Oduor v DOO (Minor suing through mother & next friend of JLO) (Civil Appeal E028 of 2023) [2023] KEHC 27163 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27163 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E028 OF 2023

RE ABURILI, J

DECEMBER 20, 2023

BETWEEN

BERNARD OMONDI ODUOR ..... APPELLANT

AND

DOO (MINOR SUING THROUGH MOTHER & NEXT FRIEND OF JLO) ..... RESPONDENT

(An appeal arising out of the Judgment of the Honourable S. Temu in the Senior Principal Magistrate's Court at Nyando delivered on the 7th February 2023 in Nyando SPMCC No. E171 of 2017)

JUDGMENT

Introduction

1. The appellant herein Bernard Omondi Oduor was sued for general and special damages for injuries sustained by the respondent minor DOO through his mother and next friend Jacinter Leviba Omalla, following a road traffic accident that occurred on the 12th July 2017 along the Ahero – Kisumu road when the respondent was travelling as a passenger in motor vehicle registration no. KCG 182V where the said motor vehicle lost control and rolled off the road leading to the injuries sustained by the respondent.
2. In his defence, the defendant denied liability and attributed the occurrence of the accident to the negligence of the respondent.
3. This suit was part of a series before the trial court including Nyando SPMCC No. 168 of 2017 and 166 of 2017. Liability was determined in SPMCC 166 OF 2017 at 100% against the appellant.
4. The trial magistrate in her judgement awarded the respondent general damages of Kshs. 70,000, special damages of Kshs. 2,000.

5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 10th February 2023 on the 17th February 2023 raising the following grounds of appeal:

    a. That the learned trial magistrate erred in fact and in law by apportioning 100% liability to the defendant without considering the circumstances of the case.

    b. That the learned trial magistrate erred in fact and in law by apportioning 100% liability to the defendant whereas the police abstract was only marked for identification by the plaintiff and never produced the same to confirm he was involved in the accident.

    c. That the learned trial magistrate erred in law and in fact in awarding general damages when the plaintiff herein failed to give testimony on how the accident happened and if he sustained any injuries.

    d. That the learned trial court erred in failing to sufficiently appreciate that it was not open to him to rely upon documents marked for identification but not produced as evidence.

    e. That the learned trial magistrate erred in law and in fact in finding in favour of the respondent against the appellant when there was totally no credible evidence or proof of negligence on the part of the appellant.

    f. That the learned magistrate erred in law and misdirected himself to the extent and value of the respondent's injuries and thereby erred in law in his assessment of damages as there was no treatment documents produced by the plaintiff.

    g. That th learned resident magistrate erred in law and in fact in failing to find that the special damages pleaded had not been specifically proved as provided for by the law.

    h. That the learned magistrate erred in assessing damages and failed to apply the trite principles in awarding damages and especially on general damages and comparable awards for analogous injuries.

    i. That the learned trial magistrate erred in fact and in law and in failing to consider th appellant's submissions on both liability and quantum by completely disregarding the submissions and authorities of the appellant and as a result arrived in unjustified decision on quantum.

6. The parties's counsel filed written submissions to canvass the appeal.

Appellant's Submissions

7. The appellant submitted that since the matter was based on negligence, the claimant had to prove the elements of negligence.

8. It was further submitted that neither respondent nor the next of friend testified to confirm if they were involved in the alleged accident and as such, the trial court erred to have considered the respondent's case as against the appellant as the same remained unproved.

9. It was submitted that pleadings were not evidence as was held in the case of CMC Aviation Ltd v Crusair Ltd (No. 1) (1987) KLR 103.

10. The appellant submitted that the mere filing of documents in court was not enough as there was need for the respondent to testify, identify and produce documents in corroboration of his case failure to which the facts in issue remained unproven and thus the respondent failed to prove elements of

negligence. Reliance was placed on the Court of Appeal case of Kenneth Nyaga Mwige v Austin Kiguta & 2 Others [2015] eKLR.

11. It was submitted that there was no evidence to corroborate the respondent's pleadings. The appellant submitted that there was no police Occurrence Book or file produced before the court to shed more light on whether the respondent was in the appellant's motor vehicle. Reliance was placed on the case of Caroline Waithira Kago v Stephen Muiruri Njau & Another [2016] eKLR where the High Court upheld the lower court judgement that dismissed the plaintiff's case for failure to produce the police abstract.

12. It was submitted that in th absence of the initial treatment notes, the P3 form did not stand and further that the medical report was not proof of injury since it was filed 2 months after the accident when the plaintiff had healed and further as it was not produced by the maker of the document, Dr. Okombo.

13. The appellant also relied on the case of Peter Migiro v Valley Bakery Limited [2015] eKLR where the High court overturned the lower court decision and dismissed the suit for failure to produce the initial treatment notes which it held were so important that without their production, it would be difficult for a court to ascertain if indeed the claimant was injured.

14. On quantum, it was submitted that the award rendered was unjustified and the same ought to be set aside in its entirety and further that the special damages awarded were awarded erroneously as the same were not proven.

15. The appellant further submitted that thy ought to be granted costs of both the lower court and this appeal.

The Respondent's Submissions

16. It was submitted that the appellant failed to call a witness in support of his case and now seeks to retry his case afresh. The respondent submitted that the findings of the trial magistrate were within range in every respect and were based purely on evidence and material placed before the trial magistrate.

17. The respondent herein submitted that the instant appeal was devoid of merit and was designed to frustrate the respondent from enjoying the fruits of his judgement and thus ought to b dismissed.

Analysis and Determination

18. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions, as contemplated in section 78 of the *Civil Procedure Act*. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

19. In addition, the apellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

20. Having considered the Appellant's Grounds of Appeal and the respective parties' counsel's written Submissions, the issues emerging for determination are:

    i. Whether or not the finding on o justified in the circumstances of this case.

    ii. Whether or not the award of quantum was inordinately low in the circumstances of this case so as to warrant interference by this court.

21. The above issues are discussed below.

Liability

22. On liability, In Khambi and Another v Mahithi and Another [1968] EA 70, it was held that:

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

23. In Isabella Wanjiru Karangu v Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde v George M Angira Civil Appeal No. 12 of 1981, it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

24. The law is clear that he who alleges must proof. The term burden of proof draws from the Latin Phrase Onus Probandi and when we talk of burden we sometimes talk of onus.

25. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:

    1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

    2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence."

26. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.

27. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

28. The question therefore is whether the respondent herein discharged the burden of proof that the appellant was liable in negligence for the occurrence of the accident wherein the plaintiff minor was allegedly injured.

29. On whether the respondent proved negligence on the part of the appellant, it is worth noting that the trial record reveals that the respondent never testified in court. Further, none of the documents attached to the respondent's plaint were admitted in evidence. In addition, although the trial court referred to the series files, the evidence adduced in the series files on liability was never adopted as evidence in this case for the minor.

30. The oral evidence of PW2, Hamisi Benard, who alleged to be part of a group of people who examined the minor was that he prepared the medical report but did not sign it rather the said medical report dated 2.8.2017 was signed by on Dr. Okombo as admitted in cross-examination by PW2.

31. The law is that a document can only be produced by its maker. PW2 alleged to have aided in examination of the minor leading up to the preparation of the aforementioned medical report and that Dr. Okombo only signed the said document. However, no evidence has been adduced in support of this allegation. It was thus the respondent's obligation to call Dr. Okombo to produce the aforementioned medical report as it was his signature that was on the report especially given that PW2 did not say that the doctor was unavailable and could not be called to testify and production of the medical report.

32. The appellant did not call any witness in support of the case as pleaded. Where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

33. However, the fact that a defence is held as mere allegations in no way lessens the burden on the plaintiff to prove his or her case. The court in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR the court stated:

> " I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the

reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.

(See Kirugi and Another v Kabiya and Others [1983] e KLR)."

34. Thus, despite the absence of evidence from the appellant, the respondent was obligated to prove its case on a balance of probabilities.

35. Even considering the police abstract attached as part of the documents in support of the respondent's case, it was necessary to call the maker to verify the information in that document. The police abstract only shows that a report of the occurrence of the accident was made to the nearest police station. It is evident that it was not made by the plaintiff/respondent. The question is, who issued the police abstract, who gave the registration number of the motor vehicle – what was the outcome of the investigations, who was to blame for the Road Traffic Accident- clearly what is on that document needed to be subjected to the test of cross examination on its contents.

36. Of course it cannot be said that without the Police Abstract, then there is no evidence of an accident. I have no reason to depart from the observation in Peter Karithi Kimunya v Aden Guyo Haro (2014) eKLR that failure to produce a police abstract per se should not be fatal to the plaintiff's case. However, in this case the police abstract carried the evidence for this case and the maker needed to appear and to testify to the issues.

37. This court is thus faced with the question; what weight should be placed on documents not produced as an exhibit? The Court of Appeal in Kenneth Nyaga Mwige supra addressed itself to this matter stating;

> " The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.
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> 19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.
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> 20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once

this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21. In Des Raj Sharma -v- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value."

38. Guided by the case above, which this court is bound by, it is clear that the documents attached to the respondent's case having not been admitted as evidence, it had no evidential value. Coupled with the plaintiff's respondent's failure to give testimony in support of his case, it is clear that the respondent failed to adduce evidence to discharge the burden of proof that the accident, if any, occurred as a result of the appellant's negligence.

39. The respondent did not adduce any evidence before the trial court and hence ended up with a case missing the evidence that could have made her case for the minor who had no capacity to sue in his own name without a guardian or next friend. I am therefore persuaded that on a balance of probabilities the respondents did not prove her case to warrant an award of damages sought. I therefore need not delve into the issue of quantum of damages payable.

40. However, a perusal of the entire trial court record shows that the case for the minor was casually and poorly and haphazardly prosecuted and the trial magistrate too casually handled the case such that the evidence as recorded was so scanty and mixed up that one can hardly understand why the case started from PW2 and not PW1. This was irregular as there is no evidence of testimony of any other witness in the series accident files HCCA E026 and E027 of 2023 being adopted as evidence for the minor on liability. If that were to be the case, then that order of adoption could have been made in this file and not in any other file. I have perused the other two files and I see no order in those files being test suits on liability. The plaintiff was a minor child. The law as it is at Articles 48 and 53 of *the Constitution* guarantees the children rights to access justice and, a child's best interests are of paramount importance in every matter concerning the child.

41. It follows that the child who sued through its mother and next friend was entitled to the best representation before court. The mother hired an advocate. However, the prosecution of the minor's case was, in my view, not in its best interest. There is no explanation on record why the evidence on whether the minor was a passenger in the accident motor vehicle and whether an accident occurred as

pleaded and why that evidence could not be adduced by the child's mother and next friend or by any other witness who was in the accident motor vehicle as this was a matter in a series of other claims.

42. That omission on the part of the trial court and the plaintiff's advocate to be sensitive to the child's best interest occasioned an injustice to the child. In my view, this child was never heard. The right to be heard is guaranteed under Article 50(1) of *the Constitution*. In my view, the failure to adduce evidence in support of the case for the child occasioned a miscarriage of justice for the child and as this court is ward of children, it must endeavour to do justice at all times by ensuring that the child's best interest is promoted and protected.

43. Accordingly, having found that the respondent child was not heard, I find that it is in the best interest of the child that this case be remitted back to the trial court for a rehearing before another magistrate other than Hon Temu. The appellant shall have costs of this appeal assessed at kshs 20,000 which shall be paid from the plaintiff's advocates' costs on account that the advocate too did not handle the child's case with diligence. The costs in the lower court shall be paid by the plaintiff's advocate personally on account that he did not prosecute the plaintiff's case with care. The plaintiff cannot be punished for the mistakes of his advocate as was evident in this case.

44. In the end, I allow this appeal to the extent that I set aside the proceedings, judgment and decree of the lower court and substitute it with an order invoking section 78 of the *Civil Procedure Act*, for a rehearing of the plaintiff's case as stated above.

45. This file is closed and the lower court file together with a copy of this judgment be returned to the trial court forthwith.

46. I so order.

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

R.E. ABURILI

JUDGE