Wekulo v Masinde & another (Civil Appeal 33 of 2019)
[2023] KEHC 18879 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18879 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 33 OF 2019

PJO OTIENO, J

MAY 26, 2023

BETWEEN

HANNINGTONE MUTALI BARASA WEKULO ..... APPELLANT

AND

AINEA MASINDE ..... 1ST RESPONDENT

WEST KENYA SUGAR COMPANY LIMITED ..... 2ND RESPONDENT

(Being an appeal from the Judgment of Hon. P. M. Mwangi (PM) in Kakamega CMCC No. 267 of 2012 delivered on 13th February 2019)

JUDGMENT

Background

1. The genesis of the appeal was a road traffic accident alleged to have occurred on or about the 2nd of November 2014 at about 3pm to 4 pm in Buneri area. It was and remains the Appellant's case that on or about 02/11/2011 along Navakholo-Musaga Murray Road, at Buneri area, the Respondents by driver/agent/employee/servant or himself drove and managed motor vehicle registration number KAL 642N Toyota Pick-up Matatu so violently and recklessly that it caused an accident by running into a winch that was pulling a tractor transporting sugarcane from an adjacent parcel of land occasioning him; a fare paying passenger severe injuries, loss and damage. He alleged that, but for the Respondent's reckless and negligent manner of handling the motor vehicle, the accident would not have been caused.

2. At the trial, the Appellant in the prosecution of his case called a total of three witnesses and documents in support of his case. The Plaintiff, now Appellant, testified as PW1 stated that on 2/11/2011 he was travelling as a passenger in the said motor vehicle KAL 642N Toyota pick-up, owned and driven by the 1st Respondent, from Kakamega along Navakholo-Musaga road when the incident occurred. He presented that the winch was on the right side of the road while the trailer that was being pulled was leftwards on the shamba and it is the wire that passed across the road that led to the collision. He

was taken to Navakholo sub-county hospital and later to Kakamega General hospital where he was admitted until 5/11/2011 and upon which he was ascertained to have suffered blunt injuries on both shoulders, blunt soft injuries on the anterior wall of the chest as well as a fracture on the left 8th rib. On cross-examination, he indicated that he never heard the bang neither did he witness the accident taking place being he was asleep and that his testimony is grounded on what he saw after the incident had taken place.

3. PW2, Police Constable attached to Kakamega police station attended court to produce a police abstract on road accident, No 151/2011, respecting the accident having not been the officer who investigated the matter. It was his testimony, based on the information from the police records, that on the material day, the tractor KBH 451Q, fitted with a winch, was on a mission to rescue another trailer which was stuck in the sugar case plantation when the motor vehicle the Appellant was aboard, without noticing the presence of cable across the road, rammed onto the cable that was being used to pull the trailer causing the vehicle to loose control, veer off the road thus landing on the left side of the road. He added that no one was blamed for the accident and that the motor vehicles when inspected, none of them was found to have had defects prior to the incident.

4. Dr. Charles Andai testified as PW3 and described himself as a Medical Practitioner who prepared medical report on the Plaintiff which he produced as an exhibit and showed that the Plaintiff had sustained a fracture of the 8th rib on the left side and blunt injuries on both shoulders. He opined that the Plaintiff had serious skeletal injuries and moderate soft tissue injuries.

5. On cross-examination, he admitted that he prepared the report by looking on the case summary including the X-ray films from Kakamega PGH Hospital which document had no indication that the Appellant had been treated for shoulder and ribs blunt injuries.

6. In the submissions filed, the Appellant pleaded for an award of Kshs 800,000 citing a similar case of *Easy Coach Limited vs Emily Nyangasi* (2017) eKLR.

7. The two Respondents filed separate Statements of Defence which were, in essence, a total denial of the claim by the Appellant but equally alleged contributory negligence against each. However, after the Appellant closed its case, the 1st Respondent opted to lead no evidence nor tender any document as exhibit while the 2nd Respondent, with the consent of the other parties, produced a medical report on the Appellant prepared by Dr P W Oketch at the request of the 2nd Respondent. That report shows that the Appellant suffered soft tissue injuries as well as a fracture of an unspecified rib.

8. The trial Magistrate on the matter dismissed the suit on grounds that the Appellant had failed to establish his claims on a balance of probabilities, that the liabilities against the Respondents were unproven and lastly that there was no proof of injury thus no damages were awardable.

Appellant's case

9. The Appellant having been aggrieved and dissatisfied by the trial court's decision lodged this appeal against the entire Judgment on grounds that: -

    i) That the trial magistrate, in disregarding prosecution evidence of the appellant having been injured while travelling in respondent's motor vehicle, erred in law and fact by finding that the appellant failed to prove its case against the respondents on liability and negligence.

    ii) That the trial magistrate erred in law and fact in misdirecting himself by considering matters he ought not to have considered thus arriving at a wrong decision.

iii) That the judgment of the learned trial magistrate is contrary to the weight of the evidence on record thus wrongly made.

iv) That the trial magistrate erred in law and fact by failing to assess the damages he would have awarded had the appellant succeeded.

10. The Appellant then prayed for the setting aside of the said Judgment and for an order as to an award of general damages for pain and suffering as well as special damages.

11. As directed by the court, the Appellant and Respondents filed written Submissions which the court has enjoyed the benefit of reading and taken into account in arriving at this determination.

Analysis and Determination

12. After careful re-evaluation of the evidence before the trial court, in execution of the mandate of a first appellate court, the court determines that two issues stand out for its determination in deciding the appeal. The issues are: -

i) Whether the appellant proved his case on negligence against the two respondents or any of them for the causation of the accident?

ii) Whether the trial court properly addressed its mind to the evidence before declining to award damages?

13. Being a first appellate court the principles of law enunciated in *Selle & Another v Associated Motor Boat Co Ltd & Others* (1968) bind the court to re-evaluating the entire evidence and come up with its own deductions while bearing in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings.

a. Whether the Respondents were liable for causing the accident.

14. The fact that there occurred an accident as presented and described by the Appellant is not in dispute. It is also not disputed that the injuries pleaded were indeed suffered by the Appellant who was in all event a passenger and not in control of the either of the two vehicles.

15. The only evidence on causation was that by the Appellant. In his evidence, he was at the rear cabin and not able to see what was in the front cabin and on the road ahead. He was thus unable to establish what speed the matatu was doing or if the cable was visible to the oncoming traffic, but was adamant that after the accident he saw that the tractor being towed was on the right, as one faces Navakholo, while the winch was on the left. His evidence that the collision was between the matatu and the cable stretched between the two trailers was never challenged. It was however clear that the matatu was on the road and the cable stretched across the same road.

16. Even the evidence by the police, PW2, that there were never warning signs on the road, from that evidence it is unclear as to who between the matatu and the winch driver was more to blame for the accident. From the analysis of the record at trial, it is, to this court, inescapable that both were negligent in the manner they conducted themselves. The Matatu driver was at fault in not being a proper lookout for the obstruction on way presented by the winch cable while the winch driver was negligent in failing to place warning signs that he was towing a trailer from a farm onto the road.

17. The extent of their respective actions could have best been narrated by the two drivers, but both chose not to give evidence in that regard. Where there is lack of precise evidence on the extent to which each of

the two drivers to a collision contributed to a collision, the position of stare decisis is that both should be held to have contributed equally to the collision. In *Hussein Omar Farah -Vs- Lento Agencies* [2006] eKLR the Court of Appeal, after setting out the conflicting versions of the collision stated: -

> " The collision is a fact and a certainty but the question still remains whether the accident occurred because the appellant's truck swerved as it was being overtaken or because its driver suddenly got into the road?
>
> In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

18. The court thus finds that both the driver of the matatu and that of the winch were equally at fault and are thus equally liable to the Appellant. In coming to the decision that neither of the drivers was liable to the Appellant, the trial court sought to rely on and did rely on the principle of vicarious liability. In doing so the court rendered itself thus: -

> " The evidence as it is does not prove negligence upon the driver of tractor KBH. The evidence by PW1 & PW2 that a chain linking a trailer to tractor KBH, both at the opposite sides of road, was responsible for the accident lacked the corroboration required of it since no eye witness testified on the circumstances that led to the occurrence of the accident. PW1's & PW2's explanation as to how the accident took place was speculative and cannot be acted upon by the court.
>
> On the 1st issue for determination I find that there was no evidence as to which the motor vehicle KAL & KBH was liable for the accident. None of the motor vehicle can be held liable for the occurrence of the accident. Vicarious liability was not proven against any of the defendants."

19. That excerpt ignores the fundamental question as to causation and the fact that the occurrence of the accident was never in contestation and gives undue weight and importance to whether or not the driver was an agent of the owner. Whether or not the principle of vicarious liability applied ought to have emerged from the evidence by the party denying privity with the driver in their pleadings. Before the trial court, none of the Respondents denounced the drivers of the subject vehicles by evidence. It was thus not an issue arising from the evidence.

20. It remains the law that pleadings not proved by evidence remain mere allegations and cannot be the basis of a finding by the court. See *Fahim H Amir t/a Fahim H Amir Transporters v Tumaini Transport Services Company Limited* [2017] eKLR.

21. The Court thus holds that the finding that no liability was proved was in error arising out of the misapprehension of the evidence and wrong exposition of the law on vicarious liability. To that extent, the finding on liability is set aside and in its place substituted a finding that both Respondents are liable to the Appellant jointly and severally being joint tortfeasor.

22. On general damages for pain and suffering, the trial court took the view and held that there was lack of corroboration of the Appellant's evidence on the extent of his injuries and therefore he made no award. That is equally an erroneous conclusion. It is never the law that only medical report must prove and support an award of damages for injuries that are otherwise proved. A personal injury must not be a fracture or indeed physical bodily injury. It is enough that one apprehends fear and suffers emotional

or mental trauma. Such would still be entitled to damages even if the same be nominal. It is unjust in such cases that the court declines to award damages and leave an injured citizen with no remedy.

23. In this matter, there was, over and above the evidence and report by Dr. Andai, the medical report by Dr Okech, produced by consent at the instance of the 2nd Respondent which established that the Appellant had suffered bodily injuries. With such consensual evidence on the injuries suffered, it was an aberration of the law to find that no injuries were suffered to merit damages being awarded.

24. The Court sets aside the decision awarding no damages and in its place substitutes an award of Kshs 200,000 being general damages for pains and suffering. There were documents to demonstrate that the Appellant spent Kshs 5,000 on PW3 to prepare the report and give evidence and Kshs 200 to procure the police abstract. The Court finds that special damages were proved at Kshs 5,200 which is hereby awarded to the Appellant.

25. The court would have concluded at this juncture, but there are more errors in the decision. The trial court, went further to determine two other suits which had been stayed to await the determination of the one that was heard and determined. The court said: -

> "By court orders dated 16/8/2017 in CCNO 256/12, proceedings in CCNo's 256/12 & 257/12 were stayed pending the determination of this case being the test suit for the said CCNO's 256/12 & 257/12.
>
> In respect of the CCNO's 256/12 & 257/12 on the 4th issue I find that liability has not been established against the defendants. I note that the cause of action in this case and CCNO's 256/12 & 257/12 arose on the same day under similar circumstances and involving common defendants.
>
> Plaintiff has failed to establish his claim on a balance of probabilities and this suit is dismissed with no orders as to costs."

26. That part of the judge would stand set aside on the basis that a judgment in the test suit has been set aside but also on the additional basis that the court proceeded like it had received, reviewed and analysed the evidence by the two claimants and found same wanting. That would amount to condemning the two unheard. Let those two files; Kakamega CMCC 256 and 257 of 2012, be returned to the trial court for purposes of assessment of damages.

27. In conclusion the Appeal succeeds in full, the dismissal order is set aside and Judgment entered for the Appellant against the Respondents jointly and severally for: -

    i. General damages for pains and suffering Kshs 200,000

    ii. Special damages Kshs 5,200

28. The Appellant is awarded the cost of this Appeal as well as the costs before the trial court. In addition, the Appellant gets interest at court rates for special damages from the date of the Judgment while on special damages, interest shall be calculated from the date of the suit.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 26TH DAY OF MAY, 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for Khayumbi for the Appellant

No appearance for the Respondents

Court Assistant: Polycap Mukabwa