Nyarangi v Chelule (Civil Appeal E092 of 2024)
[2024] KEHC 16297 (KLR) (Civ) (18 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16297 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E092 OF 2024

H NAMISI, J

DECEMBER 18, 2024

BETWEEN

JANNIFER NYARANGI ..... APPELLANT

AND

JOEL CHERUIYOT CHELULE ..... RESPONDENT

(Being an Appeal arising from the Judgement of the Small Claims Court at Nairobi delivered by Hon. T.K. Nambisia on the 22 day of December 2023 in SCCC No. E5477 of 2023)

JUDGMENT

1. This appeal arises out of a suit filed in the Small Claims Court by the Appellant against the Respondent seeking the following orders:
    i. General damages for pain and suffering;
    ii. Special damages of Kshs 9,550/=
    iii. Costs of the suit
    iv. Interest on (i) and (ii) above at court rates
    v. Such further or other relief as this Honourable Court may deem fit to grant
2. The Appellant's claim arose out of an accident that occurred on 27 August 2023 along Waiyaki Way. The Appellant was travelling as a fare paying passenger in the Respondent's motor vehicle registration number KCE 891T when the said motor vehicle lost control, veered off the road and hit barriers. As a result of the accident, the Appellant sustained the following injuries:
    i. Bruises and tenderness on the left hip joint

ii. Bruises on the left leg

iii. Swollen left leg

3. The Respondent did not enter appearance and interlocutory judgement was entered against them. The matter proceeded to formal proof by way of documents.

4. The trial court delivered its judgement on 17 May 2024. In dismissing the claim, the trial court held that the Appellant had failed to prove that the Respondent owed her a duty of care at all, that was breached or that they were liable for the accident. The trial court noted that although the Appellant claimed to have been a fare paying passenger in the Respondent's motor vehicle which she boarded in Eldoret, there was no evidence tendered to prove this fact. The Appellant did not produce a travel receipt.

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

i. That the learned Adjudicator erred in law in dismissing the Appellant's claim without any justification;

ii. That the learned Adjudicator erred in law in failing to analyse the Appellant's documentary evidence and submissions in addressing the issues raised thereby misleading herself on the finding derived therein;

iii. That the learned Adjudicator's exercise of jurisdiction was so injudicious and contrary to the established law so as to occasion grave injustice to the Appellant;

iv. That the learned Adjudicator's judgement is against the weight of evidence.

6. Directions were given to canvass the appeal by way of written submissions. The Appellant filed their submissions dated 27 August 2024. The Respondent did not participate in the proceedings despite being served.

Analysis & Determination

7. Section 38 of the *Small Claims Court Act* provides as follows:

1. A person aggrieved by the decision or an order of the Court may appeal against that decision or an order to the High Court on matters of law;

2. An appeal from any decision or order referred to in sub section (1) shall be final.

8. In the case of Otieno, Ragot & Company Advocates -vs- National Bank Kenya Ltd [2020] eKLR, the Court of Appeal addressed the duty of a court considering points of law.

> " This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR)."

9. Similarly, in the case of Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal stated:

> " This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR, on a second appeal, the Court confines itself to matters of

law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR in which it was held that: "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

10. The duty of this Court, in this instance, is similar to that stated herein above, which is essentially on points of law. In the case of J N & 5 Others -vs- Board of Management, St. G School Nairobi & Another [2017] eKLR, in addressing a point of law and a point of fact, Justice Mativo stated thus:

> " In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.
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> In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."

11. I have considered the Record of Appeal, Supplementary Record of Appeal and the submissions by the Appellant. The issue for determination before the Court is whether the Appellant proved liability by the Respondent to the required standard. The Appellant's case was founded on the negligence of the Respondent. As such, the Appellant was by law required to establish, on a balance of probabilities, that:

    a. The Respondent owed her a duty of care;

    b. The Respondent breached that duty, and;

    c. the Appellant suffered injury as a result of that breach.

12. In considering whether the Respondent owed the Appellant a duty of care, the main factor to consider would be whether or not the Appellant was travelling in the Respondent's motor vehicle at the time of the accident. The trial court's dismissal was based on the fact that the Appellant did not produce a receipt evidencing that she was a passenger in the said motor vehicle. In Samuel Gikuru Ndungu V Coast Bus Company Ltd [2000] eKLR, when faced with a similar situation, the Court of Appeal stated thus:

> " The learned trial Judge did not advert to this evidence. He appears to have thought that because the appellant had averred in his amended plaint that he was a fare-paying passenger, his failure to produce the fare receipt he was issued was evidence that he was not a passenger in the bus at the time of the accident. Such a receipt is evidence but not the only evidence in proof of the fact of the appellant, or any other person being a passenger in a particular motor vehicle. In the case before us, the police abstract report on the accident and the appellant's oral testimony clearly established that the appellant was a passenger in the accident bus

on the date and time of the subject accident. The finding by the learned trial Judge to the contrary is clearly in error in view of that evidence." (emphasis mine)

13. In the case of Stephen Njoroge Thuo v Hellen Muihu Maina [2017] eKLR, the learned Justice Ngugi, J (as he was then) opined that the lack of a receipt in itself would not be dispositive in the Kenyan context. In this instance, the Police Abstract produced confirmed the occurrence of the accident, and that the Appellant was one of the passengers. It is, therefore, my considered view that the Appellant proved liability by the Respondent to the required standard.

14. Having proved liability, the next issue for determination would be the quantum of damages. It was the Appellant's testimony that she attended Hospital on 1st September 2023 for treatment of the injuries sustained in the accident. The Medical Report by Dr. Okere indicated that by 16 October 2023, the Appellant did not present with any complaints. The injury was classified as harm. Although the Appellant's claim indicated that she sustained injuries on the left leg, the medical reports indicated injuries on the right leg.

15. In her submissions, the Appellant indicated a whole list of injuries which had not been pleaded. In submitting for a sum of Kshs 500,000/= for general damages, the Appellant relied on the case of Joseph Mutua Nthia -vs- Fredrick Moses M. Katuva [2019] eKLR.

16. I have looked at comparable cases. In Wahinya v Lucheveleli (Civil Appeal E046 OF 2021) [2022] KEHC 13762 the respondent sustained injury to the left lateral chest wall, blunt injury to the right upper limb, blunt injury to the right upper limb, blunt injury to the right thigh and left leg and the court upheld the trial court's award of Kshs. 200,000/=.

17. In Pitalis Opiyo Ager v Daniel Otieno Owino & Another [2020] eKLR, the court upheld the trial court's award of Kshs. 200,000 in respect of soft tissue injuries. In the case of Ephraim Wagura Muthui & 2 others V Toyota Kenya Limited & 2 others [2019] eKLR, the court assessed damages at Kshs. 100,000/= for soft tissue injuries.

18. In Ephraim Wagura Muthui 2 others V Toyota Kenya Limited & 2 others [2019] eKLR Majanja J set aside the lower court award of Kshs. 55,000/= for cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back and substituted it with an award of Kshs. 100,000/=.

19. Based on the foregoing, I find that an award of Kshs 100,000/= for general damages is reasonable in the circumstances.

20. With regard to special damages, the Appellant pleaded a sum of Kshs 9,550/=, comprising of:

    i. Medical Report - Kshs 5,000/=

    ii. Medical expenses - Kshs 4,000/=

    iii. Motor vehicle search - Kshs 500/=

21. In proof thereof, the Appellant produced a receipt dated 17 October 2023 for Kshs 5,000/= and Invoice for Motor vehicle Search for Kshs 550/=. I, therefore, find that the Appellant has proved special damages of Kshs 5,550/- and award the same.

22. The upshot is that the appeal is meritorious and the same succeeds. The order of the trial court is hereby set aside and substituted with the following order:

    i. Judgement is hereby entered in favour of the Claimant as against the Respondent in the sum of Kshs 100,000/= as general damages for pain and suffering and Kshs 5,550/- as special damages;

ii. The said sum of Kshs 100,000/= shall accrue interest at court rates from 22 December 2023 until payment in full;

iii. The Claimant is awarded costs of the suit.

23. The Appellant is hereby awarded costs of the appeal assessed at Kshs 30,000/=.

DATED AND DELIVERED AT NAIROBI THIS 18 DAY OF DECEMBER 2024.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

…… …… for the Appellant

,…… for the Respondent