REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 85 OF 2013

1. LOCHAB BROTHERS LTD

2. JOB MUSUMBA MALAVI.....APPELLANTS

VERSUS

JOHANA KIPKOSGEI YEGON.....RESPONDENT

(An appeal from the Judgment/Decree of the Resident magistrate Hourable R. Aganyo dated 16th May 2013 in Nakuru Chief Magistrate's Court Civil Case No. 274 of 2012

JUDGEMENT

1. This appeal arises from the judgment of the trial Magistrate whereof the appellants' driver and owner of motor vehicle Registration No. KAL 665K were held wholly to blame for an accident that resulted to injury to the respondent a pedal cyclist and who had sued in the trial court for compensation for the injuries he sustained. He was awarded a sum of Kshs.600,000/= in general damages for pain and suffering and Kshs.3,000/= in special damages.

2. The appellants in their grounds of appeal fault the trial magistrate both in law and facts and the grounds that the findings were against the weight of evidence and that the Respondent did not prove his case to the required standard, on a balance of probability.

It is a further ground of appeal that the trial Magistrate failed to appreciate the totality of the evidence before her and erred in not considering the appellants submissions and authorities relied upon in their submissions. The appellants have urged that the damages awarded for the injuries sustained by the Respondent are inordinately high and excessive.

3. This is the first appellate court. It is its duty to re-consider and re-evaluate the evidence tendered before the trial court. In doing so, the court must warn itself that it neither saw nor heard the witnesses testify. It should be cautious not to interfere with the findings unless they are based on no evidence, or on misapprehension of the evidence unless it is shown that the magistrate acted on wrong principles of law in reaching his conclusions. See **Selle & Another -vs- Associated Motor Boat Co. ltd & Another EA 123 Page 126 and Mwanasokoni -vs- Kenya Bus Services Ltd and Others (1982-88) I KAR 278.**

4. In the statement of claim dated 10th March 2012 and filed on the 13th March 2012 the Respondent stated that he was pedal cycling along the Egerton – Njoro road on the 15th December 2011 when the appellants motor vehicle registration No. KAL 665K negligently and violently knocked him from the rear from which impact he sustained serious injuries. He stated the particulars of negligence and blamed the driver of the vehicle.

5. The appellants denied ownership of the vehicle and that the 2nd appellant was an agent or authorised driver of the 1st appellant, and further denied occurrence of the accident and generally a general denial in their defence. In the alternative, the appellants raised a defence of contributory negligence against the Respondent.

6. Upon hearing the parties, the trial magistrate made findings that there was sufficient evidence to link the motor vehicle to the accident by way of the police abstract and proceeded to award general and special damages in compensation for the injuries sustained by the Respondent.

7. **The Respondent's evidence.**

PW1 was the Respondent Johanna Kipkosgei Yegon. His evidence before the trial court was that the accident happened around 6.00p.m. when he was riding a bicycle on the Njoro-Mau road when he was hit from behind by a lorry, that he lost consciousness and regained consciousness after a month of treatment at Nakuru Provincial Hospital where he was admitted. He produced a police abstract that stated the accident vehicle as the appellants vehicle KAL 665K and records from Kenya Revenue Authority confirmed ownership as stated above.

Upon cross examination, the Respondent stated that he was cycling ½ metre off the road, that the vehicle was over speeding and it hit him with the front left on the left side of the road. It was his testimony that the bicycle carrier was damaged by the impact that threw him off the bicycle.

8. **PW2 was CPL Samuel Sigei,** a police officer from Njoro police station where the accident was reported. He testified that he received information of a hit and run accident involving a pedal cyclist and a lorry heading to Nakuru from Egerton and details of the lorry were given by the unnamed caller, that the said lorry and driver were arrested near Eveready Factory Nakuru and together with the driver they visited the Respondent at the Provincial General Hospital Nakuru where they found him seriously injured. He testified that he did not get any independent witnesses to the accident. He did not produce the investigation file or report in court. Nevertheless he told the court how the accident occurred as narrated to him by his fellow officers who did not attend court to testify.

9. **The Appellants case** was urged by the 2nd Appellant who was the driver of the alleged accident lorry KAL 665K on the material date. He denied that his vehicle was involved in an a accident and that he was arrested at Eveready.

10. **<u>Analysis of Evidence</u>**

I have considered the parties written submissions before the trial court and in this appeal and the evidence by both the Respondent, his witnesses and the 2nd appellant.

The appellants vehemently deny that their vehicle was involved in an accident on the material date and that there was total lack of evidence linking the vehicle to the accident. It is their submission that no eye witness testified and the police officers evidence (PW2) was based on insufficient information received from the public that the appellants lorry had caused the accident as no statement were recorded by the informants.

11. The issues that arise from the above evidence in my view are:

(1) Whether the appellants vehicle Registration No. KAL 665K was involved in the accident on the 15th December 2011 involving the pedal cyclist, the Respondent.

(2) Whether the evidence on record is sufficient to conclude that indeed an accident occurred on the material date and time involving the cyclist and the lorry.

(3) If the answer to (1) and (2) above is in the affirmative, which of the parties ought to be held

liable in negligence or whether both the 2nd appellants and the Respondent contributed to the occurrence of the accident, and if so, to what percentages.

(4) Quantum of damages.

12. I have perused the trial magistrates judgment. I must state that the said Magistrate did not attempt to analyse the evidence on record on the issue of the causation of the accident or negligence. She dealt at length on the injuries and *quantum* of damages after making a sweeping and unsupported statement that:

"the plaintiffs side submitted that the 2nd defendant is fully liable for the accident to the extent of 100% and the defendant was their authorised driver. I agree as there was sufficient evidence before court linking vehicle KAL 665K to the accident and the police abstract."

13. With respect to the learned Magistrate, that conclusion is devoid of a serious interrogation and analysis of the evidence. None is demonstrated. It is not enough to agree or disagree with a party's submissions. Reasons for such findings ought to be stated.

To that extent I agree that the Learned Magistrate failed to give reasons in support of the judgment pronounced on the 16th May 2013.

14. The Respondent testified that he was hit from the rear and that the lorry was speeding. It is not clear how he determined that the lorry was speeding yet it was behind him. There was no eye witness to the accident, nor were there independent witnesses who could have shed light on how the accident occurred. Other than some alleged members of the public who allegedly made a report to the police and gave details of the lorry, no direct evidence was tendered.

It is unfortunate that the investigating officers from Njoro police station failed to attend court to testify on their findings.

PW2, the police officer only produced the police abstract. His evidence of the causation of the accident was mere hearsay. He did not have the police file with him. His evidence was of no evidential or probative value to say the least.

15. The alleged accident vehicle was not taken for examination to confirm whether or not it could have hit the cyclist or its roadworthiness. That would have confirmed appearance of dents on the left front alleged to have hit the respondent and or pre-accident defects.

In **HCCC Case No. 33 of 2004 Mary Wangui Kimani -vs- Gilgil Telecommunications Industries Ltd (20007) e KLR** in very similar circumstances a pedestrian was hit by a hit and run vehicle. In the present case, the investigations if done the report was not availed to the court. No eye witnesses or even any member of public offered their testimony to the court.

It was around 6.00p.m. when the alleged accident occurred. The respondent other than stating that the vehicle hit him, he could not identify it as it was behind him nor could he state the speed it could have been driven at, and worse still, he did not prove the particulars of negligence stated in in plaint.

16. **In C.A. No. 118 of 2020 David Kajogi M'mugaa -vs- Francis Muthoni (2012) e KLR,** the court discussing the issue of causation and referring to the case **Statpack Industries -vs- James Mbithi Munyao Civil Appeal No. 152 of 2002 Justice Alnashir Visram** (as he then was) stated:

"Coming to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a casual link between someone's negligence and his injury the plaintiff must adduce evidence from which, on a balance of probability a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury** perse **is not sufficient to hold someone liable for the same."

17. The above passage has very sound jurisprudence on the issue of causation and link of a person's injury to an accident.

It is evident from the evidence before the trial court that the Respondent could not link the alleged accident vehicle to the accident and the injuries. Prove must be tendered. No evidence whatsoever was adduced to link the two. It is therefore evident that the trial Magistrate failed to see that no link was established by evidence of the respondents injuries to an accident involving the defendants vehicle.

18. As stated before in this judgment, the police officers from Njoro police station failed in their duty to adequately investigate the accident to find out the vehicle details that had knocked the respondent. Their failure to even produce the investigation report and police file smacks of serious lack of interest in their work which unfortunately has forced me to come to the unenviable conclusion that no sufficient evidence was tendered to connect the 2nd appellant, the driver of the alleged accident motor vehicle Registration KAL 665K to the accident on a balance of probability.

As a result, the appeal is found to be meritorious I proceed to set aside the trial magistrates findings and conclusion on liability and substitute it with a pronouncement that the Respondent failed to prove on the required standard that the appellants motor vehicle caused the accident and therefore not liable in negligence and consequential damages.

19. The trial Magistrate awarded the respondent Kshs.600,000/= damages for pain and suffering for the injuries he sustained. I have considered the said injuries.

I am satisfied that the trial court considered the principles enunciated in the case **Kemfro Africa Ltd t/a Meru express Services -vs- A.M Lubia & Another (1987) e KLR 27** on the assessment of damages. Nothing has been placed before me by the appellant to demonstrate that the court took into account irrelevant factors, or left out any relevant factor, nor inordinately high as to be an erroneous estimate of the damages.

Had the appeal not succeeded, I would have upheld the damages awarded by the trial court.

20. In the premises, the appeal is meritorious and is allowed. The trial Magistrate's judgment on liability is set aside and substituted with one that the Respondent failed to prove to the required standards his case against the appellants on a balance of probability. It follows that the case before the trial court is dismissed with costs to the appellants. The costs of this appeal shall be paid by the Respondent.

It is so ordered.

Dated, Signed and Delivered this 20th Day of April 2017

J.N. MULWA

JUDGE