REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 21 OF 2010

JAMESON SIIKA.....APPELLANT

VERSUS

ANDREW MARANGA ONGERI.....RESPONDENT

(An appeal from the judgment and decree of Hon. S.R. WEWA (Resident Magistrate) dated and delivered on the 25th day of February, 2008 in the Original KISII CMCC NO. 97 OF 2006)

JUDGMENT

1. The appellant herein JAMESON SIIKA, was the plaintiff before the subordinate court at Kisii in Kisii CMCC 97 of 2006 wherein he sued the respondent (then the defendant), for special damages arising out of a road traffic accident that occurred on 9th December 2005.

2. The appellant's case before the lower court was that on 9th December 2005, he was driving his motor vehicle Registration number KAA 732D Toyota Pick-up along Kisii-Keroka Road, when near Birongo Market the appellant's said motor vehicle collided with the respondent's motor vehicle Registration Number KAR 859W, Toyota matatu thereby occasioning material damage to the appellant's said motor vehicle.

3. The appellant attributed the said accident to the negligence of the respondent and prayed for special and general damages together with costs of the suit.

4. The respondent, on his part, filed a defence and counter-claim to the appellant's case in which he denied liability for the accident and attributed its occurrence to the negligence of the appellant. He similarly prayed for special damages in respect to repair costs and damages for loss of use for which he prayed for a set off against the appellant's similar claim.

5. After considering the evidence tendered by both parties and their witnesses, the trial court dismissed both the appellant's claim and the respondent's counterclaim thereby triggering this instant appeal in which the appellant has listed the following grounds of appeal:

> **1. The Learned Trial Magistrate erred in fact and law in dismissing the Appellant's suit without considering and/or properly considering the evidence of the Appellant and his witnesses touching and concerning causation of the suit accident and without assigning any proper and valid reason (s) for such dismissal.**

2. Having found and held that the Respondent's driver had driven the Respondent's Vehicle at an excessive speed and failed to control and/or manage same, the Learned Magistrate erred in law in dismissing the Appellant's suit.

3. The Learned Trial Magistrate erred in law in failing to analyze and determine the raised vide the pleadings and evidence by the parties. Consequently, the Learned Magistrate abdicated her judicial obligation and/or duty, to the detriment of the Appellant.

4. The Learned Trial Magistrate misconceived and/or misapprehended the circumstances obtaining at the time of the occurrence of the suit accident and consequently, failed to address and/or direct her judicial mind to the issues in dispute.

5. The Learned Trial Magistrate failed to cumulatively and/or exhaustively evaluate the entire evidence on record and hence failed to discern the material discrepancies apparent in the Respondent's case. Consequently, the judgment of the Learned Trial magistrate is coloured with misapprehension of the evidence on record.

6. The Judgment of the Learned Trial Magistrate is contrary to the weight of the evidence on record. Consequently, the said judgment is manifestly unsafe and thus deserving to be vacated.

7. The judgment of the Learned Trial Magistrate has not set out the issues for determination, the determination thereof and the reasons for such determination. Consequently, the judgment of the Learned Trial Magistrate offends the provisions of Order xx Rule 4 of the Civil Procedure Rules.

6. The respondent similarly filed an appeal against the trial court's decision being **Kisii HCCA No. 47 of 2008** wherein he raised the following grounds of appeal:

1. The learned final magistrate erred in law in failing to consider and analyze the Appellant's case as a whole and thereby arrived at a wrong conclusions.

2. The learned trial magistrate erred in law in fact in deciding the appellant's driver was equally to blame when it is clear on record that it is the Respondent who swerved to his lane.

3. The learned trial magistrate in law in not assessing the quantum of damages, that will have been payable by Appellant to the respondent had found in favour of the appellant.

4. The learned trial magistrate decided the case against the weight of evidence.

7. When this appeal came up for mention before me on 24th September, 2015, the court directed that this appeal be consolidated with the respondent's appeal NO. 47 of 2008 and on 11th December 2015, parties agreed to canvass their arguments on appeal by way of written submissions.

Appellant's submissions

8. The appellant submitted that the trial magistrate did not set out the issues for determination as required by the provisions of **Order 21 Rule 4 of the Civil Procedure Rules 2010**, but instead glossed over the issues in dispute thereby arriving at a judgment that did not determine even the simplest of the issues between the parties, including the issue of whether or not the respondent's counter claim was properly on record in view of the fact that court fees had not been paid.

9. The appellant contended that as a result of the trial magistrate's failure to address the issues raised in the suit, the resultant judgment was not only deficient but was also totally defective and hence invalid thereby leading to a miscarriage of justice. On this point, the appellant relied on the decision in the case of **Al-Malik Brothers Motors Limited vs Jackline Kemunto Ondari & Another, Kisii HCCA No. 120**

of 2006 (unreported) in which it was held as follows:

> ***"I have considered the above submissions. With great respect to the Trial Magistrate, he did not comply with the mandatory provisions of Order xx Rule 4 of the Civil Procedures, (now repealed) in his Ruling." (Emphasis supplied).***

10. The appellant added that the judgment of the trial court was coloured with errors of commission and omissions which negated its substance as it ran contrary to the clear provisions of the law and amounts to a travesty of justice.

Respondent's submissions

11. The respondent faulted the trial magistrate for failing to analyse and consider the entire case thereby arriving at a wrong conclusion. The respondent also reiterated that the trial magistrate did not comply with the provisions of **Order 21 Rules 4 and 5 of the Civil Procedure rules 2010**. The respondent urged this court to exercise its jurisdiction and re-evaluate the evidence adduced before the trial court with a view to arriving at its own independent conclusion.

12. The respondent also took issue with the trial magistrate's failure to consider the testimonies tendered by the respondent's witnesses thereby dismissing the same in the face of corroborated evidence in support of his case.

13. The respondent contended that the trial court erred in failing to quantify or assess the damages that would have been payable to the respondent had he found in his favour.

14. The respondent suggested that this court should allow both appeals in view of the fact that they raise similar issues and consequently, refer the case back to the subordinate court for a retrial with costs abiding the outcome of the retrial.

15. This being a first appeal, this court is mandated to re-evaluate the evidence tendered before the trial court with a view to arriving at its own independent decision. (**See Selle & Another vs Associated Motor Boat Company Ltd & Others [1968] EA pgs 123-131**.

16. The appellant's case before the trial court was advanced by two witnesses as follows:

PW1 JAMES SIIKA AMOS ONGARO is the appellant herein. He testified that on 9th December 2003, he was driving his motor vehicle Reg. NO. KAA 732 Toyota Pick-up from Kisii to his home in Keroka when at Birongo market, a 5 year old suddenly crossed the road from the left side of the road whereupon he swerved to the right side to avoid hitting the child but that the respondent's motor vehicle Reg. No. KAR 859W which was moving at a high speed from Keroka, hit his vehicle. He stated that the weather was fine and the road was good. The appellant produced exhibits to prove the towing and repair charges he incurred as a result of the said accident. He blamed the respondent for the accident and for driving at a high speed.

17. On cross examination, the appellant stated that he was driving slowly at 35 Kph at the time the accident occurred.

18. **PW2 JOSEPH MOSE AMBANI** was a passenger in the respondent's motor vehicle Reg No. KAR 859W at the time of the accident. His testimony was that the respondent's motor vehicle was not moving at a high speed and in a bid to avoid hitting a child, it scratched the appellant's motor vehicle. He blamed the respondent for the accident as the vehicle was moving at 80Kph.

19. On cross examination, he stated that the appellant's car swerved to the lane of the respondent's car in a bid to avoid hitting a child who was crossing the road.

20. **PW3 BEN V. ONCHARI** and **PW4 JOSEPH OTONDI** were mechanics who repaired the

appellant's motor vehicle. They produced receipts in respect to their repair charges as exhibits.

21. **PW5 ROBERT NYAKUNDI OGEGA** was the breakdown operator who towed the appellant's car at a cost of Kshs. 10,000/=. He produced a receipt as Pexhibit 2 in support of his said charges.

22. **DW1 ANDREW MARANGA ONGERI** was the businessman and owner of motor vehicle Reg No. KAR 859W. His testimony related to the information he received from DW2 regarding the accident and the cost the incurred in repairing the said vehicle.

23. **DW2 EVANS NYAGAKA** was the driver of the Respondent's motor vehicle at the time of the accident. He stated that on the material day, he was carefully driving the respondent's motor vehicle along Kisii Keroka road when at Birongo area, the appellant's vehicle, which was coming from the opposite direction swerved into his lane thereby colliding with the respondent's motor vehicle.

24. **DW4 ARON MULWA KITHUKA** was a motor vehicle valuer with Automobile Association of Kenya, Kisumu Branch. He quantified the costs of repairs of the respondent's motor vehicle at Kshs. 264,654/=.

25. **DW5 ALFRED OKOCHI** sold spare parts to the respondent amounting to Kshs. 143,200/=.

Analysis and Determination

26. Upon perusing the Record of Appeal, the parties respective submissions and the authorities cited, I note that the issues that require my determination are as follows:

> **a) Whether the trial court complied with the provisions of Order 21 Rule 4 and 5 of the Civil Procedure Rules.**
>
> **b) Whether the respondent's counter-claim was properly before the court.**
>
> **c) Whether the trial court ought to have quantified the damages.**
>
> **d) Who was to blame for the accident in question?**

27. Both the appellant and the respondent accused the trial court of failing to adhere to the provisions of **Order 21 Rule 4 and 5 of the Civil Procedure Rules**. The said provisions require a judicial officer to give a basis of how he/she arrives at a particular decision. It was submitted that the failure by the trial magistrate to set out the concise statement of the case, the points for determination and the reasons for the decision was a fatal error since it contravened the provisions of Order 21 Rule 4. In the case of **Ochieng v. Amalgamated Saw Mills (2005) 1KLR 151** it was observed as follows:-

> ***"The trial magistrate abdicated his judicial responsibility in failing to set out the points for determination and the reasons for his decision. A judicial officer may be right or wrong in his final decision, but either way, he is under a duty to state in writing the reasons which made him arrive at a particular decision. In my view, any purported judgment that does not contain the essential ingredients of a judgment as required under Order XX Rule 4 is not a judgment and an appellate court would most likely set it aside. An aggrieved party who has a right of appeal would be disadvantaged by such a judgment if he chose to appeal. An Appellate court should be able to follow the reasoning of a trial magistrate in order to determine if the decision arrived at was proper in law or not."***

28. In the English case of **Flanner v. Halifaz Agencies Ltd [2001] ALL ER 273** it was held thus:-

> ***"1. The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since***

without reasons the losing party will not know (as was said in Ex parte Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind, if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.

2. The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself..."

29. This being a first appeal, this court is under an obligation to re-evaluate the facts afresh and come to its own independent findings and conclusions as was observed in **Selle v. Associated Motor Boat Company & Others (1968) E.A. 123**.

30. On the first issue, **Order 21 Rule 4 and 5 of the Civil Procedure Rules** provides as follows:

"4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

5. In suits in which issues have been framed, the court shall state its finding or decision, with the reasons thereof, upon each separate issue."

31. In the instant case, the judgment of the court was more or else a one page judgment the full text of which I will reproduce hereunder as follows:

"Judgment

The plaintiff vide this suit sues the Defendant seeking Damages, Costs and interest thereof.

There is evidence and submission, which I do consider. There are issues to consider:

- **Whether accident did occur.**
- **Whether the M/V of the plaintiff was damaged.**
- **Who was to blame.**
- **Whether the expense was incurred.**

The plaintiff did testify to the effect that the driver of M/V KAR 859 W was at high speed from Keroka. The road was straight and no corner.

I do find that an accident did happen.

What is an issue then is who is to blame.

The defendant's driver has been blamed for causing the accident being at high speed and therefore unable to avoid/manage the motor vehicle to avoid the accident.

The plaintiff swerved to the defendant's driver lane. This is not denied. Why didn't he stop? The Defendant equally if he wasn't at a high speed he should have been able to control the motor vehicle by stopping. This he failed to do.

In my view the blame is apportioned.

The plaintiff swerved in a bid to save a life.

The defendant had no reason as to why his agent was at high speed.

In the upshot the blame is apportioned. I don't find anybody to blame.

I do dismiss the claims.

Costs in the cause.

S.R. WEWA

R.M."

32. It is my finding that the trial court's judgment set out above does not meet the threshold of the essentials expected of it under Order 21 Rule 4 of the Civil Procedure Rules. I am guided by the words of Makhandia J (as he then was) in the case of **South Nyanza Sugar Co. Ltd v. Omwando Omwando (2011) eKLR** where he held :-

> ***"I do not think that, the judgment as crafted by the learned Magistrate really qualifies for a valid judgment. Ordinarily and in law a judgment should deal with issues raised and should not be scanty. A judgment must comply with the mandatory provisions of order 21 rule 4 of the Civil Procedure Rules which provide that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision. In the circumstances of this case, it cannot be said from the extract of the judgment I have set out above the trial magistrate complied with this mandatory provisions of the law. The trial magistrate by not setting out points for determination and reasons for his decision contrary to the aforesaid provisions of the law abdicated his judicial responsibility. As a judicial officer he was under a duty to state in writing the reasons which made him arrive at a particular decision on liability and the apportionment thereof. It could not have been done in vacuo. Any judgment that does not contain the aforesaid essential ingredients is not a judgment and an appellate court will frown at such a judgment and indeed impugn it as I hereby do. This ground alone would have been sufficient to dispose of the appeal. "***

33. From the foregoing, I am in agreement with the submissions of the counsel for the appellant and respondent that the trial court's judgement fell short of the requirements of a judgment within the meaning of **Order 21 Rules 4 and 5 of the Civil Procedure Rules** and therefore the said judgment cannot stand**.**

34. Having found that the judgment of the trial court cannot stand, this court still has jurisdiction to deal with this matter the same way the trial court would have dealt with it in line with the provisions of **Section 78 (1) (a) of the Civil Procedure Act** which stipulates as follows:

> **"Subject to conditions and limitations as may be prescribed, an appellate court shall have power -**
>
> **(a) To determine a case finally;"**

I will, therefore, proceed to consider the other issues that arise from this appeal.

35. Turning to the 2nd issue on whether the respondent's counter claim was properly before the court, the appellant contended that the said counterclaim had not been paid for and therefore ought to have been expunged from the court record. The record of appeal filed before this court does not however contain copies of the court receipts in respect for payment of the court filing fees so as to enable me peruse the same in order to confirm if indeed the requisite court filing fees was paid or not. In the event that the court filing fees for the counterclaim was not paid, I concur with the submissions of counsel for the appellant that the trial court ought to have expunged the respondent's counterclaim from the court record. I am guided by the decision in the case of **Unta Exports Ltd vs Customs [1971] EA 648** wherein it was stated:

> ***"I have no doubt whatsoever that both as a matter of practice and also as a matter of law***

documents cannot validly be filed in the civil registry until fees have either been paid or provided for by a general deposit for the filing advocate for which authority has been given to deduct court fees…."

36. In the instant case, no orders or judgment was made by the trial court in favour of the respondent in respect to the counterclaim and therefore, I find that the alleged non-payment of the court fees for the counterclaim did not prejudice the appellant's case in any way.

Quantum of damages

37. The appellant argued that the trial magistrate erred in failing to quantify the award of general damages he would have been awarded had he been successful in the lower court case. The respondent also made a similar argument in respect to his counterclaim. It is now trite law that a trial court is under a duty to assess the general damages payable to the plaintiff even after dismissing the suit. This position is confirmed by the Court of Appeal in the case of **Mordekai Mwangi Nandwa V Bhogals Garage Ltd CA No. 124 Of 1993 reported in [1993] KLR 448** where the court held that the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment. Similarly, in the case of **Matiya Byabaloma & Others V Uganda Transport Co. Ltd Uganda Supreme Court Civil Appeal No. 10 of 1993 IV KALR 138** where the court held that the judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim".

From the above authorities it is clear that in the instant case, the trial court fell into error by not assessing the award of general damages he would awarded to the appellant and respondent had they been successful in proving their respective cases. Both the appellant and respondent claimed general damages for loss of user of their respective motor vehicles together with special damages for material loss/damage caused to their respective motor vehicles. Both parties estimated their daily for loss of user at Kshs. 5000/= and this translated into a special damage which the appellant had to specifically plead and prove at the hearing.

38. In the case of **Kampala City Council –Vs- Nakaye [1972]E.A** the Court of Appeal at Kampala held-

"It is settled law that special damages need not only be specifically pleaded but must also be strictly proved."

39. The burden of proof in civil cases is on a balance of probability.

Denning J. in **Miller –Vs- Minister of Pensions (1947)** discussing that burden of proof had this to say-

"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."

40. **Section 107** and **108 of Evidence Act Cap 80** provides who bears the burden of proof in a case. Those two Sections provide-

"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 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.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

41. Under the above circumstances, it is my finding that the claim for loss of user was a special claim for a specific amount of money which had to be specifically proved. On loss of user the appellant testified as follows:

"I could hire a motor vehicle to enable me move. I spent Kshs. More than (sic) 7000/=. I have no receipt. I could just pay those whom I hire from."

42. As can be seen from the evidence tendered by the appellant, he was not able to prove that he hired a vehicle and at what cost during the period that his vehicle was allegedly under repair. Had the appellant proved his claim on loss of user, this court would have awarded him the sum of Kshs. 5000/= per day for a period of thirty days which makes a total sum of Kshs 150,000/=. I am of the humble view that a period of 30 days would have been sufficient for the appellant to repair his vehicle and put it back on the road.

Liability

43. On liability, the trial court found that none of the parties to the suit was to blame for the accident. In the case of **Karanja V Melele (1983) KLR 142 at page 152** the court had this to say:

"I agree with what Law JA said in Malde v Angira civil appeal No. 12 of 1982(unreported) that apportionment of blame represents an exercise of discretion with which this court will interfere only when it is clearly wrong or based on no evidence or on the application of a wrong principle."

44. In the instant case, it was not disputed that an accident occurred on 9th December 2005 involving collusion between the appellant's motor vehicle Reg. No. KAA 732D and the respondent's motor vehicle Reg. No. KAR 859W. It was also not disputed that both vehicles were damaged following the said accident thereby necessitating some repairs and this meant that each party incurred costs of repairs. What was in dispute however was, which vehicle was to blame for the said accident.

45. The appellant's case was that the swerved to his right in order to avoid hitting a minor who then was crossing the road thereby leaving his lane and entering into the lane of the respondents' car that was coming from the opposite direction. While the appellant blamed the respondent for driving at a high speed, the respondent also blamed the appellant for moving into his lane.

46. My own assessment of the evidence tendered before the lower court is that the real genesis/cause of the accident was the minor who was reported to have been crossing the road. It is clear that appellant did not just swerve out of his lane for no apparent reason. The reason was to avoid hitting the child. It then happens that at the very moment that the appellant's vehicle swerved to the right lane to avoid hitting the child, the respondent's vehicle had already reached the same spot thereby causing an inevitable collusion for which neither of the parties could be blamed. It is therefore my finding that the trial court was justified in holding that none of the parties was to blame for the said accident which was to me equivalent to stating that each party bore equal blame. To my mind, the person to blame was the unidentified minor who was reported to have been crossing the road at the time the accident happened.

47. The circumstances of this case warranted the apportionment of liability on a 50% to 50% ratio in that each party can be said to have contributed to the said accident in equal measure as none can be said to have been wholly liable. I therefore find it ironical that the appellant, who made the first move of swerving off his lane to avoid hitting the child was the initiator of the suit before the lower court. In an ideal situation, the appellant was expected to avoid hitting the child and at the same time be careful not to hit other road users like the respondent. However, many times in an accident scenario, events take place on a split second basis where both drivers do not have time to think out their actions in advance. This was one such case and I fully agree with the findings of the trial court in apportioning equal blame to both parties. I find no reason to interfere with the trial court's findings on liability.

48. Having assessed the evidence tendered in this case and having found that he each party was equally to blame for the accident in question, it is my finding that the trial court came to the right decision when it dismissed both claims with no orders as to costs. Consequently, I find that even though this appeal was merited in the sense that it raised numerous errors of law and fact in the decision of the trial court which I have addressed in this judgment, a relook and re evaluation of the evidence tendered before the trial court leads me to arrive at the same finding that the both the appellants case and the respondent's counter claim was not proved to the required standards and I hereby dismiss them.

49. Each party shall bear his own costs.

Dated, Signed and delivered in open court this 5th day of December, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

N/A for the Appellant

N/A for the Respondent

Omwoyo court clerk