IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO 42 OF 2018

BETWEEN

MOSES THEURI NDUMIA ……………..…..……..…………………… APPELLANT

AND

I G TRANSPORTERS LIMITED …………………….......…….. 1ST RESPONDENT

GREGORY MUTUKA …………………………………..……. 2ND RESPONDENT

(Being an appeal from a Judgement and Order of the High Court of Kenya at Voi, (Kamau J.) dated 20th February, 2018 in High Court Civil Appeal No 8A of 2017)

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JUDGMENT OF THE COURT

[1] The key issue for determination in this appeal is whether the first appellate Judge erred in apportioning liability equally between the appellant and the respondents. This is a second appeal as the record shows the original suit was filed by the appellant before the Principal Magistrates' court at Voi. Therefore, by dint of the provisions of **Section 72(1)** of the **Civil Procedure Act, Cap 21 Laws of Kenya** only matters of law fall for our consideration. The section provides as follows:-

> ***"Except where otherwise expressly provided in this Act, or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely:***
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> ***(a) the decision being contrary to law or to some usage having the force of law.***
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> ***(b) the decision having failed to determine some material issue of law or usage having the force of law.***
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> ***(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may, possibly have produced error or defect in the decision of the case upon the merit."***

[2] A brief synopsis of the facts surrounding the matter is necessary as the two courts below gave a full account of the matter merely to put this judgment in perspective. On the 28th November, 2013 the appellant was driving motor vehicle registration **No. KBP 913Q ZC 6000 with trailer** along Mombasa – Nairobi Highway when at Taita Taveta he was involved in an accident with the respondent's vehicle registration No. UAD 161Q. According to the appellant and a Police officer one corporal Joyce Iha who testified and produced the occurrence book, police abstract form and the P3 form, the accident was caused by the driver of the 1st respondent's vehicle when trying to overtake another vehicle thereby causing a collision with the appellant's vehicle. As a result of the said collision the appellant suffered severe injuries, he was hospitalized and discharged with a lifelong medical condition. He therefore claimed general damages of Kshs.1,500,000; future medical expenses of Kshs.500,000 for hip replacement after every 10 years and Kshs.388,275 being medical expenses.

[3] The respondents filed a defence that generally denied liability and although admitting the accident occurred, they attributed the negligence or part thereof to the appellant. However, the respondents did not adduce any evidence during the hearing. After hearing the matter, that was the appellant and his witness, the respondents did not call any evidence but relied on written submissions. Upon considering the evidence on record, the learned trial magistrate found the appellant discharged his burden of proof of his claim and awarded him a total sum of Kshs.2,825,000 with costs and interest.

[4] Aggrieved by the said judgment the respondents appealed before the High court. The central issue that was on contention was liability. That is whether liability should have been apportioned between the appellant and the respondents. It was generally admitted the accident happened as alleged by the appellant, the bone of contention was whether the 1st respondent's driver was wholly to blame for the accident in the absence of a sketch plan showing the exact point where the accident occurred. The respondents therefore proposed an apportionment of liability at 50% - 50%. Upon hearing the parties this is what the learned Judge posited in a pertinent paragraph of the judgment the subject matter of this appeal;-

> ***"Taking into account the inflationary trends over the years, it was therefore the considered view of this court that the award of Ksh.1,500,000 general damages for pain suffering and loss of amenities that the learned trial magistrate awarded the respondent herein was reasonable in the circumstances of the case.***
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> ***The appellants did not dispute the special damages. Interference by this court was hence not warranted. Notably, despite having raised the issue of future medical expenses in their memorandum of appeal, they did not submit on the same. What this court noted was that they did not adduce other evidence to controvert the amount in the medical report that the respondent relied upon in this respect. All the same, it was not clear to this court if they had abandoned this ground of appeal and there was therefore no value in analysing this ground of appeal.***
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> ***For the reasons foregoing, the upshot of this court's judgment was that the appellant's appeal that was dated 13th September, 2017 and filed on 15th September, 2017 was partly merited on the issue of apportionment of liability.***
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> ***In the circumstances forgoing, this court hereby sets aside and/or vacates the judgment of Ksh.2,825,000 that had been entered in favour of the respondent against the appellants and in its place hereby enters judgment in his favour against the appellants for Ksh.1,412,500".***

[5] This is the gravamen of this appeal that is predicated on some 5 grounds of appeal that faults the apportionment of liability; when it was only the appellant who adduced evidence which was not controverted; that there was no legal basis to support the apportionment of liability; failing to comprehend the facts presented in the authorities cited by the respondents were distinguishable from the facts in the instant case; for imposing a burden of proof higher than the set balance of probabilities and finally for ordering the appellant to bear costs of the appeal.

[6] When the appeal came up for hearing, **Mr. Njoroge**, learned counsel for the appellant relied on his client's written submissions and in his oral highlights counsel emphasized that in the absence of defence evidence that could have controverted the appellant's evidence on where the accident happened, the court relied on the respondents' defence, written submissions and the authorities cited. The authority that was heavily relied on was the case of **JIMINAH MUNENE MACHARIA –VS- JOHN KAMAU ERERA** CIVIL APPEAL No. 210 of 1998 which cited the words of Lord Denning in **BAKER –VS- MARKET HARBOUROUGH INDUSTRIAL COPERATIVE SOCIETY LTD** (1953) WLR page 1472 at 1476. It was held in that case that where both drivers died in an accident and the collision was established to have taken place in the centre of the road, liability was apportioned to both drivers in the absence of evidence.

[7] Counsel for the appellant distinguished the facts in that case from the instant appeal in that the appellant testified on where the accident happened. He testified that after he was forced out of the road by the 1st respondent's vehicle that was overtaking another one from the opposite direction, he swerved off the road but the incoming vehicle followed him and caused the collision. There was evidence by the police officer which indicated the driver who was to blame for the accident. There was in his view no conflicting narrative of how the accident happened and therefore the oral evidence by the appellant and the police officer sufficiently discharged the burden on a balance of probabilities. In view of the circumstances of this case where the evidence of the appellant was not challenged, counsel submitted that the trial magistrate correctly applied himself and arrived at the right conclusion.

[8] Counsel for the appellant went on to submit that merely pleading a denial without calling evidence especially where the appellant had joined issue with the defence was worthless. There was no oral or documentary evidence by the respondents to back the allegation of contributory negligence. This was the position postulated in the cases of **LINUS NGANGA KIONGO & 3 OTHERS –VS- TOWN COUNCIL OF KIKUYU** [2012] eKLR at page 3. According to counsel for the appellant, failure by the respondents to adduce evidence during trial meant that the oral evidence of the appellant as to how the accident happened supported by the police abstract that attributed the blame on the respondents remained unchallenged and the Judge was wrong to isolate pleadings from the defence matters that required a production of sketch plans. The respondents also had a duty to produce the same document which they did not thereby placing unfair burden on the appellant. Counsel urged us to allow the appeal with costs.

[9] The appeal was opposed; **Mr Ajigo** learned counsel for the respondents relied on his clients' written submissions and list of authorities but did not make any oral highlights. Counsel started by reciting the mandate of this Court in a second appeal as stated by this Court in the case of **PURITY WAMBUI MURITHI -VS- HIGHLAND MINERAL WATER AND COMPANY LIMITED** CA No. 58 OF 2014 where it was held that on a second appeal, the Court confines itself to matters of law unless, it is shown that the two courts below considered matters it ought not to or looking at the entire conclusion it is perverse such that no reasonable tribunal would arrive at. The submissions supported the conclusion by the Judge that the burden of proof of where the impact of the accident was remained the responsibility of the appellant. Thus there were several possibilities regarding the point of impact and the Judge was right to hold that both drivers were responsible for the collision and therefore the apportionment of liability equally. We were urged to disallow the appeal as the Judge properly re-evaluated the evidence and subjected it to a fresh analysis and the conclusion that there was no clear cut evidence on how the accident occurred was cogent.

[10] We have considered the record of appeal, the submissions and authorities cited and as indicated in the opening paragraph, the issue for determination is whether the Judge erred in apportioning liability at 50% - 50% between the appellant and respondents. In other words, whether the conclusion that failure by the appellant to produce the 'sketch plan' showing the point of impact was erroneous, not supported by evidence such that no reasonable tribunal dealing with the same set of facts would arrive at such a conclusion. That is what would qualify as an issue of law.

[11] We appreciate on the outset that the appellant being the plaintiff or claimant in this matter carried the burden to prove his case on a balance of probabilities that the accident was caused through negligence of the 1st respondent's driver and as a result he suffered loss as per the various heads of damages that he claimed. In this regard the appellant gave evidence on how the accident happened and was cross examined by counsel for the respondents. He insisted the 1st respondent's vehicle was being driven from the opposite side trying to overtake, forcing him to swerve off the road but it followed him off the road where the accident occurred. This evidence was supported by the police officer who produced the O.B where the accident was recorded, a P3 Form and the Police Abstract form that indicated the driver of the 1st respondent's motor vehicle was to blame for the accident. The respondents did not call any evidence to counter this evidence. In our own appreciation of the evidence even on cross examination we do not think the appellant was even taken to task on the issue of 'sketch plan' or the point of impact. This is how evidence of cross-examination of the appellant was recorded;

> ***"The accident occurred at half past midnight. I was heading towards Nairobi. The tanker was heading towards Mombasa. I saw same on its lane as it approached about 50 m away. Suddenly it got into the road, it was hit on the head on the side not face on. The collision occurred off the road. We moved off the road on level ground hence my vehicle never overturned…"***

[12] In the absence of any evidence from the defence, we are persuaded there was preponderance of evidence by the appellant that amounted to a *prima facie* case and it required to be countered by the respondents. If the respondents had information that the impact of collision was in the centre of the road, we are persuaded under the provisions of **Section 112** of the Evidence Act, they had a responsibility to adduce that evidence so as to disprove the appellant and the police officer who produced the abstract form. See **KENYA POWER & LIGHTING CO LTD –VS – PAMELA AWINO OGUNYO** CIVIL APPEAL NO 315 OF 2012 where a Bench of this Court differently constituted had the following to say;

> ***"We note, in any event, that the appellant made various allegations in its statements of defence against the respondents. These included, inter alia, that the appellant was not the supplier of electricity in the stated region where fire damage took place; that the damaged crop was illegally planted in an area reserved for the appellant as a way-leave for its power lines and electric cables and that the respondents had failed to leave adequate space between the crops and electric poles so as to prevent the possibility of the crop being burnt in the event that a fire broke out. A party who asserts or alleges that certain facts exist has a legal burden to prove those claims – Section 107- 109 of the Evidence Act which place a burden of proof or what may be called evidential burden of proof on the party making the assertion. In JANET KAPHIPHE OUMA & ANOTHER V MARIE STOPES INTERNATIONAL KENYA (KISUMU) HCCC NO 68 OF 2007 Ali Aroni, J. Citing EDWARD MURIGA through STANLEY MURIGA V NATHANIEL D. SCULTER CIVIL APPEAL NO 23 OF 1997 had this to say on the said provisions of the Evidence Act;***
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> ***"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence"***

[13] It is not lost to us also that the facts in this case are different from those in the case of **Baker** (supra) that the Judge heavily relied on where Lord Denning had the following to say;

> ***"… On proof of the collision in the centre of the road, the natural inference would be that one or other or both were to blame. If there was on other evidence given in the case, because both drivers were killed, would the court, simply because both drivers were killed, would the court, simply because it could not say whether it was only one vehicle that was to blame or both of them, refuse to give the passenger compensation? The practice of the courts is to the contrary. Every day, proof of the collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence, the result must be the same. In the absence of any evidence enabling the court to draw a distinction between them, they must be held both to blame, and equally to blame"***

[14] There was no evidence that the drivers died, indeed the appellant was one of the drivers and there was no indication that the respondents were unable to adduce evidence of the 'sketch plan' because their driver had died. As aforesaid, the issue of the 'sketch plan' was not raised before the trial court but in the High court. In the circumstances we find this appeal has merit, the Judge erred by failing to consider the guiding principles in the Evidence Act, after the appellant had laid out a preponderance of evidence that formed a *prima facie* case in support of his claim.

[15] In the upshot we allow the appeal set aside the judgment dated 20th February, 2018 and uphold the decision of the trial court. The appellant shall have the costs of this appeal and also the High court.

Dated and delivered at Mombasa this 20th day of September, 2018.

ALNASHIR VISRAM

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR