REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HCCA NO.43 OF 2014

MAASAI MARA SERVICE STATION.....1ST APPELLANT

STEPHEN GITHUI WAMBUI.....2ND APPELLANT

VERSUS

MARY WAIRIMU NYUGUTO.....1ST RESPONDENT

WANGUI MWANGI.....2ND RESPONDENT

(Appeal from the Judgment of Hon.Wilbroda Juma Chief Magistrate in Nyeri CMCC NO.61 of 2013 of 11th June 2014).

J U D G M E N T

The respondents herein filed a suit against the appellants in Nyeri CMCC. No 61 of 2013 seeking orders: -

1) General Damages for pain and suffering and loss of amenities.

2) Special damages of Kshs.397,194/-

3) Costs and interest of the suit.

4) Any other/further relief that the court may deem fit.

On 11th June, 2014, the learned Chief Magistrate granted the following orders:-

i. Judgment entered against the defendants in favour of the plaintiffs

ii. Defendants jointly and severally liable for the accident at 100%.

iii. General damages for 2nd plaintiff-Kshs.500,000/-

iv. Special damages for 2nd plaintiff Kshs.13,988/-

v. General damages for 1st plaintiff Kshs.1,800,000/-

vi. Special damages for 1st plaintiff Kshs.383,206/-

vii. Each plaintiff awarded costs of the suit, and interest on damages and costs from date of the judgment.

The appellants were aggrieved by the judgment and filed this appeal setting out 8 grounds of appeal. These in summary are that the trial magistrate erred in law and fact in failing to appreciate that failure to produce the police abstract by the plaintiffs meant that they had failed to prove their case, that she considered irrelevant matters in arriving at the decision in favour of the respondents, that she failed to find that the pleadings and evidence could not sustain an award for damages, that she awarded manifestly excessive damages against cited precedent.

Counsel agreed to dispose of the appeal by way of written submissions.

According to the plaint dated 13th December 2011, the respondents were, on 10th March 2010 walking along the Nairobi/Nakuru Road at about 6.30pm when the appellant's driver/servant/agent drove their motor vehicle Reg. No. KAZ 226L so negligently that it lost control, veered off the road and hit them causing them severe bodily injuries, damage and loss.

The 1st respondent sustained injuries viz:-

1. Fractures to the radius and ulna bones of left forearm and left femur.
2. Compound fractures of the left thumb and right femur.
3. Friction burns of the left leg.
4. Loosened 1st incisor tooth, left upper jaw.

1st respondent incurred special damages:-

1) Medical report –	Kshs.3000/-
2) Consultation with Dr.Muchai	Kshs.1500/-
3) Medical expenses	Kshs.300,106/-
4) Airlift to Eldoret	Ksh. 5,500/-
5) Taxi services	Ksh. 73,100/-
	Ksh. 383,206/-

The 2nd plaintiff sustained injuries:-

1. Fracture of the pelvis involving the left superior and inferior ischiopubic ramii.
2. Soft tissue injury to right ankle
3. Bruises on back of both hands and face.
4. Cut wound on right eye brow.

She incurred special damages of:-

1) Medical report	Ksh. 3000/-
2) Tianshi health products	Kshs.10,988/-
	Ksh. 13,988/-

In their defence the 1st appellant denied being the registered owner of the culprit motor vehicle, denied that any accident occurred as alleged, and without prejudice placed the blame the sole blame on the appellants for the accident put them to them to strict proof of all the claims.

I have perused the Record of Appeal, submissions by appellants counsel.

I did not find the submissions by counsel for respondents although he is on record stating that he had filed his submissions as well.

From the appeal the issues for determination appear to be:-

1) Whether the plaintiffs/ respondents proved their case to warrant the orders granted.

2) Whether the damages awarded were manifestly excessive to warrant interference by this court.

In dealing with the appeal the court is guided by the principles laid down in **Selle -Vs- Associated motion Bear Company Ltd (1968) EA** – that the duty of the 1st appellate court is to analyze the evidence on record give it a fresh assessment and draw its own conclusions, always alive to the fact that it never saw or heard the witnesses. It is also settled that an appellate court will not interfere with the finding of fact of the trial court unless that finding is based on no evidence, or the trial court acted on wrong principles in reaching its decision.

The 1st plaintiff/respondent **Mary Wairimu Nyuguto** testified that on the material date she was at "87" along Nairobi/Nakuru Highway. She was on the right side waiting for motor vehicles to pass so she could cross. All of a sudden she heard the sound 'VROOM' of a motor vehicle and the next moment she was on the ground. She lost consciousness and found herself in hospital. She learnt later that there had been a power explosion at the time of the accident. She also learnt later that the motor vehicle involved was KAZ 226L. She was in the company of her daughter, the 2nd plaintiff/respondent whom she learnt had also sustained injuries.

Except for the police abstract and the medical reports, the production of the receipts in a bundle demand stating her expenses were not objected to by the defence. She blamed the driver of the motor vehicle for everything.

On cross-examination she said it was about 3.30pm. That she had stopped in the middle of the road waiting to cross. She also said that the flyover for pedestrians to cross the road was about 50m away from where she was waiting to cross the road. She said she saw the lorry coming from a distance. She could not explain how it reached her. That there were no other persons at the stage at the time of the accident and after it happened she lost consciousness and found herself in hospital.

Margaret Wangui Mwangi testified that on the material date about 6.30pm she had just alighted from a matatu at Uthiru 87 stage. As she waited for the matatu to move, she heard a loud bang! and then lost consciousness only to find herself in a hospital in Nakuru the following day.

On cross-examination she said the road was not very busy but there was a flow of motor vehicles. She said she saw the motor vehicle after she alighted but could not tell whether it was in a line of motor vehicles. She said she learnt that the loud bang was an explosion. She could not remember how the accident had happened.

Dr.Muchai Mbugua testified that he examined the 1st plaintiff/respondent on 14th November 2011. He found that;

a. The compound fracture of the right femur was still painful and she was using a walking frame.

b. Stiffness of left thumb

c. Loose incisor tooth

d. Multiple scars

e. 30% disability

f. She had closed her business

He also examined the 2nd plaintiff/respondent. He found that she had healed bruises on both the backs of her hands.

The defence did not call any witnesses.

In their submissions in the lower court counsel for defendants submitted that there must have been a crowd which surged onto the road following the explosion. They also submitted that no eye witness was called to testify on how the Road Traffic Accident happened as neither plaintiff saw how it happened. That no evidence was tendered on the defendant driver's alleged negligence, and since no police abstract was produced, the plaintiff's testimony could not be relied on. In addition, that no charges were brought against the 1st defendant's driver. Their position was that the plaintiffs must have moved into the path of the motor vehicle.

They referred the magistrate to:-

1. **NBI HCCA 680/2007 Julius Omolo Ochanda & Joyce Atieno Muga -Vs- Samson Nyaga Kinyua (2010) eKLR** where Justice H.M. Okwengu followed the Court of Appeal decision in **Civil Appeal 254/1996 –Patrick Mutie Kamau &Another -Vs- Judy Wambui Ndurumo** in which the Court of Appeal held the view that a pedestrian also owes a duty of care to other highway users to move with care and abide by the Highway code.

2. They also relied on **HCC (Kisumu) Peter Okello Omondi –Vs- Clement Ochieng (2006) eKLR** where Justice Warsame was of the same view that a pedestrian owes a duty of care to other road users and must move with care not to endanger their safety.

Counsel for the plaintiffs submitted that although the 2nd defendant had recorded a statement describing how the Road Traffic Accident had happened he never showed up to be cross-examined on the same hence the plaintiff's testimony of how the accident had happened was unchallenged and hence it was a case of **res ipsa loquitor**. That a prima facie case of negligence had been made out and the defendant's statement corroborated the plaintiffs' case that they were innocent bystanders that the defendant witness's attempt to blame the explosion/ a motor cyclist who caused him to lose control was untenable as that statement corroborated the plaintiffs case.

So, what evidence is available before this court that an accident happened between the 2 respondents and the motor vehicle Reg. No. KAZ 226L?

It is not disputed that neither of the two respondents saw what hit them. Neither of them can say with any certainty that it was the motor vehicle Reg. No. KAZ 226L that hit her. Each of them learnt about the identity of the motor vehicle that allegedly hit her from third parties

who were not witnesses in the case.

What is not in doubt is that each of them sustained injuries that are attributable to a Road Traffic Accident.

It is also a fact that no eye witness was called to testify as having witnesses the accident. Not even the police appeared to testify and no police abstract was produced to corroborate the allegation that a Road Traffic Accident happened between the 2 respondents and the motor vehicle driven by the 2nd appellant.

The 1st respondent told the court that she came to learn later that she had been hit by KAZ 226L. That source of the information did not testify – the question then is which are these facts that speak from themselves?

From the evidence given before the learned magistrate, each of the respondents heard a bang and found herself in hospital the following day. The respondents made reference to the statement by the 2nd appellant submitting that the said statement corroborated their case.

I have perused the said statement. The driver's story does not corroborate the respondents' story his statement was that there was an explosion, and as a result a motor cycle that was slightly ahead of him carrying 2 pillion passengers lost control and got into his lane forcing him to swerve to the right, which is towards the middle of the road and where there is a concrete wall. Since he could not swerve far enough, the cyclist was hit by the left bumper of his motor vehicle. The cyclist and his 2 passengers fell down. He stopped but did not alight because a crowd had gathered and he sensed danger and left. The following morning he reported at Kabete police station. Some people went there to complain that their relative had been hit by his lorry but had no registration number.

In the plaintiffs' list of documents was a police abstract dated 14th September 2011 issued to the 1st plaintiff showing that she was involved in a Road Traffic Accident along Nairobi/Nakuru Highway on 10th March 2010 at 6.30pm with motor vehicle Reg. No. KAZ 226L.

The name of the owner of the motor vehicle is stated as Stephen Githui Wambui.

The accident is indicated as pending under investigation. The same indicates that the Road Traffic Accident was reported on 11th March 2010 vide OB IAR (F) 26/10.8. These 2 pieces of evidence were not subjected to cross-examination. What is the evidential weight of these pieces of evidence?

In her judgment the learned magistrate found that the plaintiff's case was proved because the evidence given by the plaintiffs was not controverted by any evidence from the defence.

In **Nandwa -Vs- Kenya Kazi Ltd (1988) eKLR** the Court of Appeal cited from **Hendusian -Vs- Henry I.Jentins & Sons (1970 AC 282 e301** where the judge stated;

> **In an action for negligence the plaintiff must allege, and has the burden of proving that the accident was caused by negligence on the part of the defendants. That is the issue throughout to the trial, and in giving judgment at the end of the trial, the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if not so satisfied the plaintiff's action fails. The formal burden of proof does not shift.** (emphasis added)
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> **But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference.** (emphasis mine) **In this situation there is said to be an evidential burden of proof resting on the defendants…...**

In the present case it is clear from the testimony of the 2 plaintiff/respondents that they were involved in an accident, they sustained injuries but they do not know, did not know whether it was the 2nd defendant/appellant or another person. They did not also know how it happened. Hence they cannot claim to have established a set of facts from which it can be in confirmed that they proved the claim that an accident happened between them and the alleged motor vehicle.

It was their burden to establish-

1) That a Road Traffic Accident occurred

2) It occurred between them and the said motor vehicle

3) That it was due to the negligence of the 2nd defendant/respondent.

Except that they sustained injuries there is no evidence it was caused by the 2nd defendant/respondent. The respondents also attempted to lay blame on the plaintiff/applicants in their submissions which the learned magistrate dismissed. Those submissions were not founded on any evidence.

He who alleges must prove –see also **Kirugi & Another -Vs- Kabuya & 3 others (1987) KLR 347**. There are also the clear provisions of Section 107 of the Evidence Act, Cap 80 Laws of Kenya.

To come back to the issue of the police abstract it was necessary to call the maker to verify the information in that document. It alleged a report was made. It is evident it was not made by either of the plaintiffs – so who made it, who gave the registration of the motor vehicle – what was the outcome of the investigations, who was to blame for the Road Traffic Accident- clearly what is on that document needed to be subjected to the test of cross examination on its contents.

Of course it cannot be said that without the Police Abstract there is no evidence of an accident. I have no reason to disagree with the Judge in **Peter Karithi Kimunya –vs- Aden Guyo Haro (2014) eKLR** that failure to produce a police abstract **per se** should not be fatal to the plaintiff's case, however in this case **the police abstract carried the evidence for this case** and the maker needed to appear and to testify to the issues.

The plaintiffs chose not to call the police and hence ended up with a case missing the evidence that could have made their case.

I am therefore persuaded that on a balance of probabilities the plaintiff/respondents did not prove that there was a road traffic accident between them and the defendant/appellants' motor vehicle.

On the issue of damages- in the lower court the 1st plaintiff had sought General damages of Ksh. 2,500,000/- relying on-

1) Joseph Musee -Vs- Julius Mbogo Mugi, Karimi Charles Kamanda, Moses Khaemba, Richard Mururia Bariu- (2013)eKLR

2) James Njau Kariuki –Vs- Mary Goreti Wakibwibwi & another (2007)eKLR

The defence proposed the sum of Ksh. 450,000/- subjected to 50:50 contributory negligence.

For the 2nd plaintiff –she sought the sum of Ksh. 800,000/-.

She relied on:-

Edward Mzamuli Katana -Vs- CMC Motors Group (2006) eKLR

Margaret Babastu -Vs- Juliet Mwakio HCC 424/1989

Simon Kabali & another -Vs- Zipporah Chege (2012) eKLR.

The defendants proposed Kshs. 250,000/= subjected to 50:50 relying on **Joyce Wanjiru Kamau -Vs- Kenya Canvas Ltd & another HCC360/1989**

Bildad Mwangi Gichuki -Vs- TM-AM Construction Group (Africa) HCC 1617/98.

I have reviewed the submissions and authorities and the medical reports supporting the claims. It is settled that no award of damages can restore a plaintiff the state he or she was before the accident. It is meant to compensate for the pain, loss and damage suffered. The ward should neither be too low nor too high, and the court will be guided by precedent with regard to the appropriate award. At the end of the day it is judicial discretion depending on the circumstances of the case. I find no reason to disturb the awards made by the learned magistrate as they were not made on wrong principles neither would they have been excessive in the circumstances.

Nevertheless, I do find that the plaintiffs/respondents did not prove their case on a balance of probabilities to warrant the awards against the defendant/ appellants. The appeal succeeds. The judgment and decree of the subordinate court are set aside. The appellants will have costs of this appeal and the case below.

It is so ordered.

Dated, delivered and signed at Nyeri this 28th day of Sept 2018

Mumbua T. Matheka

Judge

In the presence of:

Albert

Wambui Mwai for JK Kibicho for appellant

Nderi for respondent