



Mwaka v RN (Minor Suing Through WN Next Friend) (Civil Appeal E034 of 2020) [2023] KEHC 21691 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21691 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E034 OF 2020**

**MW MUIGAI, J
JULY 31, 2023**

BETWEEN

NICHOLAS MWAKA APPELLANT

AND

RN (MINOR SUING THROUGH WN NEXT FRIEND) RESPONDENT

(An Appeal against the judgment Dated 19th March Delivered by the Honorable C.A Ocharo, Principal Magistrate in Machakos Chief Magistrate's Court Civil Suit No. 134 of 2010)

JUDGMENT

Background

Proceedings In The Magistrate's Court

Plaint

1. *Vide* a Plaint dated 23rd January,2010 and filed on 29th January,2010 against the Appellant in which the Respondent claimed that at all material times the suit, the Appellant was the registered owner and/ or driver of motor vehicle registration number xxxx. Contending that on 14th February,2009 along Nairobi-Mombasa Road the Respondent was a lawful passenger in the motor vehicle registration number xxxx when the Appellant, his driver, servant, agent and/ or employee so negligently drove managed and/ or controlled the said motor vehicle such that it lost control, left the road and rolled several times thus occasioned bodily injuries to the Respondent and that the particulars of injuries were:
 - a. Injury on the head
 - b. Injury on the right leg



2. The Respondent particularized special damages as follows:
 - a. Medical report 3,000/=
 - b. Medical expenses 3,500/=
 - c. Police abstract 200/=
 - d. Copy of record 500/=
3. Respondent prayed for judgment to be entered against the Appellant for:
 - a. General damages
 - b. Special damages
 - c. Cost of the suit
 - d. Interest on (a), (b) and (c) above at court rates.

Defence

4. The Appellant filed his defence dated 11th February, 2010, opposed the Respondent's claims denying at any time being the registered owner and/ or driver of motor vehicle registration number xxxx as was alleged in the plaint. He further denied that the accident occurred on the said date and place involving the said motor vehicle registration number xxxx and further denied that the Respondent was lawfully travelling as passenger in the said motor vehicle as alleged, demanding strict proof thereof.
5. The Appellant denied all the particulars of negligence enumerated in the plaint *in toto*. Stating that the Respondent averred that if such an accident occurred which is denied the same was inevitable accident, caused by circumstances beyond the control of the driver of motor vehicle registration number xxxx and that it could not be avoided. The Appellant denied the particulars of injuries and special damages and prayed that the Respondent's suit against him be dismissed with costs and interest thereon.

Hearing At The Trial Court

6. At the hearing, PW1 from Athi River base testified that driver of xxxx one Alex Museche was charged for careless driving and fined Kshs 3,000/= and produced police abstract as an exhibit and blamed the driver for the accident.
7. PW2 the Respondent (minor) stated that he fractured his left arm, broke his tooth, suffered head injuries and a cut wound on the left leg which was stitched. Further stated that he still experienced nose bleeding. On cross examination Respondent testified that he had head scans for one and half years after the accident but see only one receipt for the head scan and that at the time of the accident he was thirteen years and was accompanied by his mother for P3 filling on 15/7/2009. Respondent testified that he went to see Dr. Syengo about three years after the accident and that his fracture had healed denying that the injuries he suffered were sustained somewhere else other than the accident.
8. After the close of the Respondent's case, the Appellant (DWI) adopted his recorded statement as his evidence in chief in which on cross examination he admitted being the owner of the accident vehicle and an employer of Alex Musee.
9. The matter was canvassed vide written submissions (not in the record of appeal).



10. Vide judgment delivered on 19th March, 2019, Hon. C.A Ocharo agreed with the Respondent and entered judgment on its favor in which the learned Magistrate entered the said judgment against the Appellant on the following terms:
 - General damages at Kshs. 100,000/=
 - Special damages at Kshs. 5,250/=
 - Total Kshs. 105,250/=
 - Cost of suit and interest.
11. *Vide an Ex parte* Notice of Motion dated 6th December, 2022, and supporting affidavit dated 6th December, 2022 the Appellant sought orders that: this application be certified urgent and heard ex parte in the first instance; Honorable Court be pleased to set aside the orders for the dismissal of the Appeal herein made on 21st September, 2022: this Honorable reinstate both the appeal and the orders for stay execution of the Decree in CMCC 134 of 2010 pending the hearing of the Appeal.
12. In the said Supporting Affidavit Sworn by the Advocate, the said Advocate deposed inter alia that the affidavit in support of the application is made to set aside the orders made on 21st September, 2022 as the Appellant had been wholly innocent in what transpired and resulted in having his appeal dismissed and that the Appellant will suffer irreparable loss and damage through no fault on his part; deposing that the said orders be vacated, thereby reinstate the Appeal and the orders for stay of Execution pending appeal.
13. *Vide* an order issued on 9th December, 2022, the Honorable Court set aside orders of dismissal of appeal made on 21/9/2022 and reinstated both the Appeal and orders for the stay of execution of decree in CMCC 134 of 2010.

The Appeal

14. Dissatisfied with the Judgment, the Appellant vide Memorandum of Appeal dated 9th December, 2020 sought orders to have the Appeal allowed and the trial court's judgment be set aside and dismiss the suit; in the alternative, this Honorable Court do set aside and substitute the award made in the lower or revise the judgment in the lower court on liability and quantum; the costs of this appeal be awarded to the Appellant. On the grounds That:
 - a. The Learned Trial Magistrate erred in law and in fact in finding the Appellant guilty of negligence yet the Respondent did not produce any evidence that he used the vehicle in which he was injured
 - b. The Learned Trial Magistrate erred in law and in fact in finding the Appellant liable for the injuries sustained by the respondent yet there was no evidence to contradict the Appellant's Sworn Statement that the driver of the vehicle acted outside the scope of his authority.
 - c. That the Learned Trial Magistrate erred in law and in fact in finding favor of the Respondent yet the Respondent failed to prove his case on a balance of probabilities that the injuries he sustained arose from the accident which occurred on 14th February, 2009
 - d. The Learned Trial Magistrate erred in law and in fact in condemning the Appellant to pay Kshs 105,000/= to the Respondent despite the Respondent's failure to prove his case on a balance of probabilities.



- e. The Learned Trial Magistrate erred in law and in fact by finding that the Appellant did not object to the production of documents as this is contrary to the Defendant's Statement in Pre-trial Directions filed therein.
 - f. The Learned Trial Magistrate erred in law in shifting the burden of proof of the plaintiff's injuries to the Defendant by stating that "in the absence of any evidence to the contrary this court finds that he indeed suffered injuries as pleaded" when it was upon the plaintiff to prove his case on the balance of probabilities.
 - g. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the P3 form relied on did not support the Respondent's claim that the injuries arose from the accident of 10th February,2009
 - h. The Trial Magistrate erred in fact in failing to take note that the P3 form did not disclose any injuries to the head and right as claimed in the plaint
 - i. The Trial Magistrate erred in fact in failing to take note that Dr. Syengo report did not refer to any injury on the leg herein as was particularized in the plaint.
 - j. The Trial Magistrate erred in fact in failing to take note that there was no reference in any of the documents from Kenyatta National Hospital to any injury to the head or the legs which were the injuries particularized in the plaint.
 - k. The Trial Magistrate erred in fact in failing to take cognizance that the report from Athi River Medical Services did not refer to any injuries to the leg and did not refer to any stitching and/ or treatment to the legs and therefore did not support the claim that the Respondent sustained injuries to his leg.
 - l. The Trial Magistrate erred in fact in failing to appreciate that the Respondent did not adduce sufficient evidence to prove his case and the Appellant was therefore under no obligation to compensate the Respondent.
 - m. The Learned Trial Magistrate erred in law and in fact in failing to critically examine the factual issues brought out in cross examination of the Respondent which established that the Respondent did not have a valid case against the Appellant.
15. The Appeal was deposed by way of written submissions.

Submissions

Appellant's Submissions

16. The Appellant vide his submissions dated and filed on 13th April 2023 submitted that the trial court after correctly stating the injuries it had to consider were the injuries particularized in the plaint, the trial court proceeded to erroneously conclude that the injuries particularized in the plaint were proved by the evidence produced by the Respondent to the trial court. contending that the evidence produced to prove injury to the head and right leg as particularized in the plaint was inadmissible and in the alternative without prejudice to the same, the said evidence failed to factually prove that the Respondent sustained the said injuries at all and/ or on 14th February,2009 when the accident occurred.
17. On the ground of inadmissibility of documents (ground 5 memorandum of appeal) it was the submission of the Appellant that the medical report from Athi River Medical Services (page 15 of the record) and the Medical Report by Dr. Syengo (page 13 of the record) and Kenyatta National Hospital



(page 17 of the record) and P3 form (page 26 of the record) was objected to by the Appellant in the Pre-trial Questionnaire (page 40 of the record). Contending that Respondent's Pre-Trial Questionnaire (at page 38 of the record) he stated in answer to question 12 that he also required a "medical experts". Urging that both parties requested the attendance of "medical experts" and therefore it was erroneous for the Trial Court to hold as follows (at page 58 of the record paragraph 5).

"the medical documents are admissible in as far as the defendant did not object to their production at the time of hearing. The defendant is estopped from raising the issue of admissibility in his submissions. The essence of a trial before court is to see that justice is done and not to dwell on technicalities such as procedural law"

18. It was the position of the Appellant that the evidence from which the trial court made the awards in its judgment was inadmissible as there was no evidence before the court as regards the Respondent's injuries and therefore no basis to make an award for any injury.
19. As regards the general damages (grounds 7,8,9,10 and 11 of the memorandum of appeal), it was submitted on behalf of the Appellant that the injuries pleaded in the plaint, namely injuries to the right leg and on the head were not proved. Contending that report by Dr. Syengo, a Consultant Psychiatrist was made 3 years after the accident as it was dated 21st March,2012 and the accident happened on 14th February,2009. Urging that there is no mention in the Report that the Respondent's present complaints that she note in March 2012 were directly related to any injury sustained in February 2009.
20. Submitting that the Athi River Service Report (at page 15 of the Record), did not make any reference to any injury to the right leg at all and as regards head injury the report merely notes "Impression Head Injuries" which he urged was not an unequivocal statement that the Respondent sustained any head injury though made on the same day of the accident. As to Nairobi West Hospital Limited (page 16 of the record), it was the Appellant's contention that the report was dated 29th February,2012, which is three years after the accident. The report according to the Appellant states that the Respondent's head scan was "Normal Brain CT Scan" and does not refer to injury to the right leg. Urging that the report does not prove that the Respondent suffered any injury to the head or right leg in an accident which occurred three years earlier.
21. It was submitted further that the Kenyatta National Hospital Report (pages 17-25 of the record) stated that the Respondent "attended Accident and Emergency on 15/2/2009 following a road accident. Urging that an X Request Form was for the arm and does not mention the head or the right leg, therefor according to the Appellant does not prove that there was injury to the head or any leg as early as the same day or next day after the accident. Averring that the P3 Form (at pages 26 and 27 of the record) makes no mention of head injury likewise no mention of injury to the lower limb and no mention of any injury to the right leg.
22. Contending that none of the medical reports produced by the Respondent established that he suffered head injuries and an injury to the right leg on 14th February,2009, urging that there was no evidence before the court to enable it to conclude that the Respondent sustained injury to the head and right legs as pleaded in the plaint.
23. On the duty of the claimant to prove his case, it was the Appellants contention that the trial court was misguided and erroneously applied the law as regards claimants to prove his claim. He relied on sections 107, 108, 109, and 110 of the Evidence Act:
 - 107 Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
 109. 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.
 110. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.
24. Similarly, reliance was made on the case of *Karugi & another v kabiya & 3 Others* (1987) KLR, 347 the court of Appeal held that:

“The burdens on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended.

The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge.

For these reasons I would dismiss the appeal, but, in the circumstances, I would make no order as to costs. As Platt Ag JA also agrees there will be an order in the terms proposed by Chesoni Ag JA.

Platt Ag JA. I agree with the judgments that have been read, and would only like to emphasize two points.”

25. It was the Appellant’s case that the evidence before the court did not meet the standard of proof as required by law and the trial court erroneously considered that the respondent had proved the injuries claimed in the plaint and the award of Kshs 100,000/= should be set aside and the appeal allowed on the grounds set out in the Memorandum of Appeal, urging further the award of Kshs 3000 for the medical report should also be set aside as there is no receipt on record to prove that the Respondent made a payment of Kshs. 3,000/= for any of the Medical Reports Produced and that the award of special damages of the balance of Kshs 2,250/= should also be set aside as the Respondent failed to prove that he was injured as particularized in the plaint.
26. Finally, the Appellant submitted that his appeal be allowed, judgment entered against him be set aside or alternatively substituted or revised and he be awarded costs.

Respondent’s Submissions

27. Respondent *vide* his submission dated 1st March, 2023 and filed on 3rd March,2023 and submitted on the grounds of liability and quantum.
28. On the liability it was the Respondent’s case that PW1 police officer testified that on 14th February,2019 that driver of the suit motor vehicle xxxx one Alex Musche was charged with careless driving and fined 3,000/= in default 3 months’ imprisonment and that the Defendant admitted that the vehicle belongs to him but shifted responsibility to the driver stating that he did not authorize his driver to hire the vehicle or use the same as taxi.



29. Submitting that the plaintiff testified and submitted that the Defendant is variously liable for the acts of the driver and that the plaintiff was a passenger in the motor vehicle xxxx. contending that the plaintiff was injured and the Defendant's driver was in his daily course of business with authority from the Defendant carrying the plaintiff with the implied authority of the Defendant and that Grounds 1,2,3,4,5,6,7,8,9,10,11,12 and 13 Memorandum of Appeal fails.
30. On the issue of quantum, it was the Respondent's submission that the he testified on 23/2/2019 that he had injuries to the head and right leg and that he produced evidence in support of his case. Opining that he sought for Kshs 1,100,000/ and that he experienced headaches, averring that the court awarded him Kshs 100,000/= which was very lenient and on the lower side and chose not to appeal. Submitting that he proved his case on the balance of probabilities and that grounds 4,5,6,7,8,9,10,11,12 and 13 of the Memorandum of Appeal fails. Reliance was placed on the case of *Joseph Wabukho Mbavi v Frida Lwile Onyango* (2019) eKLR, in which the Court found that the suit motor vehicle belonged to the Appellant and was driven by someone in the lawful employment of the Appellant hence vicarious liability. The Court dismissed the appeal.
31. Submitting that in this case, the suit motor vehicle belonged to the Appellant and was driven by someone in the lawful employment of the Appellant hence vicarious liability and prayed that the appeal be dismissed.
32. Contending that the Respondent proved negligence on the issue of liability and the Appellant is vicarious liable and that he proved that he sustained injuries as a result of the Appellant's negligence and submitted documents in support of the injuries and that both quantum and liability should not be disturbed.

Notice

1. This Court finds the Appeal incomplete and therefore the Court cannot competently consider the appeal on merit as the original trial Court record was not availed and no explanation, reasons advanced to this situation.
2. The Court notes with concern that exhibits produced medical Reports treatment Notes and other documentary exhibits and written submissions by parties through Counsel on record and witness Statements relied on by the witnesses were all not availed. The Record of Appeal does not contain most of the documents to aid this Court form an informed decision on the Appeal.

Order:

The Deputy Registrar to call for and avail the Trial Court File Civil Suit 134 of 2010 – Machakos Chief Magistrate's Court.

Further Mention for Directions on 26/9/2023.

NOTICE/ORDER DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 31/7/2023. (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

In The Presence/absence Of:

Mr Othieno - For The Appellant



Mr. Mutisya - For The Respondent

Geoffrey/patrick- Court Assistant(s)

