KM (Suing as the Father and Next Friend to JMK - Minor) v Nthumbi & another (Civil Appeal E162 of 2022) [2024] KEHC 11253 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11253 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E162 OF 2022

H NAMISI, J

SEPTEMBER 26, 2024

BETWEEN

KM (SUING AS THE FATHER AND NEXT FRIEND TO JMK - MINOR) .... APPELLANT

AND

MUIGAI NTHUMBI .... 1ST RESPONDENT

PATRICK MWANGI MWAURA .... 2ND RESPONDENT

(Being an Appeal from the judgement of Hon. E.W. Wambugu, Senior Resident Magistrate delivered on 2nd September 2021 in Kithimani CMCC No. 267 of 2017)

JUDGMENT

1. This appeal arises out of an accident that occurred on 20 October 2016 involving motor vehicle registration number KBX 529, along Matuu – Thika Road. The said motor vehicle was a Lorry that was ferrying sand at the time of the accident. The minor, who was aged 16 years at the time, was allegedly sitting in the Lorry, on top of the sand, when the motor vehicle lost control, veered off the road and overturned.
2. As a result of the accident, the Appellant sustained the following injuries:
    1. Fracture of right medial malleolus;
    2. Recurrent pains on the right ankle
    3. The medial malleolus on the right leg is tender on a deep palpitation;
    4. Degree of permanent incapacity is 15%

3. By Plaint dated 25 September 2017, the Appellant instituted proceedings against the Respondents, seeking general damages for pain and suffering, special damages of Kshs 4,000/=, costs of the suit and interest.

4. The Respondents entered appearance and filed a Statement of Defence dated 10 July 2018.

5. At the hearing, the Appellant adopted his witness statement and bundle of documents. It was his testimony that on the material day, the Appellant received a phone call from the driver informing him that his son, the minor, had been involved in a road accident while onboard the motor vehicle registration KBX 529E. The minor had been rushed to Matuu Sub County Hospital for treatment.

6. In his documents, the Appellant produced a Police Abstract dated 7 December 2016 issued by Matuu Police Station. The same indicated the minor as a passenger, and that the nature of injury sustained was grievous harm. The Appellant also produced a copy of records for the motor vehicle, P3 Form, receipts for special damages and a Medical Report dated 20 July 2017 prepared by Dr. Cyprianus Okoth Okere.

7. The parties entered consent on the production of the Respondents' documents, namely the Police Abstract and the Motor Vehicle Accident Report.

8. The 1st Respondent adopted his witness statement. He confirmed that he was the owner of the motor vehicle and arrived at the scene after the accident. The Lorry had veered into a trench and landed on its side. No one was injured. The 1st Respondent testified that he did not know the minor. The driver of the lorry was not authorised to carry other passengers.

9. The Respondents produced a Police Abstract dated 25 August 2017 issued by Matuu Police Station. In this Abstract, no injuries were reported.

10. At the end of the trial, both parties had an opportunity to file their submissions. The trial court then delivered its judgment, dismissing the suit with costs. In its judgement, the trial court opined that the Appellant had failed to prove his case on a balance of probabilities.

11. The Appellant, being dissatisfied by the judgement, lodged an appeal on the following grounds:

    i. That the learned Magistrate erred in law and in fact in finding that the Appellant had failed to prove his case on a balance of probability;

    ii. That the learned Magistrate erred in law and fact in finding and holding that the Respondent was not suited, yet the Respondent conceded to have been involved in the accident;

    iii. That the Magistrate erred in law and fact in assessing low general damages;

    iv. That the learned Magistrate erred in law and fact by dismissing the Appellant suit in its entirety and against the weight of evidence adduced at the trial;

    v. That the learned Magistrate erred in law and fact in dismissing the suit by the Appellant due to her misdirection and wrong exercise of discretion on the evidence tabled before her;

    vi. That the learned Magistrate erred in law and fact by reaching a conclusion that was contrary to the evidence before her and the Appellant submission;

    vii. That the learned Magistrate erred in law and fact by failing to acknowledge that the appellant was indeed a minor at the time of the accident;

12. Directions were given to canvass the appeal by way of written submissions. On 7 June 2024, parties were directed to upload their submissions on the portal. To date, there are no submissions on the online portal or in the court file.

13. I have considered the Memorandum of Appeal and Record of Appeal. Before I proceed to analyse the facts and evidence, I wish to decry the quality of drafting of pleadings that find their way to the courts. Just a cursory glance at the Memorandum of Appeal reveals that it is a poor attempt at copy-pasting of the grounds, some of which are completely inapplicable in the present circumstances. Verbosity and periphrasis in the grounds of appeal does not make the appeal successful.

Analysis & Determination

14. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123.

15. In civil cases, a plaintiff is required to prove his claim against the defendant on the balance of probabilities. This position was clearly stated in the case of *Kirugi & Ano. -Vs- Kabiya & 3 Others* [1987] KLR 347 wherein the Court of Appeal stated that the burden was always on the plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof.

16. In *Treadsetters Tyres Ltd –Vs- John Wekesa Wepukhulu* [2010] eKLR where Ibrahim J. allowed an Appeal quoted Charles worth & Percy On Negligence, 9th edition at P. 387 on the question of proof, and burden thereof where it is stated:-

> " In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferior and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

17. Pursuant to Section 109 of the *Evidence Act*, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

18. In *CMC Aviation Ltd .V. Cruisair Ltd* No 1 1978 KLR 103 [1976 – 80 1 KLR 835] Madan J (as he then was) had the following to say: -

> " Pleadings contain the averments of the parties concerned. Until they are proved or disapproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un – proven. Averments in no way satisfy, for example the definition of 'evidence' as anything that make clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth." (Emphasis mine)

19. Turning to the case herein, in its judgement, the trial court opined thus:

> There is ample evidence from the plaintiff and 1st Defendant attesting that motor vehicle registration number KBX 529E was involved in a road accident on 20 October 2016. Plaintiff and defendants produced two distinct police abstracts which confirm the occurrence of the accident. It was the plaintiff's contention that his son was on board the motor vehicle at the time of the accident.
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> This was denied by the defendants. 1st Defendant attests that there was no passenger in the motor vehicle at the time of the accident and the driver was not allowed to carry unauthorised passengers. The plaintiff placed reliance on his police abstract dated 7 December 2016 which demonstrates he was a passenger on board that motor vehicle and he suffered grievous harm.
>
> On the other hand, the defendants rely on their police abstract dated 25 August 2017 which indicates no one was injured. The two police abstracts were issued by Matuu Police Station and neither of the parties called the investigating officer to court to give a clarification on the two conflicting police abstracts. As it stands, I am not able to determine which of the two abstracts has the correct details.

20. Based on the evidence and documents availed to me, I couldn't agree more with the trial court. The Appellant had prior knowledge of the Respondents' case and had ample time and opportunity to present an eye witness or the minor himself. As rightly noted by the trial court, by the time the matter proceeding for hearing, the minor had attained age of majority and capable of testifying. He did not. As such, the parties then left it to the court to guess which of the two abstracts is factual.

21. Based on the provisions of section 109 of the *Evidence Act*, it is not the duty of the court to play guessing games, as was required of the lower court in this instance. The duty of proving the case fell squarely in the Appellant, who failed to discharge the same. There is ample evidence before the court that the minor sustained injuries and was treated for the same. There is also evidence that there was a road accident on the material day involving the said motor vehicle. However, there is no conclusive evidence before the court linking the injuries sustained by the minor to the accident.

22. The upshot is that the appeal is unmeritorious and the same fails. The appeal is hereby dismissed with costs assessed at Kshs 40,000/=..

DATED AND DELIVERED AT MACHAKOS THIS 26 DAY OF SEP 2024.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Ms. Adhiambo for the Appellant

N/A for the Respondents