REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 165 OF 2013

MORRIS MAKAU MUTUA …… APPELLANT

VERSUS

JOSPHAT TIPANGU KOVULO ……..…… RESPONDENT

(An Appeal arising out of the judgment of M.K.N. Nyakundi Ag SPM delivered on 11th July 2013 in Kangundo Senior Principal Magistrate's Court Civil Case No. 238 of 2009)

JUDGMENT

The Appellant was the original Defendant in Civil Case No. 238 of 2009 at Kangundo Senior Principal Magistrate's Court, and has appealed against the judgment of the Hon M.K.N. Nyakundi which was delivered in the said suit on 11th July 2013. The learned trial magistrate found that the original Plaintiff in the said suit, who is the Respondent herein, had proved his case on a balance of probabilities and entered judgment against the Appellant. The Respondent's claim arose from an accident that occurred on 4th June 2009 at about 7.30 p.m along Tala-Machakos road involving motor vehicle registration number KAQ 886Q. The trial Magistrate found the Appellant 100% liable for the accident. He also awarded the Respondent Kshs. 50,000/= as general damages and Kshs. 3,200/= as special damages.

The Appellant has now moved this Court through a Memorandum of Appeal dated 6th August 2013, wherein he has raised the following grounds of appeal:

1. The learned trial magistrate erred in law and in fact by finding that the Respondent had proved that he was involved in the subject accident when evidence was adduced to the contrary.
2. The learned trial magistrate erred in law and fact in finding that the Respondent was involved in the accident without giving due consideration to the defence evidence or by totally misapprehending the defence evidence.
3. The learned trial magistrate erred in law and in fact by relying on treatment notes that had cancellations, were not stamped and were on a plain piece of paper, and by the evidence that the out-patient number 5353 on the treatment notes did not belong to the respondent.
4. The learned trial magistrate erred in law and in fact by failing to consider the evidence by the defendant witnesses disregarding the hospital register produced in court which showed that there was no accident reported on 4th June 2009.

5. The learned trial magistrate erred in law and in fact in finding the evidence by PW4 more credible than that of DW1 when the evidence on record showed otherwise.
6. The learned trial magistrate erred in law and in fact in disregarding the Appellant's evidence of the police officer, the occurrence book and revocation letter which proved that the Respondent was not involved in the alleged accident.
7. The learned trial magistrate erred in law and in fact in disregarding the fact that the Respondent tendered fraudulent documentary evidence to prove her involvement.
8. The learned trial magistrate erred in law and in fact in not finding that the Respondent failed to rebut any of the pleaded particulars of fraud as per the Appellant's amended defence.
9. The learned trial magistrate erred in law and fact in holding the Appellant 100% liable in view of overwhelming evidence showing that the Respondent's case was based on fraudulent documents.
10. The learned trial magistrate erred in fact and law in not basing his findings on evidence adduced or the applicable law.
11. The learned trial magistrate erred in law and fact in awarding general damages while the Plaintiff had failed to prove his case on a balance of probability.

The Appellant is praying for orders that his appeal be allowed, the judgment of the trial magistrate be set aside and proper findings be made, and that the suit against the Appellant be dismissed with costs.

The Facts and Evidence

The brief facts of this appeal are that the Respondent instituted a suit against the Appellant by filing a plaint dated 17th August 2009. His claim was that on or about 4th June 2009 at about 7.30 p.m along Tala-Machakos road near Koma, the Appellant's driver and or agent carelessly and negligently drove motor vehicle registration number KAQ 886Q Toyota Matatu, such that he caused it to lose control, veer off the road and overturn. The Respondent gave particulars of the Appellant's negligence in this regard.

Further, that as a consequence, the Respondent, who was a passenger in the said motor vehicle, sustained serious bodily injuries. The particulars of injuries were pain and tenderness on the back, blunt head injury and pain tenderness on the chest worsened by breathing and speaking. The Respondent claimed special damages of Kshs. 3,200/=, general damages for pain, suffering and loss of amenities, and costs of the suit.

The Appellant filed a defence dated 9th September 2009 which was amended on 19th July 2011. In his defence he denied the allegations of the accident occurrence, that the Respondent was a passenger of the said motor vehicle, and the particulars of negligence. The Appellant averred that in the alternative, any such occurrence of the accident was caused solely and/or substantially contributed to by the negligence of the Respondent.

The Appellant also stated that the Respondent's claim was based on fraud and misrepresentation that he was involved in an accident and got injured, and gave the particulars thereof. The Appellant further denied the injuries and damages particularized in the Respondent's Plaint.

The Respondent called five witnesses during the trial. PW1 was PC Francis Kisavi who testified that he is a police constable attached to Kangundo police station traffic section. He stated that a report was made on 4th June 2009 of an accident at 7.30pm involving motor vehicle KAQ 886 Q which was being driven from Tala to Machakos. Further, that the investigating officer was PC Karisa who visited the scene of the accident together with Sergeant Malika.

PW1 stated that he had the file on the accident with him, and according to him the driver of the motor vehicle lost control and rolled due to speed. He testified that eight passengers were injured, and that the Respondent was among the said persons, and was in a list of those who were involved in the accident in a letter from Kangundo Police Station to Kangundo MOH that referred the said persons for treatment. He produced the said list and letter as exhibit 2. He stated that the Plaintiff had recorded his statement on 5/6/09. PW1 also produced the police abstract and P3 form as exhibits.

PW2, Corporal Fredrick Maina, stated that he undertook an investigation into the accident that occurred on 4th June 2009 after receiving an allegation of fraud from Kairu Advocates. He testified that he recorded the statements of the Respondent, clinical officer, record officer and the investigating officer of the accident involving motor vehicle KAQ 886Q, and ascertained that the Respondent was in the said accident. He produced his letter on the same and the statements he recorded as exhibits.

PW3 was the Respondent, who affirmed that he had been involved in the accident the subject matter of the suit on 4th June 2009, and that the motor vehicle KAQ 886 Q which was at high speed lost control. He stated that he was hurt on the left side of the head and the left leg, and reported the accident at Kangundo Police Station. He also stated that he was given a letter and treated at Kangundo Hospital on 4th June 2009 and discharged immediately.

PW4 was John Mutua, a clinical officer at Kangundo District hospital, who on his part stated that he had treated the Respondent on 4/6/09 after an accident. He said that the Respondent had injuries on the left side of the head and lower limb and was treated for soft tissue injuries. He reiterated that he was on duty on that date and produced the treatment card as an exhibit.

The last prosecution witness, PW 5, was Dr. C. Mwangi, who stated that she was a doctor at Kenyatta National Hospital and that she examined the Respondent on 9th June 2009. Upon examination she found that the Respondent had a partial healed bruise on the left temporal scalp and tenderness on the left thigh. PW5 produced her report as an exhibit.

The Appellant called two witnesses during the trial. DW1 was Gladys Kwamboka Nyangoto who testified that she worked at the health records and information department at Kangundo hospital, and that the hospital records did not have the names shown by PW1 as victims of the accident. Further, that based on their records, the Respondent was not treated at Kangundo hospital and that his claim is fraudulent.

DW2 was Chief Inspector Rotich attached to Siaya Divisional Traffic, and he testified that the name of the Respondent was not captured in the occurrence book and the police file, and that nobody visited the hospital according to the records. He testified that Directline Insurance Company asked him to investigate the accident, and his finding was that the Respondent's claim was fraudulent.

The Issues and Determination

The Appellant and Respondent canvassed this appeal by way of written submissions. The Appellant's Advocates, Kairu & McCourt Advocates filed submissions dated 27th October 2015. The Appellant argued therein that DW2 had confirmed that the Respondent's names were not registered in the hospital on 4th June 2006. Further, that the trial court should have considered the OB as material evidence in determining the case as espoused in sections 35, 36 and 38 of the Evidence Act. He therefore stated that the case was not proven on a balance of probability.

The Appellant also argued that the award of 100% liability was excessive in light of evidence that the Respondent was not involved in the accident. The decisions in **Kemfro Africa Ltd t/a Meru Express**

Service vs A.M Lubia & Another, (1987) KLR 27, **Karanja vs Malele (1983) KLR 142, Berkeley Steward Ltd, David Coltel & Jean Susan Colten vs Lewis Kimani Waiyaki, (1982-88) I KAR 101-108** were cited for the position that where there is no evidence as who is to blame for an accident, the liability should be apportioned equally.

The Respondents Advocates, Mutunga & Company Advocates on their part filed submissions on 12th November 2015. It was submitted therein that there was adequate evidence proving the Respondent was a victim of the accident, and that the alleged fraud was not proven by the Appellant.

The Respondent stated that PW2 testified that after investigations, he had found that the Respondent was a genuine victim of the accident in question. He was of the opinion that there was no defence witness who was called to testify in rebuttal to the plaintiff's evidence as regards liability. He termed DW1 and DW2 as ghost witnesses as they were not mentioned in the proceedings.

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellants are contesting the issues of liability and quantum of damages. The fact that an accident occurred on 4th June 2009 involving motor vehicle registration number KAQ 886Q is not disputed by the parties. Likewise, the Appellant did not dispute that he is the owner of motor vehicle registration number KAQ 886Q, and that the said vehicle was being driven by his agent at the time of the said accident. The issues in dispute and for determination are firstly, whether the Respondent was involved in the said accident; if so, whether the said accident was caused by the negligence of the Appellant; and lastly, whether the Respondent is entitled to damages and the quantum.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661 , Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424.** The duty of this court as the first appellate court is therefore to examine and re-evaluate the evidence in, and findings of the trial Court, and to reach its own independent conclusion as to whether or not the findings of the trial Court as to liability and quantum of damages should stand.

On the first issue as to whether the Respondent was involved in the accident that occurred on 4th June 2009 involving motor vehicle registration number KAQ 886Q, PW1 and PW2 testified that he was one of the persons involved in the said accident. They produced in evidence a list of persons involved in the accident referred by Kangundo Police Station to Kangundo Hospital for treatment and a police abstract showing that the Respondent was involved in the accident. The Appellant brought two witnesses to rebut this evidence, namely DW1 and DW2, by showing that there was no record of the Respondent receiving treatment at Kangundo hospital, or no record of the accident in the Occurrence book (OB) at the police station.

In light of the conflicting evidence brought by the Appellant and Respondent on this issue, this Court is of the view that the evidence by PW1 and PW2 appears to be more credible for various reasons. These are that PW1 and PW2 were both stationed at the police station where the accident was reported, they had in their custody and produced the police file that had the results of the investigation to the accident, and PW2 in addition took statements from the persons who investigated the accident and who treated the Respondent, and confirmed that the Respondent was indeed involved in the said accident.

DW1 and DW2 were on the other hand neither at the scene of the accident, nor did they receive any report as regards the same to be able to conclusively state that the Respondent was not involved in the same. For these reasons it is the finding of this Court that the trial magistrate did not err in relying on the

evidence of PW1 and PW2 in finding that the Respondent did prove on a balance of probabilities that he was involved in the said accident.

On the issue of liability, the central feature for one to be liable for negligence is that one has to breach a duty to take care, and it is upon the claimant to lead either direct or circumstantial evidence to establish the facts of a breach of duty of care. In the present appeal the Respondent claimed that the Appellant's agent was driving in high speed and therefore as a result was not able to control the Appellant's motor vehicle resulting in the accident. This was corroborated by the evidence of PW1 who had details of the investigations of the accident. The Appellant on the other hand did not bring any evidence to rebut this allegation or show any part played by the Respondent that led to the occurrence of the accident.

The Appellant in particular did not dispute the fact as stated by the Respondent and PW1 in their evidence that motor vehicle registration number KYD 031 overturned while being driven on the Tala –Machakos Road upon reaching Koma corner. The only inference that can be drawn in the circumstances which is a likely possibility, is that the Appellant's agent was not able to control the said motor vehicle due to the speed the vehicle was being driven, since if it had been driven at low speed the vehicle would most likely not have overturned. The Respondent therefore proved liability and the learned magistrate did not err in apportioning 100% liability to the Appellant in light of the foregoing reasons.

On the last issue of whether the Respondent is entitled to damages, this Court as the appellate court will only interfere where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5)**.

The Respondent called two witnesses, PW4 and PW5 who testified as to the injuries that he suffered as a result of the accident. In particular, PW5 in her medical report dated 9th June 2009 stated that the injuries sustained by the Respondent were back pain, right side headache and chest pain worsened by breathing and speaking. Other than disputing that the Respondent was not involved in the accident, the Appellant did not call any other evidence to show that these injuries were not suffered by the Respondent. In addition the evidence of DW1 and DW2 cannot be relied upon on this fact, as they never examined the Respondent.

The Respondent in his submissions before the trial court relied on the decision in **Patrick Muiruri Nduati vs Laura Njambi Murigi, HCCC No. 2594 Nairobi** where general damages of Kshs 70,000/= were awarded in 1994 for haematoma to the right parieatal region, a deep cut on the right wrist, right leg and thorax. The Appellant on the other hand relied on **Sokoro Saw Mills Co Ltd vs Grace Nduta Ndungu, Nakuru HCCA No. 9 of 2003** where the Appellant therein suffered soft tissue injuries to the right hip and the back, and an award of Kshs 30,000/= as general damages was made in 2006.

The trial magistrate relied on the latter decision in his award of Kshs 50,000/= as general damages, while also taking inflation into account. I see no reason to interfere with the trial magistrate's award as he rightly noted that the injuries in the decision relied upon by the Respondent were much more severe than those in the present case, and as inflationary factors are a relevant factor to be taken into account in the award of damages. The Respondent also produced receipts as proof of the special damages awarded of Kshs 3200/=. The first receipt dated 9th June 2009 was for Kshs 3,000/- for the medical report fees (Plaintiff's exhibit "14b"), and the second dated 5th October 2009 for Kshs 200/= evidencing payment for the accident abstract (Plaintiff's exhibit "15").

Arising from the findings stated herein, I accordingly dismiss this appeal and uphold the decision of the trial magistrate. I award the costs of the appeal costs to the Respondent.

It is so ordered.

DATED AT MACHAKOS THIS 23rd DAY OF DECEMBER 2015.

P. NYAMWEYA

JUDGE