David v Vikash Enterprises Ltd & another (Civil Appeal E106 of 2023)
[2024] KEHC 9974 (KLR) (Civ) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9974 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E106 OF 2023

S MBUNGI, J

JULY 30, 2024

BETWEEN

JOHN BWIKA DAVID ..... APPELLANT

AND

VIKASH ENTERPRISES LTD ..... 1ST RESPONDENT

BENSON MUSYOKA MAINA ..... 2ND RESPONDENT

(Appeal against the Judgement of Hon. D.M. Kivuti (PM) delivered on the 23rd April 2021 at Milimani CMC. Case No. 2593 of 2019)

JUDGMENT

Representation:

For Appellant- Musili Mbiti & Associates Advocates

For Respondent- Munene Wambugu & Kiplagat Advocates

1. The Appellant being dissatisfied with the Judgement of Hon. D.M. Kivuti (PM) delivered on the 23rd April 2021 in Milimani CMC. Case No. 2593 of 2019 between Vikash Enterprises Limited v Benson Musyoka Maina, filed the Memorandum of Appeal dated 21st February 2023; the Record of Appeal dated 17th March 2023 and received in court on 18th March 2023(filed with the leave of court granted on 9th February 2023 in Miscl. Civil Application No. E310 of 2021) (pg.1 of the Record of Appeal); and the Supplementary Record of Appeal dated 22nd May 2023 seeking the following orders:-

    a. The Appeal be allowed.

b. The Judgment and decree of the Learned magistrate be set aside and be varied as the court may deem fit.

c. The plaintiff suit in Milimani Chief Magistrate's court civil case no. 2593 of 2019 be allowed and defendant be held 100% for he accident.

d. The Honourable court be pleased to award general damages and special damages to the appellant commensurate to the injuries suffered.

e. The cost of the appeal and that of the subordinate court be awarded to the appellant with interests from the date of filing the lower court suit.

2. The Appeal was premised on the following grounds:-

i. The Learned Trial magistrate erred in law and in fact by finding that the appellant had failed to prove his case on balance of probability.

ii. The learned Magistrate erred in law and in fact in failing to assess the quantum damages awardable.

iii. The learned Magistrate erred in law and in fact by dismissing the suit against the appellant due to his misdirection's and wrong exercise of discretion on the evidence tabled before him.

iv. The Learned Magistrate erred in law and on fact by considering irrelevant matters not before the honourable court.

(Page 2-3 of Record)

Background to the appeal

3. The Appellant vide a Plaint dated 4th February 2019 and supported by a verifying affidavit sworn on an even date sought before the trial magistrate court the following reliefs:-

a. General Damages.

b. Special damages as stated in paragraph *6* above

c. Costs of this suit.

d. Interest from the date of filing this suit.

4. The plaint had been accompanied by a list of witnesses dated 4th February 2019, the Appellant's Witness statement dated on an even date, his list of Documents dated on an even date, and his bundle of documents(Pg. 8 – 21 of the record are all pleadings by the Appellant before the lower court).

5. The claim was opposed. The Respondent/Defendants entered appearance on 9th January 2020 and filed their Statement of Defence dated 9th January 2020(Pg.-22-24) which was accompanied by their list of witnesses dated on an even date, the notice to file witness statements of an even date, and his witness statement dated 9th January 2020, the list of documents with no documents listed dated on even date (Pg. 25 -27).

6. The Appellant on 27th January 2020 filed a Reply to the Respondents' Statement of Defence dated 2nd January 2020(Pg.40), complied with Order 11, and filed their list of issues dated 24th January 2020(pg. 29-34 of Record).

7. The Respondents also complied with Order 11 on 17th July 2020 and filed the witness statement of Benson Musyoka Maina dated 15th July 2020, their list of issues of an even date, their list of documents dated 19th October 2020, and their documents(pg.35-40 of Record).

8. The Respondents filed a supplementary list of witnesses dated 2nd February 2021, statement of Fred Momanyi dated 2nd February 2021(pg.41-43 of Record).

9. The matter proceeded by way of viva voce evidence virtually on 8th February 2021 with parties calling their witnesses The Appellant testified as PW2 and Cyprianus Okoth Okere testified as PW2(expert witness). The Respondents called Fred Momanyi as Defence witness(Pg. 48-49). The parties filed written submissions after the hearing. The pLaintiff submissions(Pg. 51-60;). The and judgement was delivered on 12th February 2018(Pg. 61-64). The trial magistrate dismissed the Appellant's case as follows: "I have perused the pleadings herein, the evidence by the parties submissions filed by both parties and find that the plaintiff was the author of his own misfortunes and therefore wholly liable for the accident. Consequently, this suit is dismissed with costs to the defendants." (pg.64)

Written Submissions at Appeal

10. The court directed that the appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by Musili Mbiti & Associates Advocates were dated 23rd March 2024. The Respondents' written submissions drawn by Munene Wambugu & Kiplagat Advocates were dated 4th June 2024.

Determination

11. The principles which guide this court in an appeal from a trial court are now well settled. In Selle And Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

> "An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

12. Further in *David Kahuruka Gitau & Another v Nancy Ann Wathithi Gatu & Another Nyeri HCCA No. 43 of 2013*, the court opined:- 'Is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on point of law and facts and come up with its findings and conclusions."

Issues for determination

13. The Appellant in his submissions identified the following issues for determination in the appeal:-

    a. Whether the appellant proved his case on a balance of probability.

    b. Whether the appellant is entitled to assessment of quantum.

c. Whether the appellant is entitled to special damages.

d. Whether the appellant is entitled to costs.

14. The Respondents in their submissions identified one issue for determination in the appeal as:-

a. Whether the trial court committed an error in law or fact in finding that the Appellant had proved his case on a balance of probability and in dismissing the Plaintiff's suit.

15. The court finds that the issues placed by the parties for determination in the appeal are with regard to apportionment of liability, and the quantum of damages and formulates the issue for determination in the appeal as follows:-

a. Whether the Appellant proved his case on a balance of probabilities against the Respondent.

b. Whether the Appellant proved his case on a balance of probabilities against the Respondent.

16. The Appellant submits that an accident occurred and he sustained severe body injuries. He submits that the issue in contention is who was responsible for the accident. The appellant submits that he was traveling as a passenger on Motor Vehicle Registration Number KBR 151S and while alighting from the said motor vehicle, the driver set the motor vehicle in motion before the appellant could alight causing him to fall and he was run over by the rear tires of the motor vehicle and sustained injuries.

17. He asserts that he produced the police abstract which indicated that the appellant was a passenger in the Motor Vehicle Registration Number KBR 151S and that the testimony was not challenged. He submits that DW1 testified that he heard people shouting that the appellant had jumped from his motor vehicle and the appellant confirmed that he was the said passenger.

18. The appellant submits that the driver of the suit motor vehicle must have been carelessly and recklessly driving in the circumstances, and that is why he was unable to control, manage, and or maintain the same into a stationary state until the appellant had fully alighted, but he instead accelerated the vehicle, ignorant of whether the appellant was alighting occasioning him serious injuries.

19. The appellant submits that he discharged his case on a balance of probability and the trial court considered irrelevant matters such as whether the appellant knew the driver and stated the appellant did not prove his case.

20. The appellant submits that not all passengers know the drivers of motor vehicles they travel in and his testimony that he was given a lift was not challenged and the driver, by allowing passengers in the motor vehicle should be liable for the consequences. He relied on the case of Muwonger vs A.G. of Uganda (19670EA 17.

21. He submits that a driver of a public vehicle should exercise caution when passengers are alighting and boarding the vehicle before leaving a stage, relying on the decision in Katana Mgao v Andrew Kamau Wokabi & another (1993) eKLR.

22. He submits that having proved that he was injured, the owner of the said motor vehicle was vicariously liable for the acts of his driver relying on the decision in Paul Muthui Mwavu v Whitestone(K) Ltd (2015) eKLR and asks the court to find that he proved his case.

17. As relateS Quantum, the appellant submits that it is not contested that he suffered severe body injuries as supported by the treatment notes and the testimony of PW2, that he suffered; bilateral ischio pubic rami fracture and left Sacro-iliac joint diathesis, which were classified as grievous harm.

23. He submits that despite the trial court finding he had not proved his case; the magistrate was required to exercise his mandate and assess the quantum awardable. He submits that the court ought to have awarded Kshs. 2,500,000 relying on the decisions in Peace Kemuma Nyangera V Michel Thuo & Another (2014) and Florence Hare Mkaha V Pwani Tawakal Mini Coach & Another.

24. He further submits that he was entitled to the special damages of Kshs, 3,550/=, the costs and interest on the suit.

Respondent's submissions

25. The respondent submits that as per the appellant's plaint paragraph *5* (pg. 48-49 of the Record), it is proved that the appellant boarded the motor vehicle which was not a public service vehicle.

26. He submits that the appellant confirmed that he was traveling in Motor Vehicle registration No. KBR 151S as a passenger and that he was seated at the front of the vehicle, that upon cross-examination the appellant was questioned on where exactly he was seated in the motor vehicle, but he could not clearly state where. The respondent submits that there was no way the appellant was seated at the front since the driver could have seen the appellant alighting from the vehicle and stopped.

27. The respondent submits that the appellant was a joyrider or unauthorized passenger who discreetly boarded the motor vehicle KBR 151S at the back which was a lorry/truck.

28. The respondent submits the appellant assumed the risk that comes with boarding at the back of a lorry unlawfully without the knowledge or authority of the respondent.

29. The respondent submits that the respondent's witness (page 36 of the proceedings) testified that he was not aware the appellant had boarded the back of the lorry and the appellant must have jumped off the lorry when the same started to move and the driver only realized when the members of the public started to wail.

30. The respondent submits that DW1 denied the allegations that the appellant was given a lift and asserts that whether the lift was gratuitous or paid for, the appellant was not an employee of the respondent and the fact of boarding a vehicle in the back cabin which is not specifically designed to carry passengers is not an act in the course of employment for the respondent to be vicariously liable for the unauthorized action of the driver.

31. To buttress this assertion, the respondent relied on the decisions in Israel Mulandi Kisengi v the Standard Limited & 2 others (2012) eKLR and Shighadi V Kenya Power & Lighting Company Limited & Another (1988) KLR.

32. The respondent submits that the appellant failed to show that he knew the driver of the motor vehicle to prove that indeed he had been allowed to hitch a lift and thus cannot blame the respondent for having chosen to take that risk and relied on the decisions in Edwin Chiroto Mandera v Mureithi Charles & another (2019)eKLR and Sammy Cheruiyot Koech & Another V Anna Chepkemoi Mutai (suing as the legal representative of the estate of the late Joseph Kingetich Mutai V Mureithi Charles & Kimutai Cheruiyot(2023)eKLR.

33. The Respondent states that the appellant admitted that the Motor Vehicle Registration Number KBR 151S was not a Public Service Motor vehicle and thus not designated to carry passengers but goods and that it had no authority to carry passengers.

34. The respondent submits that P-Exh-2 which was the copy of Records for the suit motor vehicle, the same indicated that it was registered as the 1st Respondent's and its make as a lorry/truck. That the

appellant was not an employee of the respondent to be on board the vehicle. The respondent submits that DW1 testified that they were not awarded the appellant was on board the lorry and the appellant had been given a lift.

35. The respondent submits that the Appellant having boarded the lorry without permission and not being an authorized employee of the Respondent, assumed the risk and the respondent does not owe him a duty of care. The respondent submits that no negligence was exhibited on the Respondent's part.

36. The respondent submits that the trial magistrate's decision was based on evidence presented and the appellant was the author of his own misfortunes.

37. As for Quantum, the respondent submits that had the appellant proved the case on a balance of probability, then the trial magistrate would have assessed the damages based on comparable awards such as in the case of Muthamiah Isaac V Leah Wangui Kanyingi (2016) eKLR where the quantum awarded in that case was Kshs. 400,000 for fracture of pubic rami.

38. The respondent submits that the trial court appreciated the case and understood the burden of proof placed on the Appellant and thus did not commit any error and asks that the appeal be dismissed.

Analysis

39. This court is alive to the fact that this being an appeal, the role of the court as an appellate court is to re-evaluate the evidence that was before the lower court and determine whether to confirm that decision or not. As was held in the case of Ephantus Mwangi and Geoffrey Nguyo Ngatia Vs Duncan Mwangi Wambugu (1982 – 1988) I KAR 278 the principle is that a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown to demonstrably to have acted on the wrong principles.

40. The Appellant has principally relied on the allegation that he was given a lift by the driver of the suit motor vehicle KBR 151S. In the appellant's witness statement (pg.9 of the Record) there is no indication of where the appellant was seated in the motor vehicle. He states that he was alighting at a stage along North Airport Road but does not indicate whether he was alighting from the front door.

41. As per the Motor vehicle copy of Records (pg. 12 of the record) the motor vehicle was a lorry and the allowed number of passengers in the said motor vehicle is two.

42. DW1 testified that he was a turn boy in the suit motor vehicle, and only he and the driver were in the motor vehicle. The respondent pleaded the principle of volenti non fit injuria that the appellant by boarding the suit motor vehicle without authority assumed the risks thereof. The appellant testified that there was no turn boy as the same was not indicated in the abstract. The appellant did not call the investigating officer to corroborate whether there was or not any other occupant in the vehicle and the appellant failed to discharge his burden on that issue.

43. The appellant alleges that DW1's testimony (pg.49 of record) is inconsistent for he testified that he never witnessed the accident but saw it through the side mirror. The explanation of DW1 having not seen the accident occur is that the appellant was aboard the motor vehicle but not at the front but at the back and once he alighted from the lorry the accident occurred and he was run over by the rear tires of the motor vehicle and the only way DW1 could see the accident was after it happened after the accident.

44. The appellant confirmed that the suit motor vehicle was not a public service vehicle and the same was a lorry that was dropping materials at a site in Karen and the driver allowed them to board the vehicle (pg. 49 of the record. He did not say who were also allowed to board with him or call them to testify

that indeed they were allowed to board the vehicle nor did he indicate where in the vehicle he sat, either at the front or at the back.

45. DW1 testified that they were not aware the appellant was aboard the motor vehicle and they had not allowed him to board it. The Appellant testified that the respondent as the owner of the vehicle, was vicariously liable for the recklessness, and negligence of the driver of the suit motor vehicle which occasioned the accident.

46. For the appellant to prove that the respondent is liable for the negligence, he must prove he was an authorized passenger in the motor vehicle. The trial court found that the appellant was the author of his own misfortunes for having boarded a motor vehicle which was not a public service vehicle and additionally that he did not know the driver (pg.63 of record).

47. On the law of unauthorized passengers; the appellant alleged that the driver of the vehicle having allowed him to hitch a lift, he was liable since the same was offered in the course of employment and he relied mainly on the case of Muwonge v A.G Uganda (1967) EA.

48. The Respondent, on the other hand, submitted that the lifting of the appellant was not an authorized act and the motor vehicle was not a public vehicle that was used carrying people.

49. In Mary Waitherero vs Chella Kimani and Another [2006] eKLR, Kimaru, J cited Marsh vs Mowes [1949] 2kb 208, 125 as follows: -

> " It is well settled law that a master is liable even for acts which he has not authorised provided that they so connected with the acts which he has authorized that they may be regarded as modes, although improper modes of doing them. On the other hand, if the unauthorized and lawful act of the servant is not so connected with the authorized act as to be a mode of doing it but is an independent act, the master is not responsible, for in such a case the servant is not acting in the course of the employment but has gone outside it."

50. The appellant confirmed that the Suit motor vehicle was dropping materials at a site in Karen. He alleges the driver allowed him to hitch a lift. The driver denied having allowed it. The vehicle was not a public service vehicle which the appellant confirmed, and the same was not for the ferrying of passengers as confirmed by the appellant, that it was dropping materials.

51. The Appellant in this case at hand has pleaded that he is owed a duty of care as he was allowed by the driver to board the motor vehicle. However, the motor vehicle was not authorized to carry passengers, nor was it a public service Vehicle. Thus, no liability would attach to the Respondent unless the Appellant was traveling in the aforesaid vehicle with the express authority of the Respondent either as an employee or otherwise. The appellant did not plead being an employee of the respondent, and he had no authority whatsoever to have been n boar the motor vehicle.

52. Additionally, the respondent pleaded the defence of volenti non fit injuria, which was defined by Wills J. in Osborne vs The London and North Western Railway Company (1888) 21 Q.B.D 220 as follows:

> " If the defendants desire to succeed on the ground that the maxim "volenti non fit injuria" is app1icable they must obtain a finding of fact that the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran impliedly agreed to incur it".

53. The Appellant was aware that the motor vehicle was not a public service vehicle and still proceeded to board the same whether or not he was allowed to. The motor vehicle was not in the business of ferrying passengers and the appellant was not an employee of the Respondent to have been on the

motor vehicle thus, the appellant assumed the risk attaching to him boarding a motor vehicle that was not set for ferrying passengers either for a sum of money or not, and neither was he an employee of the respondent.

54. The appellant failed to prove that he was an authorized passenger or an employee of the respondent to have been allowed to board the motor vehicle and on that basis, he failed to prove on a balance of probability that he was owed a duty of care.

55. It is, therefore, the finding by this Honourable Court that the learned magistrate was right in arriving at the decision that he did and do uphold the same.

On quantum

56. The trial magistrate did not belabor to assess the damages the appellant was entitled to having found that the respondent was not liable.

57. This court, however, faults the learned magistrate for failure to assess the damages that the appellant would have awarded the Appellant had he been successful.

58. I have considered the submissions of the Appellant's counsel on the issue of the quantum of damages and the authorities cited. I have also considered the medical report by Dr. Cyprianus Okoth Okere (Pg. 19) dated 21st November 2018 that was produced before the trial court as exhibit 7(pg. 10). According to the same he sustained a pelvic fracture with Bilateral Ischio public rami fracture and Left sacro-iliac joint diathesis.

59. On his part, the Appellant has proposed an award of Ksh.2,500,000/- in general damages while the Respondent has proposed a sum of Ksh.400,000/-. All considered, if the Appellant had succeeded in the Appeal I would have awarded Ksh.1,500,000/- as general damages considering that in Millicent Atieno Ochuonyo v. Katola Richard [2015] eKLR, the Plaintiff's injuries therein were assessed at 20% permanent incapacity and she was awarded 2 million for pain and suffering for an injury to the pelvis involving fracture of ramus and diastasis of the symphysis pubis. Considering that the appellant made a full recovery, then Kshs. 1,500,000 would be sufficient considering that the award in Milicent Atieno(supra) was made over 9 years ago and considering that the respondent produced a medical report by Dr. Wambugu. P.M. dated 1st October 2020(pg-39-40 of the Record), which indicated that the appellant had made a full recovery and there was no permanent incapacitation.

60. Additionally, I would also award a further sum of Khs.3,550/- as special damages.

61. The appeal fails on the all grounds of appeal save on the ground that the learned Magistrate erred in failing to assess the quantum damages awardable, which this court has considered.

62. Each party shall bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF JULY 2024.

S. MBUNGI

JUDGE.

In The Presence Of

Court Assistant: Elizabeth Angong'a

Appellant:

Respondents: