IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), OKWENGU & SICHALE, JJ.A)

CIVIL APPEAL NO. 299 OF 2012

BETWEEN

MUMBI M'NABEA.....……..……..... APPELLANT

AND

DAVID M.WACHIRA …….....……RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mwera, J.) dated 28th November, 2011

in

H.C.C.C. NO. 800 OF 2005)

****

JUDGMENT OF THE COURT

This is an appeal against the judgment of the High Court (Mwera, J.) whereby the learned judge dismissed a claim by **MUMBI M'NABEA** (*herein the appellant*) against **DAVID M.WACHIRA** *(herein the respondent)* for special and general damages for injuries sustained by the appellant in a road traffic accident on the night of 20th June, 2003.

The appellant moved to court and in his further amended plaint dated 25th June, 2009, the appellant averred, inter alia, that on the date of the accident, he was driving his motor vehicle registration number KZY 257 along Thika Road when the respondent drove and controlled motor vehicle registration number KAM 145C in such a reckless, negligent and careless manner resulting into a violent collision with the appellant's motor vehicles. As a result of this accident, the appellant vehicle was damaged and he sustained serious injuries of permanent cord damage and permanent loss of power in both arms and legs.

In his short written statement of defence, the respondent admitted that the accident alleged occurred but denied liability and further claimed that the accident was wholly caused by and/or was substantially caused by the negligent driving of motor vehicle registration number KZY 257 by the appellant.

At the trial before the High Court, the appellant testifying as PW1stated that on the material night, he was driving along Thika road in the inner lane when the respondent's car overtook the appellant's vehicle, got into his lane and hit the left side of his passenger door. The appellant moved to the right lane to avoid

getting into the trench at which point he passed out. He was taken to the Kenyatta National Hospital and later moved to Nairobi Hospital. In support of his claim, he produced as exhibits treatment records and several receipts as proof for payment of the medical services.

On his part, the respondent denied that his car ever got into the appellant's lane. He explained that he was driving in his left lane when the appellant tried to get into the left lane. He tried to swerve to the left to avoid the accident but the appellant's car hit his guard rail at which point he lost control and his vehicle came to a halt landing on its roof.

We would like to point out that several witnesses testified. However, for the purposes of this appeal, we do not feel that replicating such testimonies will have a bearing on our final determination.

On the evidence, the High Court (Mwera J.) as he then was, found that the appellant had not proved his case on a balance of probabilities that the respondent was actually negligent and wholly responsible for the accident. In his own words: -

> ***The probable state of things is that both motor vehicles came to a halt on the left of the road. And that can only mean that the plaintiff's motor vehicle got in the defendant's left lane, hit the right side of that vehicle near the front wheel, then both vehicles went to the left coming to a halt there.***
>
> ***The end result here is that even as the court was left to consider the story of one person as against the other, it concludes that on the balance of probabilities, the plaintiff's motor vehicle got into the defendant's lane and the collision occurred.***
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> ***The Court could have been better assisted had this accident been witnessed by another person or persons to give independent evidence from that of the 2 litigants.***
>
> ***Or had the accident been investigated so that from the investigating officer's view point desirable with sketch maps availed, the court could make out a better picture of it all. There was no independent evidence to tilt the balance of probabilities this way or that way except what the court has concluded."***

The appellant being aggrieved by that decision preferred the appeal before us on some seven (7) grounds which were argued by learned counsel ***Mr. B.M Kairara*** on behalf of the appellant while ***Mrs. Githae*** appeared for the respondent. This being a first appeal we are enjoined to subject the evidence on record to a fresh scrutiny in order to reach our own conclusions thereon. In **Selle& Another -vs-Associated Motor Boat Company Ltd& Others [1968] EA 123**, it was held, *inter alia*, as follows: -

> ***"An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally …"***

We also bear in mind and gave allowance for the fact that the High Court had the advantage of seeing and hearing the witnesses testify.

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in **Peters -vs- Sunday Post Ltd [1958] EA 424**. In its own words: -

> ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide…"***

Although, as we have stated, the appellant raised seven (7) grounds, we believe this appeal turns only on one single issue: (1) Whether the appellant by preponderance of evidence proved on a balance of probabilities that the respondent was negligent and therefore wholly responsible for the accident. This is the issue for our determination

We shall consider this issue together with authorities and the respective submissions of counsel's in light of the evidence which was given at the trial before the High Court as outlined at the beginning of this judgment.

It is not, in our view, in dispute that the appellant and the respondent were involved in a road accident on the material night. The respondent indeed expressly admitted the same in his testimony before the trial court. It is also, in our view, incontestable on the basis of the documentary evidence adduced before the learned trial Judge that the appellant suffered injuries as a result of the accident. The appellant, however, disputes the finding of the learned Judge that he did not prove liability against the defendant on a balance of probability.

In our jurisdiction, the standard of proof in civil liability claims is that of *the balance of probabilities*. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. **Section 107(1)** of the ***Evidence Act,*** **Cap 80 Laws of Kenya** provides as follows:-

> ***"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."***

The above provision provides for the legal burden of proof. However, **Section 109** of the same Act provides for the evidentiary burden of proof and states as follows:-

> ***"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***

The position was re-affirmed by the Court of Appeal in **Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280** where it was held that:-

> ***"Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."***

In this case, the burden on the appellant before the trial court was to prove on the balance of probabilities that the respondent was negligent in his driving and therefore liable for causing the accident. In the appeal before us, the appellant allege that the respondent was negligent in his actions, the burden of proof would be on the appellant to prove that it was more probable than not that the respondent acted negligently and if this was done, the burden would have been discharged. If however, the appellant failed to do this, he would consequently not have succeeded in his claim. We think the latter scenario applies in this case.

Our own review and assessment of the evidence on record in this case, shows that the appellant and respondent admitted that they were both involved in the said accident. They blamed each other for being negligent and causing the accident. The appellant however did not offer any evidence at the trial to prove that the said accident was attributed to the negligence of the respondent only. The record also shows that both the appellant and the respondent admitted during the trial that the accident was never investigated by the police. In our view, we believe that an investigation report by the Police could have enabled the trial court to make an independent assessment on who was liable for the accident. Further, the contradictory

testimony of **P.C. No. 79448 Florence Kioko** (DW3) also militates against the appellant when she stated that there were several traffic accidents reported on the material night to but that the OB had no accident report involving the appellant's vehicle, registration No. KZY 257.

In the circumstances, we agree with the learned judge that in the absence of an independent witness who saw the actual events leading to the accident, the drivers of the two accident motor vehicles were possibly both to blame for the accident. In **Jackson Mutuku Ndetei -v- A.O. Bayusuf& Sons Ltd[NAIROBI C.A No. 6 of 2003] (UR)** this Court following the decision of **Baker -v- Willoughby[1970] EAAC 467,** stated as follows: -

> ***"To determine what caused an accident from the point of view of legal liability is a most difficult task. The question must be determined by applying common sense to the facts of each particular case. One may for example, find that as a matter of history, several people have been at fault and that if any one of them had acted properly the accident would not have happened and if a man had done what he omitted to do, the accident would certainly have been prevented. See Stapley-v-Gypsum Mines Ltd [1953] 2ALL ER 478."***

For the foregoing reasons, we find that the learned Judge was entirely correct in his finding that the appellant did not prove his case on a balance of probabilities. We therefore find no proper basis for interfering with his decision.

Consequently, it follows therefore that the other grounds of appeal on award of damages do not merit our consideration. In the result, we order that the appeal be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 22nd day of February, 2016.

P. KIHARA KARIUKI, (PCA)

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JUDGE OF APPEAL

H. M. OKWENGU

……..……

JUDGE OF APPEAL

F. SICHALE

……..…

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR