Kweyu & another v Nderitu & 2 others (Civil Appeal E021 of 2021)
[2024] KEHC 11670 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11670 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E021 OF 2021

SC CHIRCHIR, J

SEPTEMBER 26, 2024

BETWEEN

ISAIAH MUMA KWEYU ..... APPELLANT

AND

SIMON NYAMWEYA VS K. G PATEL & SONS LIMITED & ANOTHER ..... GARNISHEE

AND

EPHANTUS MURITHI NDERITU ..... 1ST RESPONDENT

JUSTUS BAHATI BAKHOYA ..... 2ND RESPONDENT

TOM NICHOLAS OTIENO ..... 3RD RESPONDENT

JUDGMENT

1. The Appellant sued the respondents in the lower court , seeking damages for injuries sustained as a result of a road accident which occurred on 22nd February 2018 along the Mumias-Bungoma road at Lukoye Area. The accident involved motor cycle registration number KMEA 169K and Motor vehicle registration Number KBT 033 E.

2. In a judgment delivered on 12th march 2021, the trial court found the 1st and 2nd respondents liable for the accident, but dismissed the suit for want of proof of injuries allegedly sustained by the Appellant.

3. The appellant was aggrieved, and filed this appeal. He has set out the following grounds;

    a. The learned trial magistrate erred in law and in fact when she ignored the appellant's evidence in total and reached an erroneous decision.

    b. The learned trial magistrate erred in law and in fact by dismissing the appellant's case which had unshaken evidence.

c. The learned trial magistrate erred in law and in fact when she found that the appellant had failed to proof his case on balance of probabilities and disregarding the appellant's evidence and submissions.

d. The learned magistrate erred in law and in fact when she ignored the appellant's evidence as a whole and proceeded to dismiss the appellant's case.

4. He seeks that the Appeal be allowed and the lower court's judgment be set aside.

5. The appeal was canvassed by way of written submissions.

Appellant's submissions

6. The Appellant points out that the standard of proof in civil cases is on a balance of probabilities as was held in Timsales limited versus Harun Thuo Ndungu (2010) eKLR, but the trial magistrate applied a higher standard, and as a result he has suffered prejudice.

7. He submits that although the trial magistrate acknowledged that indeed an accident occurred on 22nd February 2018 and the accident was as a result of the negligence on the part of the respondents, she relied on the wrong principles and invoked the wrong standard of proof when it came to proving the injuries suffered. He further submits that the documents he produced were sufficient to prove the injuries he sustained.

8. It is further submitted that the respondent did not place on record any evidence to controvert his. In this regard he has relied on the decision of the court in the case of *Simon Nyamweya vs K. G Patel & sons Limited & another* (2021) eKLR and *Kimatu vs. Benson Ngali* (2012) eKLR.

9. He finally prays that this court finds that on a balance of probabilities , he proved the injuries sustained. He seeks for general damages of Kshs. 200,000/- and Kshs. 10,340/= on the special damages.

Analysis and Determination.

10. I have considered the memorandum of Appeal, the lower court record and the parties submissions, and the only issue that lends itself for determination, is whether the appellant proved, on a balance of probabilities, that he was injured following the accident; what injuries, if any and what damages is he entitled to.

11. The principles upon which an Appellate court can interfere with the findings of a trial court was set out in the case of Ephantus Mwangi & Anor vs Duncan Wambugu [1984]eKLR where the court held 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, demonstrably, to have acted on wrong principles in reaching the findings he did."

12. According to the appellant , he was involved in a road traffic accident on 22nd February 2018 while riding his motorcycle KMEA 169K along Mumias –Bungoma road when the respondent negligently knocked him. He stated that he sustained injuries on his face, chest and cut wound on the right leg. He was taken to St. Mary's hospital and then later , he went to Matungu Hospital .According to the trial court, the treatment notes from Matungu hospital indicated that he was seen at the hospital on 8th March 2018, that was about a week after the accident and the P3 form was filled in September 2018 which was 6 months after the accident.

13. The trial court reasoned that in the absence of the initial treatment chits, the plaintiff had failed to prove that the injuries indicated in the p3 form and medical report were from the alleged accident.

14. According to the appellant, in arriving at her finding, the trial magistrate's standard of proof was beyond reasonable doubt ,as opposed to the balance of probabilities. He insists that the documents he produced were sufficient proof that he had sustained injuries from that particular accident.

15. In *James Muniu Mucheru v National Bank of Kenya Ltd* [2019] eKLR, the Court of Appeal stated as follows: -

> " Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable."

16. In the case of Timsales Limited v Wilson Libuywa *Timsales Limited V Wilson Libuywa Nakuru HCCA No. 135 of 2006* the court was addressing proof of injuries where an employer had disputed the accident. The court in that case proceeded to find that it was the duty of the employee, as the plaintiff, to prove on a balance of probabilities that he indeed suffered the alleged accident in such circumstances.

17. It was incumbent upon the appellant to prove on a balance of probability that not only did the respondents negligently cause the accident subject of the trial but that he sustained the injuries pleaded as a result of the accident for which he was entitled to the damages sought.

18. At the trial court, the appellant produced a police abstract dated 14/9/2018 which indicated that the accident took place on 28th February 2018 at Lukoye along the Mumias-Bungoma road between the appellant's motorcycle and the defendant's motor vehicle registration KBT 033E.

19. On the injuries that he sustained, he produced the treatment notes from Matungu sub-county Hospital dated 8th March 2018, the outpatient card from St. Mary's Hospital dated 28/2/2018 , a medical report from Dr. Andai.

20. According to the learned magistrate, the treatment card from St. Mary's hospital did not indicate if the plaintiff was injured or nor the extent of the injuries and that the only way the court could not ascertain the extent of the injuries was production of the initial treatment notes. He did not consider the treatment chits from Matungu sub- county hospital to be primary.

21. According to Clerk & Lindsell on Torts 23rd Ed 2020, in a tort of negligence the plaintiff must prove the following:

    (a). The existence of a duty of care situation.

    (b). The breach of that duty by the defendant.

    (c). A causal connection between the defendant's careless conduct and the damage and

    (d). The existence of a particular kind of damage to the particular claimant which is not so unforeseeable is to be too remote.(Emphasis added)

    31. Thus it was not enough for the Appellant, to prove that an accident did happen, he also had to prove that he suffered loss or damage as a result . Negligence perse on the part of the defendant does not entitled the plaintiff to compensation.

22. The significance of production of treatment notes the trial court was emphasized by Maraga J (as he then was) in Timsales Limited (supra) who when considering allegations of injuries sustained sated as follows:

> " Dr. Kiamba's report does not help the Respondent. In any alleged factory accident which is disputed by the employer it is the duty of the employee, as the plaintiff, to prove on a balance of probabilities that he indeed suffered the alleged accident. A medical report by a doctor who examined him much later is of little, if any, help at all. Although it may be based on the doctor's examination of the plaintiff on whom he may, like in this case, have observed the scars, unless it is supported by initial treatment card it will not prove that the plaintiff indeed suffered an injury on the day and place he claimed he did. The scars observed on such person would very well relate to injuries suffered in another accident altogether".

23. The above decision however related to an accident in the work place, where the Employer had denied that such an accident occurred. The circumstances of the present case are different. This was a road accident, which occurrence was not in dispute. The Appellant produced a police abstract proving that indeed an accident occurred. The occurrence of the accident was also accepted by the court, demonstrated by the court's finding on liability. There is also evidence that the Appellant attended st. Mary's hospital. He produced an attendance card as well as a receipt showing that he paid for certain services in the said hospital.

24. Finally the medical report by Dr. Andia was produced whose production was not challenged as the defendant never made any appearance .

25. In the case of Amalgamated Sawmills Limited v Joseph Njoroge Matheri [2010] eKLR Emukule J pointed out that there may be circumstances when a treatment card need not be produced, and its absence would not be fatal: He stated: "Whereas I agree with the authorities cited that it is necessary to produce the primary card evidencing treatment, once a doctor's Report has been admitted in evidence by consent I think it is not open to a party on appeal to try and repudiate that report or evidence. Failure to produce a treatment card cannot therefore be fatal to an employee's claim."

26. There was no consent to the production in the present case, but the defendant did not appear, and lack of appearance implies admission of the plaintiff's claim

27. Further a difference of one week from the time the Appellant got involved in the accident and the time of treatment is not too wide to suggest any anything untoward on the part of the Appellant. The P3 form and the medical report were admittedly done several months later. But we know the basis :- the treatment chits from matungu sub- county hospital . The authors of the two documents stated as much in their reports.

28. Am satisfied that on a balance of probabilities, the Appellant proved that he suffered injuries and related loss out of the Respondent's acts of negligence.

Quantum of damages

29. According to Dr. Andia, the Appellant sustained a cut wound on the face , blunt injury to the chest and a cut wound on the right leg.

30. In my assessment, the injuries are minor soft tissue in nature . The doctor indicated that as at the time of examination, the Appellant had healed without any resultant incapacitation. I consider the would-be award by the trial court to have been slightly on the higher side.

31. In the case of *Mwangi vs Muhoho* (2024) KEHC 165 (KLR)the high court upheld the lower court award of ksh. 80,000 for injuries that were fairly similar to the present case. Also in the case of *Eastern produce Ltd vs GabrielIkari Dogani* (2020) e KLR the court upheld the award of ksh. 80,000.

32. I would in the circumstances award ksh. 80,000 for general damages. The special damages of ksh. 10, 340 was strictly proved and I award the same.

35. In conclusion , I hereby make orders as follows:

    a). The judgement of the lower court in Kakamega chief magistrate's court civil case No. 146 of 2018 is hereby set aside.

    b). Judgment is hereby entered for the plaintiff as against the defendants jointly and severally

    c). The plaintiff is awarded ksh. 80,000 in general damages and ksh. 10,340 in special damages

    d). Cost of this suit and this Appeal and the lower court is awarded to the Appellant

    e). The awards will attract interest from the date of Judgment at the trial court.

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

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin- Court Assistant .

Ms. Mideva for the Appellant