Transbionics Limited v Micheni (Civil Appeal E039 of 2022)
[2023] KEHC 18332 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18332 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E039 OF 2022

LM NJUGUNA, J

MAY 31, 2023

BETWEEN

TRANSBIONICS LIMITED ..... APPELLANT

AND

ANDERSON BUNDI MICHENI ..... RESPONDENT

(appeal against the judgment of the learned trial magistrate Hon H. Nyakweba (PM) in Embu CMCC No 105 of 2019 delivered on June 21, 2022)

JUDGMENT

1. The appellant herein filed in this court a memorandum of appeal against the judgment of the learned trial magistrate Hon H. Nyakweba (PM) in Embu CMCC No 105 of 2019 delivered on June 21, 2022. The grounds upon which the appeal is based were that: -

    i. The learned trial magistrate erred in law by finding the appellant wholly liable in negligence in disregard of the sum of evidence adduced at the hearing in regard to the respondent's evidence contributory roles in the accident.

    ii. The learned magistrate erred in law and in fact in the manner that he assessed damages for pain and suffering and in awarding damages that were excessive in the circumstances.

    iii. The judgment of the learned trial magistrate is against the law and weight of the evidence on record.

2. The appellant thus prayed that the appeal be allowed with costs and the judgment of the trial court be set aside.

3. The court directed that the appeal be canvassed by way of written submissions and both parties complied.

4. The appellant faulted the trial court for reaching an erroneous finding on liability and failing to find that there were inconsistencies in the respondent's evidence. That PW2 gave contradictory evidence to explain how the accident occurred and thus his evidence was inconsistent and unreliable. It was submitted that the respondent did not call any witness to corroborate his assertions despite indicating that he had carried a pillion passenger. The appellant contended that it was incumbent upon the respondent to produce before the court all relevant materials and documents to enable the court make a well informed decision. Reliance was made on section107 (1) of the *Evidence Act*. That given the absence of reliable independent evidence to show that the driver of motor vehicle registration number KCL 738X was to blame for the accident, and in absence of the investigating officer, the same occasioned grave inconsistencies in the testimony of the only supposed witness to the accident. In that regard, the appellant submitted that the trial magistrate erred in relying on such evidence to reach a determination that the appellant was wholly liable.

5. On quantum, it was submitted that the trial court failed to appreciate the fundamental principal in assessing damages in regards to comparable injuries. The appellant relied on the case of *Denshire Muteti Wambua v Kenya Power Lighting Co Ltd* [2013] eKLR. The appellant submitted that Dr G.N Njiru who examined the respondent indicated that the injuries sustained by the plaintiff were fracture of the right femur, lacerations to the right thigh, contusion of the left knee joint and chest. It was thus submitted that the award by the trial court was inordinately high in the circumstances herein. Further reliance was placed on the cases of *Agnes Wakaria Njoka v Josphat Wambugu Gakungi* [2015] and *Alphonza Warutu & another v Joseph Muema* [2017] eKLR. In conclusion, this court was urged to reassess the evidence herein and set aside the judgment of the lower court with its own.

6. On his part, the respondent submitted that the trial court did not find him liable for the reason that appellant did not file submissions but because, a party cannot exhibit documents through submissions. Reliance to support this position was placed on sections 62, 107, 108, 109, and 112 of the *Evidence Act*. It was his case that the standard of proof in civil matters is one on a balance of probabilities and further, the appellant herein neither tendered evidence nor called witnesses and as such, the respondent's evidence was not controverted. Further, it was his case that once the respondent testified, he thus discharged the burden of proof and given that the evidence supersedes the statement, the trial court was alive to the same. He backed up his case by submitting that the only witness who saw how the accident occurred was the respondent as the police man only visited the scene after the accident. That the initial findings showed that the appellant was to blame for the accident whether he was charged or not.

7. On quantum, the respondent relied on the finding in Agnes Wakria and Alphonza Warutu, and submitted that the injuries in the cases were not comparable at all. Further that, a trial court is not bound by parties' submissions and therefore, this court was urged to dismiss the appeal herein with costs.

8. As the first appellate court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano v Associated Motor Boat Co Ltd* [1968] EA 123). This court nevertheless appreciates that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd*. (1982-88) 1 KAR 278 and *Kiruga v Kiruga & another* (1988) KLR 348). These authorities echo section 78 of the *Civil Procedure Act* and by dint of the same, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

9. However, in the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to, but the evaluation should be done depending on the circumstances of each case and the style used by the first appellate court and that what matters in the analysis is the substance and not its length. (See Supreme Court of Uganda's decision in *Uganda Breweries Ltd v Uganda Railways Corporation* [2002] 2 EA 634 and *Odongo and another v Bonge* Supreme Court Uganda civil appeal 10 of 1987 (UR).

10. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties herein. The court thus forms the view that it has been called upon to determine whether the appeal herein has merits.

11. It is trite law that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities (See *Miller v Minister of Pensions* [1947] 2 All ER 372 and section 107 of the *Evidence Act*). However, there is evidential burden which is captured by sections 109 and 112 of the *Evidence Act*. These two provisions were dealt with in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2005] 1 EA 334, in which the Court of Appeal held that: -

> " As a general proposition under section 107(1) of the *Evidence Act*, cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in sections 109 and 112 of the Act."

12. It follows that the initial burden of proof lay on the plaintiff, the respondent herein to prove negligence on the part of the appellant.

13. Negligence was defined in the case of *Blyth v Birmingham Waterworks Company* (1856) 11 Ex Ch 781 (Baron Alderson) as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done" (See *Salmond and Heuston on the Law of Torts* 9th Edition). The elements of the tort of negligence which must be proved for an action in negligence to succeed are (a) there was a duty of care owed to him or her, (b) the duty has been breached, and (c) as a result of that breach he or she has suffered loss and damage [See *Donoghue v Stevenson* [1932] A.C 562]

14. The question therefore is whether the respondent in discharging the burden of proof placed on him did prove the elements of the tort of negligence.

15. The appellant has faulted the trial court for reaching an erroneous finding on liability in failing to find that there were inconsistencies in the respondent's evidence in that PW2 gave contradictory evidence to explain how the accident occurred meaning his evidence was inconsistent and unreliable. That it was incumbent upon the respondent to produce before the court all relevant materials and documents to enable the court make a well informed decision. On the other hand, the respondent contended that the trial court did not find him liable for the reason that the standard of proof in civil matters is one on a balance of probabilities and further, the appellant herein did not tender any evidence and as such, the respondent's evidence was not controverted.

16. The respondent in support of his case testified that he was travelling on a motor bike as a rider carrying a passenger; heading towards the Meru direction when a probox approached him from the rear attempting to overtake a lorry but encountered an oncoming vehicle and swerved to return to its lane where it collided with the respondent's motorcycle. He produced a demand letter, receipts, invoices, police abstract and undertaking by his advocates on record to clear the hospital bill at Embu Hospital. Despite the defendants/appellant having entered appearance and filed a defence, it did call any witness to substantiate its averments in the defense. It closed its case without tendering any evidence.

17. It is trite law that pleadings and/or the averments therein are not evidence and neither can they be a substitute thereof. Further, where a defendant does not adduce evidence, the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No 834 of 2002 Lesiit, J citing the case of *Autar Singh Bahra and another v Raju Govindji*, HCCC No 548 of 1998 appreciated that:

> " Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail".
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> [See also *Shaneebal Limited v County Government of Machakos* [2018] eKLR].

18. It is therefore clear from the above decisions and which I duly agree with that, where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the opposing party against them is uncontroverted and therefore unchallenged. In that regard therefore, I agree with the trial court that indeed the appellant was wholly liable for the accident herein.

19. The appellant has challenged the award of the trial court on general damage and has averred that the award is excessive and the same does not reflect the injuries suffered by the respondent. In my view, what is clear is that the appellant has challenged the trial magistrate's discretionary powers. It therefore follows that the circumstances under which this court can upset such a determination have been previously laid down by the Court of Appeal in the case of *Mbogo & another v Shah* [1968] EA where it was held that:

> " .....that this court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

20. Similarly, Madan JA (as he then was) in *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A held that;

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts;

thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

21. There is no doubt that the respondent suffered the following injuries:

    i. Multiple laceration on the fore head.

    ii. Fracture right femur mid shaft.

    iii. Extensive degloving injury right thigh.

    iv. Contusion to left elbow joint and knee joint.

    v. Chest contusion.

22. It must also be noted that injuries will never be fully comparable and therefore, what a court needs to consider is that as far as possible "the injuries are comparable" to the other person's injuries, and the after effects. [See *Stanley Maore v Geoffrey Mwenda* Nyr CA civil appeal No 147 of 2002 [2004] eKLR].

23. In the case of *David Kimathi Kaburu v Dionisius Mburugu Itirai* (2017) eKLR the High Court awarded Kshs 630,000/- to a plaintiff who sustained a fracture midshaft femur; intertrochanteric fracture; wobbly gait; severe pain on the right hip and entire hip with injuries.

24. In the case of *Joseph Mwangi Thuita v Joyce Mwole* (2018) eKLR where the plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right led and episodic pain (r) thigh with inability to walk without support and the court awarded Kshs 700,000 as general damages.

25. *Pauline Gesare Onami v Samuel Changamure & another* (2017) eKLR where the plaintiff suffered fracture of the right tibia and fibula bone, fracture of left tibia and fibula bone, laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid shaft and the court upheld the trial court's award of Kshs 600,000.

26. *Sammy Mugo Kinyanjui & another v Kairo Thuo* (2017) eKLR where the respondent had slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs; fracture of the right tibia; fracture of the left tibia and fibula. His conclusion was that the injuries were very severe but had healed the court lowered the award of general damages from Kshs 1,000,000 to 600,000.

27. *Reuben Mongare Keba v LPN* (2016) eKLR where the respondent suffered fracture of the tibia-fibula bones of right leg, dislocation of the right hip joint, bruises on the chin, fracture of the right femur and degloving injury of the right leg and was awarded general damages of Kshs 800,000.

28. In the case herein, the appellant submitted that the amount awarded by the trial court was inordinately high in the circumstances, and thus proposed an amount of Kshs 800,000.00.

29. I am therefore in agreement with the appellant that in deed the trial magistrate's determination was against the law and weight of the evidence on record. I am of the considered view that a sum of Kshs 1,200,000 would be reasonable taking into account the inflation and the passage of time from when the authorities cited above were decided.

30. For the foregoing reasons, the upshot of this court's decision is as follows:

    i. That the appellant's appeal partially succeeds.

ii. The decision by the learned trial magistrate on general damages is hereby set aside, varied and/or vacated in the manner herein below;

General damages Kshs 1,200,000.00

Specials Kshs 183,490.00

iii. Each party to bear its own costs of the appeal.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 31ST DAY OF MAY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent