Wambui v Mwariri (Civil Appeal E250 of 2023) [2024] KEHC 9924 (KLR) (Civ) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9924 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E250 OF 2023

AC BETT, J

JULY 26, 2024

BETWEEN

JOSEPHAT KURIA WAMBUI .... APPELLANT

AND

MOSES MWARIRI .... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. B.J Ofisi, Mrs (SRM and Adjudicator) in Nairobi SCC Case No. E3965 of 2022 delivered on 3rd March 2023)

JUDGMENT

1. By way of a statement of claim dated 22nd November, 2022, the respondent sued the appellant for special damages in the sum of Kshs.235,628/, costs of the claim and interest at court rates from date of filing claim until payment in full.

2. The respondent's case was that on or about 3rd May 2021 he was lawfully driving his motor vehicle registration no. KCF 915V along Ngong Road when the appellant's motor vehicle registration no. KAP 912N was negligently driven thus colliding with the respondent's motor vehicle from the front left-hand side thereby extensively damaging it.

3. In a response to the claim, the appellant denied the respondent's allegations that an accident occurred as alleged and that it was caused by his negligence.

4. The adjudicator in a judgment delivered on 3rd March 2023 found the appellant 100% liable for the accident and awarded the respondent special damages in the sum of Kshs.235,628/, interest at court rates from date of filing claim until payment in full and costs of the claim.

5. Aggrieved by the decision of the trial court, the appellant lodged a memorandum of appeal dated 30th March, 2023 seeking orders that the appeal be allowed with costs and the judgment of the trial court be set aside. The appeal is premised on the following grounds: -

   a) The learned adjudicator erred in law and in fact by finding that the appellants were 100% liable for the accident which was the subject matter of the suit.

   b) The learned adjudicator erred in fact and law in failing to consider the evidence which was tendered by the defence on liability during the hearing of the suit and the submissions filed.

   c) The learned adjudicator erred in law and in fact in wholly disregarding the evidence adduced on behalf of the appellant and displaying open bias against the appellant during hearing.

   d) The learned adjudicator erred in law and in fact in not finding that the respondent failed to prove liability on the part of the appellant.

   e) The learned adjudicator erred in fact and law in failing to consider the defendants' submissions on the costs of the suit.

   f) The learned adjudicator erred in law by weighing the respondent's case in isolation from the appellant's case and precluded herself from determination of liability impartially.

   g) The learned adjudicator erred in law and in fact by failing to apply the relevant and pertinent judicial principles, precedents and trends regarding liability of the accident and the award of costs.

   h) The learned adjudicator grossly misdirected herself by treating the evidence and submissions before her on liability superficially and consequently arrived at a wrong decision without any basis in law or fact.

   i) The learned adjudicator erred in law and fact in finding that the respondent had proved his case on a balance of probabilities in view of the evidence on record and that the appellant was liable for the accident.

   j) The learned adjudicator erred in fact and law in failing to appreciate there existed a conflict of interest between the respondent and his insurance because of their employer -employee relationship.

   k) The learned adjudicator's findings on liability and costs of the suit are not supported by facts or law hence irregular.

6. Directions were given by this court that the appeal be canvassed by way of written submissions.

7. Section 38 of the *Small Claims Act* states: -

   > "(1) A person aggrieved by the decision, or an order of the court may appeal against that decision or order to the High Court on matters of law."

8. It is therefore imperative that the court first determines whether the Appeal raises matters of law. In distinguishing between matters of law and matters of fact in *Christopher Mutinda Mutua & another v. Alfred Nganga Mutua & 11 others* [2019] eKLR ,the court had this to say: -

   > "We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or

jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of the witnesses, the existence and relevance of specific surrounding circumstances, as well as their relation to each other and to the whole...."

9. From the numerous grounds of appeal, it is apparent that the appellant, in utter disregard of Order 42 Rule 1 of The *Civil Procedure Rules*, has listed 11 grounds of appeal when only two would suffice namely:-

    (i) That the respondent did not prove his case to the required standard.

    (ii) That the learned adjudicator erred in fact and in law in failing to find that there existed a conflict of interest between the respondent and his insurer because of the existing employer employee relationship.

10. While the court cannot make a ruling on facts, it is guided by facts and cannot ignore the facts. Thus, if the court is found to have decided the case without the necessary evidential basis, or the court has failed to exercise its discretion, or the decision made is perverse or the court has made a decision based on a nullity, then the court, on an appeal has the jurisdiction to review such decision.

11. This court has considered the grounds of appeal and the issue that arises for determination is whether the respondent proved, on a balance of probabilities, that the appellant was liable for the accident.

12. On the issue of liability, the respondent testified that the appellant's motor vehicle negligently rammed into his motor vehicle on the left-hand side while attempting to overtake other motor vehicles. According to the police abstract adduced by the respondent, it was found that the appellant's motor vehicle was to blame for the accident. The appellant testified to the effect that he was the owner of the suit motor vehicle which was a city shuttle plying the Nairobi Ngong route. He stated that since his agent, Kenneth Mburu Kimani, was on duty on the said date of the accident, he was in a better position to explain how the accident occurred. The said agent, in his statement stated that he worked as a conductor of the suit motor vehicle on the material day, but he was not privy to any accident. However, the said Kenneth Mburu Kimani did not testify nor was his statement produced in court.

13. By adducing evidence supported by a police abstract and a motor vehicle assessor's report, to establish his claim, the respondent discharged his legal burden of proof as envisaged by Section 107(1) of the Law of *Evidence Act* which states: -

    " Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove the existence of those facts."

14. The respondent, in asserting his claim, gave sufficient evidence that on the material date, his motor vehicle was knocked by the appellant's motor vehicle which was being negligently and recklessly driven by the appellant's driver and that his motor vehicle was damaged as a result of the collision. At that point, the burden of proof then shifted to the appellant. The appellant therefore had the onus of proof in disproving the respondent's allegations that the accident occurred in the manner averred by the respondents. By failing to call the driver of his motor vehicle or its conductor, the appellant, who was not privy to the accident, lost the opportunity to challenge the respondent's evidence which was supported by 3 other witnesses and numerous documents produced by his insurer, Madison General Insurance Kenya Limited which was the real claimant in the suit under the doctrine of subrogation.

15. The claim, which was a material damage claim, was proven to the required standard. CW 3 and CW 4 produced the motor vehicle assessment report, the invoice, payment request form, and proof of payment by Electronic Funds Transfer through NCBA Bank. The appellant did not challenge the extent of damage to the vehicle nor the payments made for its repairs during cross- examination. At the end of the trial, the evidence in respect to the material damage and settlement of costs of repair remained uncontroverted and was therefore unopposed.

16. The evidence of the respondent was further corroborated by CW1 who stated that the appellant's motor vehicle was blamed for the accident. Although the appellant said that he did not to know how the accident occurred, he did not call the driver of the motor vehicle that was said to have been involved in the accident on the material day, nor its conductor as witnesses to give their version of events.

17. The appellant in his submissions before this court faulted the adjudicator for finding in favor of the respondent when the claim form showed that it was filled on 14th March 2021 which was two (2) months before the accident. This was a finding of fact, based on the adjudicator's own analysis and appreciation of the evidence and this court lacks the jurisdiction to disturb the same unless the findings are so perverse that no reasonable tribunal would have arrived at them. See *John Munuke Mati - v- Returning Officer Mwingi North Constituency and 2 Others* [2018] eKLR. In any event all the other documents produced in support of the claim are dated 4th May 2021, a day after the accident so there may have been an input error on the month at the time the claimant was filling the claim form.

18. The appellant has argued that the trial court erred in failing to appreciate that there existed a conflict of interest between the respondent and his insurance because of their employer- employee relationship. I do not see any conflict therein. Just because the respondent's motor vehicle was insured by his employer does not stop him from enforcing and asserting his rights as an insured, which includes the right to file for recovery against third parties. Nor does it imply conflict. In my view, if anyone were to complain about conflict of interest, it ought to have been the employer. Unless the appellant is imputing collusion on the part of the respondent and his employer. Looking at the appellant's pleadings he did not make any allegations of collusion and so his allegations of conflict of interest lacked basis. The claim was lodged by the insurer using the insured's name as is mandatory under the doctrine of subrogation. It was only coincidental that the insured happened to be its employee. The trial court did not find conflict of interest and no material was placed before the court to make me over-rule the adjudicator.

19. On the issue of costs, the basic rule on the award of costs is that costs follow the event and the same is stipulated in section 27(1) of the *Civil Procedure Act*. There was evidence of service of demand notice to the appellant, through his insurer.

20. Accordingly, for the reasons set out above, I find this appeal to be devoid of merit and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 26TH DAY OF JULY, 2024.

A. C. BETT

JUDGE

In the presence of:

.... for appellant

.... for respondent

Court Assistant: Polycap Mukabwa