James Finlay (Kenya) Limited v Bosire (Civil Case 371 of 2012)
[2023] KEHC 20880 (KLR) (Civ) (25 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20880 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 371 OF 2012

JN MULWA, J

JULY 25, 2023

BETWEEN

JAMES FINLAY (KENYA) LIMITED ..... PLAINTIFF

AND

NDUBI BOSIRE ..... DEFENDANT

JUDGMENT

1. By a Plaint dated July 6, 2012 and filed in court on July 20, 2012, the Plaintiff filed the instant suit against the Defendant seeking judgment for Kshs. 5,606,447/- together with interest thereon at court rates and costs. The suit was filed on behalf of the Plaintiff's insurer, ICEA Lion General Insurance Company Limited under the principle of subrogation.

2. It was pleaded in the Plaint that on December 29, 2009, a Leyland articulated lorry and trailer registration number KQJ 657 and ZA 5360 (hereafter "Leyland trailer") owned by Rongai Workshop & Transport Ltd was transporting a consignment of tea belonging to the Plaintiff. When nearing Londiani along Kericho - Nakuru Road, a collision occurred between the Leyland trailer, a petrol tanker registration number KBH 301V and an Isuzu tipper lorry registration number KAL 679U owned by the Defendant and driven by a servant or agent of the Defendant. The Plaintiff contended that the collision was caused by the negligence of the driver of the Defendant's tipper lorry. It pleaded that as a result of the collision, the Leyland trailer ferrying the Plaintiff's goods caught fire and the entire consignment of tea was destroyed. It suffered loss and damage which was duly paid by its insurer ICEA Lion General Insurance Company Limited as follows:

   Value of consignment of tea Kshs. 5,360,107

   Accident Investigator's fees Kshs. 53,931

   Loss adjuster's fees Kshs. 192,409

Total Kshs. 5,606,447

3. The Defendant denied the claim vide a Statement of Defence dated 31st March 2014.

Evidence

4. Only the Plaintiff participated in the trial by calling five (5) witnesses.

   PW1, Valerie Jean Louis, a Fleet Compliance Manager at Rongai Workshop & Transport Ltd adopted her witness statements dated 8/8/2016 and 9/6/2016 as her evidence in chief and produced the Plaintiff's further list and bundle of documents dated 14/6/2017 in support thereof. It was her testimony that on the evening of 29/12/2009, they received a message from the traffic police that the Leyland trailer had been involved in an accident near Londiani. Together with several other staff of the Company, they travelled to the scene where she took photographs. The following day, she took further photographs of the three motor vehicles that were involved in the accident. She later printed the photographs and adduced them in evidence.

5. PW2, Wesley Bosuben, a Senior Sales and Marketing Manager at the Plaintiff Company also adopted his witness statement dated 5/1/2019 as his evidence in chief. He testified that at the material time, he was employed as the Assistant Factory Manager at Kitumbe Factory where the Plaintiff's consignment of tea weighing 26,040 kilograms was loaded on the Leyland trailer at Kitumbe Factory for transportation to Mombasa. He averred that the vehicle was subsequently involved in an accident and all the tea got burnt and damaged. PW2 noted that the tea was to be sold at auction in Mombasa and based on the price which was obtained at the said auction, the consignment was valued at USD 71,631.60. There was also 32 kilograms of samples valued at USD 80.32 as evidenced by the dispatch notes and commercial invoice in the Plaintiff's Bundle of Documents. It was PW2's further testimony that the exchange rate of the US dollar to Kenya Shillings at the material time was 1 USD equivalent to Kshs. 75.50 thus the total value of the destroyed tea amounted Kshs. 5,414,249.96. PW2 stated that the Plaintiff however received from its insurers the sum Kshs. 5,360,107/- since its cover was subject to 1% policy excess.

6. PW3, Stephen Misik was a former Factory Assistant at the Plaintiff's Kitumbe Factory. He adopted his witness statement dated 20/7/2012 as his evidence in chief. In the statement, he averred that he supervised the loading of the tea consignment on to the Leyland trailer on the material day.

7. PW4, George Sayagie, a photographer also adopted his witness statement dated 22/8/2016 and list of bundle of documents dated 14/6/2017 as his evidence in chief. He averred that on the material day, he went to the scene of accident and took photographs showing the positions of the three vehicles that were involved in the accident. He later printed the photographs and adduced them in evidence.

8. PW5, Samuel Nganga was a Deputy Claims Manager - Non Motor Section, at ICEA Lion General Insurance Company Limited who was the insurer of the Plaintiff's tea. He adopted his witness statement dated 3/1/2020 as his evidence in chief and produced the plaintiff's bundle of documents dated 3/1/2020 in support thereof. It was his testimony that ICEA Lion General Insurance Company Limited settled the Plaintiff's claim on the value of tea lost and destroyed in the accident at a sum of Kshs. 5,360,107/- as shown in the Acceptance of Loss Form at page 22 of the Plaintiff's Second Further Bundle of Documents. He averred that ICEA Lion General Insurance Company Limited also paid the fees of the Accident Investigator, Pro Active Risk Solutions in the sum of Kshs. 53,931/- and the fees of the Loss Adjusters, Cunningham Lindsey Kenya Limited, in the sum of Kshs. 192,409/- as evidenced by the invoices at pages 4 and 5 of the Plaintiff's Bundle of Documents.

Submissions

9. As regards liability, the Plaintiff submitted that from the photographs adduced by PW1 and PW4, it is clear that the Leyland trailer was being driven on the correct lane of the road while the Defendant's tipper lorry, which was travelling in the same direction, was on the wrong side of the road. It was submitted that the only conclusion that could be drawn is that the tipper lorry was overtaking the Leyland trailer thereby causing the accident. The Plaintiff contended that the fact of overtaking in the face of the oncoming tanker was clear negligence on the part of the driver of the tipper lorry and thus, the Defendant should be held vicariously liable for the loss and damage suffered as a result of the negligence of his agent or servant.

10. On the issue of damages, the Plaintiff submitted that the claimed sum of 5,360,107/- is well supported by the evidence tendered by PW2, PW3 and PW5.

11. The Defendant did not put in written submissions.

Analysis and Determination

12. The court has given due consideration to the pleadings, evidence adduced as well as the submissions by the Plaintiff. The only issue that falls for determination is whether the Plaintiff has proved its claim against the Defendant on a balance of probabilities.

13. In determining this issue, due regard must be paid to the well-settled proposition that the legal burden of proof lies upon the party who invokes the aid of the law. That is the purport of section 107 of the *Evidence Act* which stipulates thus;

> "(1) 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.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

14. The first question therefore is whether the Plaintiff has discharged the burden of proving that the Defendant is liable in negligence for the accident that resulted in the destruction or loss of the Plaintiff's tea consignment. It is not in dispute that the subject accident occurred and that the tipper lorry belonged to the Defendant herein. At paragraph 4 of the Plaint, the Plaintiff enumerated the particulars of negligence attributed to the driver of the Defendant's tipper lorry. Notably however, there was no eyewitness account of the events that led to the accident and/or of who was to blame for the accident as none of the witnesses who testified in this case were at the scene at the material time. Indeed, PW1 and PW4 both stated that they visited the scene after the accident had occurred and took photographs of the aftermath.

15. Even the Police abstract that was produced by the Plaintiff's witness does not indicate who was to blame for the accident. Rather, it shows that the matter was pending under investigation by one Corporal Mugambi but the Plaintiff did not call the said investigating officer to testify on the outcome of the investigations conducted, if any. Further, not even the Investigation Report prepared by Pro-Active Risk Solutions who were engaged by the Plaintiff's Insurer, ICEA Lion General Insurance Co. Limited, to investigate the circumstances of the accident, was adduced in evidence in order to put the court in the picture about who was to blame for the accident.

16. Interestingly, to prove liability, the Plaintiff relied on the photocopies of the photographs of the accident scene and the three motor vehicles adduced by PW1 and PW4. Foremost, in the court's considered view, the photographs, which contain some brief explanation of what each of them represents, do not meet the requirements of section 106B of the *Evidence Act* which stipulates that:

> "(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
>
> (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—
>
> (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
>
> (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
>
> (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
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> (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
>
> (3) ...
>
> (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following —
>
> a. identifying the electronic record containing the statement and describing the manner in which it was produced;
>
> b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
>
> c. dealing with any matters to which conditions mentioned in subsection (2) relate; and

d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it."

17. In *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR, the Court of Appeal stated that:

> " Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer." In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions to vouch for the authenticity and integrity of the electronic record sought to be produced..." {Emphasis mine}

18. In *Samwel Kazungu Kambi vs Nelly Ilongo & 2 others* [2017] eKLR, Korir J. when dealing with production of photocopies of photographs by a person who was not an eyewitness observed as follows:

> " 19. In the case before me, no information has been supplied concerning the source of the photographs. Even assuming that they were printed from a digital camera or a mobile phone, and further assuming that these devices fall within the definition assigned to a "computer" by section 3(1) of the *Evidence Act*, then applying the standards set by section 106B(2), one would find that the conditions therein were not met.
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> 20. Under section 106B, for an electronic record to meet the standards for production as an exhibit, the computer should be demonstrated to have been under the control of a particular person during the relevant period. The information ought to have been fed into the computer in the ordinary course of the activities that need to be proved. There is also need to establish that at the material time the computer was operating properly but in case of any defect it should not have been to the extent that it would affect the electronic record or its accuracy. Another condition is that the electronic record should be derived from information fed into the computer in the ordinary course of the activities in question.
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> 21. Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities.
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> 22. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could

not therefore tell the court that the photographs were a true reflection of the incident he witnessed."

19. Similarly, in the instant case, neither PW1 nor PW4 who adduced the copies of the photographs were eyewitnesses to the accident. The source of the photocopies of the photographs, that is, the computer used to generate them, was not revealed. The device used to capture the images was unknown. The person who processed them was not named and lastly, they were not accompanied by the certificate envisaged under section 106B(4) of the Act to confirm their authenticity. In the circumstances, the court holds the considered view that the photographs cannot be relied on this case.

20. Even assuming that the photographs were correctly adduced, it would still have been impossible for the court to determine the particulars of negligence attributed to the Defendant's driver by simply looking at them. The photographs ought to have been accompanied by sketch maps of the accident scene showing the positioning of the three motor vehicles when the accident occurred as well as eyewitness accounts. This is especially because none of those photos show the three vehicles at the same scene. Rather, only one photo at page 17 of the Plaintiff's Further Bundle of Documents dated 10/1/2017 shows the Leyland trailer and the petrol tanker on one side of road facing each other after the accident while the Defendant's tipper lorry appears to have been photographed separately. The upshot is that the evidence on record does not prove any of the particulars of negligence attributed to the driver of the Defendant's tipper lorry.

21. Consequently, the court finds that the Plaintiff has failed to prove its claim against the Defendant to the required standard, which is on a balance of probability. This suit is therefore dismissed with costs to the Defendant.

22 Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 25TH DAY OF JULY 2023.

JANET MULWA

JUDGE