



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. E030 OF 2021

BETWEEN

MOHAMED GUYO BORU.....APPELLANT

AND

RICHARD MWILARIA ARITHORESPONDENT

(Being an appeal from the Judgment in Tigania PMCC NO. 41 OF 2020 by Hon. R. Ongira (RM) on 26th January 2021)

JUDGMENT

Background

1. On 28th November, 2019, an accident involving motor vehicles T701ADG Toyota Townace and Respondent's vehicle KBF 246B Toyota Fielder occurred along Meru-Maua road as a result of which the Appellant who was a passenger in T701ADG Toyota Townace suffered bodily injuries.

The trial

2. The case proceeded by way of formal proof in which the Respondent blamed the Appellant for overtaking negligently thereby causing the accident.

3. At the conclusion of the trial, the learned trial magistrate found the Appellant's case not proved and dismissed it with costs to the Respondent.

The Appeal

4. The Appellants dissatisfied with the lower court's decision preferred this appeal and by a Memorandum of Appeal dated 24th February 2021 raised grounds that;

- a. **The Learned trial Magistrate erred in law and fact in dismissing the Appellant's case on a technicality.**
- b. **The Learned trial Magistrate erred in law and fact in dismissing the case when he had proved it on a balance of probabilities as required by the law.**
- c. **The Learned trial Magistrate erred in law in following legal authorities that were irrelevant to the Appellant's case.**
- d. **The Learned trial Magistrate erred in law by awarding the respondent costs of the suit when they had never entered appearance.**

Submissions

5. The Appellant by submissions dated 15th November 2021 holds the view that the error as to the registration number did not go to the root of the cause and argues that it was a minor mistake that should not have led to the dismissal of the suit. Reliance was placed on **Belinda Murai & Others V Amoi Wainaina (1978) KLR 2782. Michael Keli Ngui alias Michael Keli V Hassanali Shabirhussein Azizali &**

Another [2020] eKLR, Makala Mailu Mumnde V Nyali Golf & Country Club [1989]eKLR, Felix Mathenge V Kenya Power & Lighting Company Ltd [2008]eKLR, Nandwa V Kenya Kazi Limited (1988)KLR 488, Juliana Mulikwa Muindi V Board of Mnamemnet Yangua Mixed Secondary School & Another [2018]eKLR.

Analysis and Determination

6. I have considered this appeal, submissions by the Appellant and the authorities relied on. I have also considered the record and the impugned judgment. This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination.

7. In Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the same court stated with regard to the duty of the first appellate court;

“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.”

8. The matter proceeded for formal proof with the appellant being the only witness in the trial and he wished to adopt his witness statement as his evidence in chief, in which he had averred that on 28th November 2019 he was coming from Maua going to Isiolo in motor vehicle registration No. T701ADG Toyota Townace at around noon when motor vehicle registration No. KBF 246B Toyota Fielder overtook another vehicle and hit theirs damaging it. He was also injured on the right leg and taken to Muthara Hospital by members of the public where he was treated and discharged on the same day.

9. In his oral evidence, he stated that he was in motor vehicle registration No. T701DDG Toyota Townace and he had not healed well as he experiences pain in his knee when it's cold. She produced the documents in her list of documents.

10. The trial magistrate dismissed the suit on the ground that the motor vehicle registration in the appellant's pleadings differed from what was in his documents and his testimony, holding that a party is tied to his pleadings and any averments should support the same.

11. The issue in question is whether the trial magistrate erred in dismissing the suit after interlocutory judgment had been entered?

12. In EMC (A minor suing through MNC) v James Irungu Nyanja [2020]eKLR, the court stated

“No doubt that an interlocutory judgement was entered against the Respondent. But on introspecting the general meaning of the word “Interlocutory” it merely means ‘on the interim’. What this implies is that the Court had prima facie entered an interim judgment against the Respondent for his failure to enter appearance and file a defence. But then, at the formal proof hearing it was incumbent upon the Appellant to demonstrate how the accident occurred, who caused the accident and to what extent liability for the accident could be apportioned to the Respondent. To this extent the Appellant totally failed.”

13. The same court also said

“The Court must emphasize one undeniable fact; that in as much as the Appellant's obligation at formal proof hearing was to adduce evidence for assessment of general damages, this did not lessen her (Appellant's) burden to demonstrate not only how the damages would be arrived at but also the relationship of the defendant with the alleged liability. More so, bearing in mind the cardinal principle that he who alleges must prove in cases where negligence is alleged. This was aptly set out by the Court of Appeal in the case of East Produce (K)Limited v Christopher Astiada Osiro, Civil Appeal No.43 of 2001 which held that:

“It is trite that the onus of proof is on he who alleges and in matters where negligence is alleged, the position was laid in the case of Kiema Mutuku Vs Kenya Cargo Hauling Services Ltd (1991) in which the Court held that:

“There is as yet no liability without fault in the legal system in Kenya, and a Plaintiff must prove some negligence against the defendant where the claim is based on negligence.”

14. Section 107 of the Evidence Act provides that 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. Section 108 is also to the effect that 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, while section 109 states that 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.

15. It is not in dispute that the facts pleaded in the plaint differed from what the supporting documents showed what happened. Further at a closer perusal of the Appellant's documents, I find more inconsistencies being that in his plaint he averred he was injured on his left leg and in his witness statement he states that he was injured on his right leg, he also alleged that after the incident he was taken to Muthara Hospital by members of the public. However, the documents produced show that on the day of the incident he was treated at Maua Methodist and not Muthara Hospital, he was only treated at Muthara Hospital on 22/1/2020 this is two months after the alleged accident and the said medical report indicates the injury as a bruise.

16. It is trite law that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. This was the position as reiterated in **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR** when the Supreme Court stated:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

17. Having considered this appeal, the evidence and the arguments as well as the decision of the trial court and reasons thereof, and having given due consideration to all the materials on record, I am unable to fault the trial court on its finding dismissing the suit.

18. Costs ordinarily follow the event. The Respondent did not participate in the trial and was therefore not entitled to costs.

19. In conclusion, I find that the appeal has no merit and disallowed in the following terms:

1) The order dismissing the Appellant's suit is sustained

2) The costs awarded to the Respondent are set aside

3) Appellant shall bear his own costs of the appeal

DATED AT MERU THIS 17TH DAY OF FEBRUARY 2022

WAMAE. T. W. CHERERE

JUDGE

COURT ASSISTANT - MORRIS KINOTI

FOR THE APPELLANTS - MS. KIEMA FOR NKUNJA & CO ADVOCATES

FOR THE RESPONDENT - N/A