

17. The appellant cited ***Joel Muga Opinja***, supra, where an issue to ownership of the vehicle which had knocked down the deceased arose, and a police abstract had been produced at the hearing of the case to prove ownership. The Court of Appeal had overturned the decision of the High Court and held as follows:

> "*We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objections, its contents cannot be later denied."*

18. The appellant alleges the police abstract dated 3.11.2001 was produced as an exhibit. The abstract only indicates that Motor Vehicle Registration no. KAM 464K belonged to one Jeremiah Ndungu of P.O Box 628 Murang'a and it's Insurance Company as Blue Shield. The appellant's assertion that the abstract showed the 2nd defendant as the owner of Motor Vehicle Registration No. KAK 963Q is not accurate. The abstract only shows the accident involved two vehicles: Motor Vehicle Registration No. KAK 963Q and KAM 464K. While I respectfully agree with the Court of Appeal decision in ***Joel Muga Opinja*** (supra) as regards proof of ownership of the motor vehicle in cases where a police abstract is produced to prove the same and it is not opposed, each case must depend on its own peculiar circumstances as to the contents of the Police Abstract. In this case, it's the appellant's witness (PW2) whose details are entered as the owner of Motor

Vehicle Registration KAM 464K in the abstract. This case is different from the ***Joel Muga Opinja***'s case as well as from ***Ignatius Makau***'s case (supra) who had already sold his vehicle to another person but the transfer had not been effected.

19. Section 8 of the Traffic Act provides as follows:

> "*The person in whose name a vehicle is registered shall unless the contrary is proved, be deemed to be the owner of the vehicle."*

This would apply, in this case, only if the appellant had produced a search certificate from the registrar of Motor Vehicles to show that Motor Vehicle Registration No. KAK 963Q Scania Trailer was registered in the name of the 2nd respondent. It was upon the appellant to discharge that burden and not the 2nd respondent who already in his defence at paragraph 2 had specifically denied ownership. Had the abstract indicated that the trailer Registration No. KAK 963Q was owned by the 2nd respondent then this court would be bound by the ourt of Appeal decisions and find that the 2nd respondent owned it, but in the absence this court finds that the it was not proved that the 2nd respondent was the owner of the accident vehicle.

20. Having found as above, the issue to be determined next is which between motor vehicle Registration No. KAK 963Q Scania Trailer and KAM 464K was to blame for the accident. The police abstract (pex no. 1) indicates that the matter was still pending investigations. As at 3.11.2001 the date of the Police Abstract neither the driver of the two vehicles had been charged. This same abstract had been produced in the year 2006 and no new information as to the outcome of the investigations was given. The police officer who had been assigned was not availed to testify. The appellant himself testified that the vehicle he was in Registration No. KAK 464K Toyota Saloon was overtaking when the accident occurred. This was corroborated by PW3 and PW2 the driver of the vehicle. In cross-examination, the appellant had testified that no person was blamed for the accident. The appellants witness PW2 who was the driver testified in cross-examination that the lorry driver was not charged. He (PW2) had confirmed also that he was overtaking. He partly stated as follows:

> "*…After passing Makindu, there was a slow moving lorry (trailer) and I decided to overtake the lorry. The road was straight and I could see 300 – 400 metres away. The surface of the road was slightly rough. The edge of the road was slightly worn.*
>
> *I checked ahead and commenced overtaking. I accelerated from 70 km/h to about 90 km/h. I had put on the indicator light."*

21. The 1st respondent testified and he stated as follows in examination-in- chief:

> "*I am Steven Makikha Makabila. I am driver. In the year 2001 I was driving a trailer KAK 963Q on 14/09/2001. I was driving the said vehicle along Mombasa –Nairobi road. After Makindu area in Kiunduwani at about 5.00p.m I was doing 30kmh. The road was pot holed and narrow. An accident occurred when a vehicle emerged from behind me. It was a car and I heard the driver apply brakes as he was overtaking me and hit my vehicle. He hit the right rear cabin tyre. There was no vehicle ahead*.
>
> Cross-exam
>
> *I have been a driver since 1975. Before the vehicle hit me I had not seen it. I saw it when I heard it brake and hit my vehicle. I did not swerve. My vehicle was in the middle of the road for the edges of the road had been worn out. I could see the rear."*

The 1st respondent's evidence and the appellant's own evidence shows it's the driver to Motor Vehicle Registration No. KAK 464K who was overtaking.

22. In my respectful view, the appellant had a duty to prove that the 1st respondent, on a balance of probability, caused the accident. The appellant and his witnesses have not discharged that; it's the 1st respondent who hit them. PW2 had stated that when he had reached near the end of the trailer, the lorry driver suddenly swerved to the right and his vehicle hit the right cabin tyre of the trailer and he was thrown into the air and off onto the grass. The 1st respondent had testified he was driving at 30 km/h and Pw2 testified he was overtaking at 90 km/h. Clearly, the appellant driver's vehicle was speeding and it is no wonder the car was on impact thrown into the air. The 1st respondent testified that he only heard the driver of motor vehicle no. KAM 464K break.

23. What appears to have happened in this case is that the PW2 was speeding while trying to overtake the 1st respondent's vehicle and then saw an on-coming vehicle and since he had already started overtaking the only way to avoid a head-on collision was to reduce the speed by applying brakes and he was thrown into the air. I find that the appellant's driver PW2 who was overtaking on a road full of potholes and one, which was bumpy and narrow, was negligent.

24. In any event and most significant to the result of this appeal, it is clear that the appellant did not prove negligence on the part of the 1st respondent. The Court of Appeal decision in ***Ignatius Makau*** (supra) sets the principle on the burden of proof, and as held in ***Wareham t/a A.F Wareham,*** (supra) it is trite that the degree of proof is on a balance of probabilities and if the evidence does not support the facts pleaded the party with the burden of proof should fail. In ***Ignatius Makau's*** case (supra) the Court of Appeal held as follows:

> "*On the issue of burden of proof we need to examine whether the appellant discharged his burden of proof on a balance of probability to prove that he was actually not the owner of the motor vehicle in question as at the time the cause of action, the subject of this appeal arise. We can borrow from the wise words of Denning J. in Miller v. Minister of Pensions [1947] All ER 373, discussing the burden of proof where he said:-*
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> "*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 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 explanation save equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

Injuries to the Appellant

25. The appellant stated that he sustained injuries as a result of the accident. In his amended plaint he particularized the following injuries.

a) Soft injuries on the interior chest, soft tissue injuries of the right shoulder.

b) Bruises below the right knee, fracture left lateral malleolus and bruised posterior on the left foot.

Evidence on record, which was produced as Pex no. 2b, which was a chit from Makindu Hospital, indicated as follows:

1. Ankle joint swelling left leg

2. Right leg had slight bruised

A further treatment chit from Makindu Hospital Pex no. 2A indicates on 24/9/2001 the x-ray showed a fracture of the left lateral malleolus. The Medical Report dated 8.12.2001 by Dr. P.K Mwangi produced as Pex no. 3 shows the following injuries:

1. Fracture of the left lateral malleolus and bruises behind the left ankle joint

2. Anterior chest –soft tissue injuries

3. Soft tissue injuries of the right shoulders joint.

The medical report dated 16.08.06 by Dr. Wambugu P.M was produced as Pex no. 5A, which showed the following injuries:

*1. Blunt trauma left ankle joint with **suspected** fracture left lateral malleolus*

2. Blunt chest trauma

He further stated in his report that the x—rays taken at Murang'a Hospital on 24.09.2001 did not reveal any fractures/dislocation, though he had been put in plaster cast bandage for about 6 weeks and underwent physiotherapy. He gave an opinion and prognosis that the appellant did not sustain a fracture of the lateral malleolus, and he had suffered a dislocation of the ankle joint instead

Damages

26. The trial court had erred by not determining the compensation that the appellant would have been awarded n the circumstances of the case, had liability been established. I respectfully agree ***Gladys Wanjiru Njaramba v. Globe Pharmacy & Anor*** [2014] eKLR where the High Court stated that a trial court is under duty to assess the general damages payable to the plaintiff even after dismissing the suit, should an appeal on liability succeed.

27. On the basis of the above evidence, the court finds the appellant had sustained a dislocation since the initial treatment document from Makindu hospital dated 14.9.2001 does not show any fracture but only a swelling on the left leg ankle joint and bruises on the right leg which was confirmed on the second medical examination report of 16/ 8/2006. The plaintiff in the trial court had relied on ***Rose Mary Bulinda v. Peter Kinyanjui & 5 Ors*** HCCC No. 86 of 1998 and ***Joseph Nduma Marage v. David Kamande & Anor*** HCCC No. 101 of 1996. In these two cases, the injuries sustained were more severe than the appellant's injury. I consider that the appellant would have been adequately compensated by an award of Ksh150,000/= in general damages for pain and suffering.

Special damages

28. It is trite law that special damages have to be specifically pleaded and specially proved. The appellant had pleaded for the following:

a) Treatment and Physiotherapy – ksh55000

b) Medical report 2000

c) Police abstract 100

d) P3 filing 1500

Total **58.600/=**

The appellant produced receipts for ksh 58,000/= and the same would be awarded to him.

Conclusion

29. However, having found that the appellant has failed to discharge his burden of proof, the occurrence of the accident cannot be attributed to the 1st respondent and, the motor vehicle registration no. KAK 963Q not having not been proved to belong to the 2nd respondent and the 1st respondent not having been shown to have been acting in the employment or for the benefit of the 2nd respondent, then the latter cannot be held vicariously liable for the torts committed by the 1st respondent driver. The appellant's claim against the respondents fails.

Orders

30. Accordingly, for the reasons set out above, this court makes the following orders:

1. The appeal herein is dismissed.

2. There shall be no order as to costs.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 3RD DAY OF DECEMBER 2018

G.V. ODUNGA

JUDGE

Appearances:-

M/S Manthi Masika & Co. Advocates for the Appellant

M/S Wangai Nyuthe & Co. Advocates for the Respondents