Kipkoech v G4S Security Company & another (Civil Appeal 10 of 2022)
[2023] KEHC 27006 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27006 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 10 OF 2022

RPV WENDOH, J

DECEMBER 20, 2023

BETWEEN

PETER KIPKOECH ..... APPELLANT

AND

G4S SECURITY COMPANY ..... 1ST RESPONDENT

EVANS ONUKO ONGODI ..... 2ND RESPONDENT

(An Appeal from the Judgement and Decree of Hon. M. Obiero (SPM) delivered on 20/1/2022 in Migori CMCC No. 1668 of 2016)

JUDGMENT

1. This is an appeal by Peter Kipkoech, (the appellant) against the judgement and decree of Hon. M. Obiero (SPM) dated and delivered on 20/1/2022 in Migori CMCC No. 1668 of 2016. The appellant was the plaintiff in the trial court while G4S Security Company and Evans Onuko Ongodi (1st and 2nd respondents) were the 1st and 2nd defendants respectively.

2. By a plaint dated 25/11/2016, and amended on 30/1/2020, the appellant filed a suit seeking general damages, special damages, costs of the suit, interest and any other relief against the respondents. The appellant pleaded that the 1st respondent was the owner, possessor, controller and/or the insured of motor vehicle registration number KCH 523F (suit motor vehicle) while the 2nd appellant was the driver of the suit motor vehicle; that on or about 7/11/2016, the appellant was lawfully travelling in the suit motor vehicle when the suit motor vehicle collided with motor vehicle registration number KBK 497V, occasioning the appellant severe injuries. The appellant pleaded the particulars of negligence on the part of the 2nd respondent, particulars of injuries and particulars of special damages.

3. The appellant further pleaded that the doctrine of res ipsa loquitor, the provisions of the Highway Code, *Traffic Act* and other relevant laws were applicable.

4. The respondents entered appearance and filed a defence dated 9/4/2018 which was amended on 28/2/2020. The respondents denied the occurrence of the said accident and the injuries sustained by the appellant. The respondents blamed the driver of motor vehicle registration number KBK 497V and particularized the negligence on the part of the driver of the motor vehicle registration number KBK 497V. The respondents also denied that the doctrine of res ipsa loquitor was applicable. The respondents asked the trial court to dismiss the suit with costs.

5. The suit proceeded to hearing and the appellant testified as PW1. The respondents did not call any witness in support of their case. The trial Magistrate in a judgement dated 20/1/2022 dismissed the appellant's suit with costs.

6. Being dissatisfied with the judgement, the appellant preferred the instant appeal on the following eight (8) grounds: -

    a. That the learned Magistrate erred in law and in fact by holding that the appellant did not prove liability against the respondents yet the respondents gave no evidence in rebuttal;

    b. That the trial court erred by shifting the burden of proof contrary to the established principles of law and hence arriving at a wrong verdict;

    c. That the trial court erred in law and in fact by selectively analysing the evidence of the appellant unfavourably, ignored the evidence that came on examination in chief and cross - examination thus arriving at a wrong determination;

    d. That the trial court ignored the fact that no single respondent's witness was called to rebut the plaintiff's testimony and claim thus the plaintiff's evidence remained uncontroverted;

    e. That the trial court erred in holding that the appellant was a passenger in the respondent's motor vehicle which was involved in an accident leading to injury to the appellant, but the respondents were not liable for the said accident;

    f. That the trial court erred by failing to rely on the further statement recorded by the plaintiff;

    g. That the judgement was contrary to the weight of the evidence presented;

    h. That the trial Magistrate misdirected himself in treating the submissions of the appellants very superficially thereby erroneously arriving at a wrong conclusion in law.

7. The appellant prayed that this appeal be allowed, the decree of the lower court be set aside and judgement be entered in favour of the appellant at 100% on liability. The appellant also asked to be awarded costs of the lower court and the appeal herein.

8. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 13/1/2023 on even date and the respondents filed their submissions dated 23/1/2023 on even date. I have duly considered the submissions by both parties.

9. This being the first appeal, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusion but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in Selle & Another vs Associated Motor Boat Co. Ltd (1968) EA 123.

10. It is also settled 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 on demonstrably

wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in Mbogua Kiruga v Mugecha Kiruga & another (1988) eKLR.

11. The Court of Appeal in Alfarus Muli vs. Lucy M Lavuta & Another Civil (1997) eKLR held that:-

> " The appellate Court interferes only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence.

12. Guided by the above principles, I have considered the appeal, the proceedings in the trial court and the submissions by both parties. The main issue for consideration is:-

    a. Whether the trial court had jurisdiction to determine the suit.

    b. Whether the trial court erred in dismissing the appellant's suit.

13. In this appeal, the respondents specifically challenge the jurisdiction of the trial court to hear and determine the suit. The respondents state that the trial court had no jurisdiction to determine the suit before it on account of the mandatory provisions of the *Work Injury Benefits Act*. The appellant did not respondent to this issue.

14. This court notes from the amended defence filed by the respondents, they admitted the jurisdiction of the trial court. However, it is now a long standing principle that jurisdiction can even be challenged at the appellate stage.

15. The Supreme Court in the case of Nasra Ibrahim Ibren vs Independent Electoral and Boundaries Commission & 2 Others Supreme Court Petition No. 19 of 2018, stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:-

> "A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367 stated thus:
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> > "What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded..." (Emphasis supplied)

16. In his witness statement dated 29/11/2016, the appellant testified that: -

> "I was on duty working as a security guard travelling on Motor Vehicle Registration Number KCH 523F along Migori - Kisii road..."

17. In cross examination, the appellant confirmed that he was an employee of G4S (the 1st respondent) and he was injured while on duty. This is a confirmation on admission by the appellant that he was an employee of the 1st respondent and the accident occurred while he was in the course of duty.

18. The *Work Injury Benefits Act* was enacted to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes.

19. I have also considered the pleadings. The appellant is specifically blaming the 2nd respondent for the occurrence of the accident. The appellant stated that the 2nd respondent drove the suit motor vehicle carelessly until it violently rammed into another motor vehicle. The respondents on the other hand blamed a third party, motor vehicle registration number KBK 497V. It is the respondents who sought to blame a third party.

20. Section 17 of the *Work Injury Benefits Act* (WIBA) provides: -

> (1) If an occupational accident or disease in respect of which compensation is payable, was caused in circumstances resulting in another person other than the employer concerned (in this section referred to as the 'third party') being liable for damages in respect of such accident or disease-
>
> (a) the employee may claim compensation in accordance with this Act and may also institute action for damages in a court against the third party; and
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> (b) the employer or insurer by whom compensation in respect of that accident or disease is payable may institute action in a court against the third party for the recovery of compensation that the employer or insurer, as the case may be, is obliged to pay under this Act.

21. Section 17 (1) (a) of WIBA provides an exception to the rule on filing suits for work related injuries. The exception arises when an employee is claiming against a third party. The employee has the option of instituting a claim under WIBA or institute a claim against the third party in court. In this instance, the appellant was not claiming against a third party for the suit in the trial court to be sustainable. The appellant being an employee of the 1st respondent and being injured in the course of duty, the proper avenue to institute the claim should have been with the Director as provided for under Section 22 of WIBA.

22. The upshot therefore is that the trial court did not have jurisdiction to hear and determine the suit and so does this appellate court. The trial court should have dismissed the suit for want of jurisdiction.

23. The appeal is devoid of merit. It is hereby dismissed with orders to cost to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 20TH DAY OF DECEMBER 2023

R. WENDOH

JUDGE

Judgment delivered in the presence of;

Ms. Abisai h/b for Mr. Abisai for the Appellant.

Mr. Odero for the Respondents.

EMMA AND PHELIX - COURT ASSISTANTS.