



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 683 OF 2019**

**CHINA ROAD & BRIDGECORPORATION (K).....APPELLANT**

**-VERSUS-**

**CAROLINE KAVUTHA MAILU.....RESPONDENT**

***(Being an appeal against the ruling and order of Honourable E. Wanjala (Ms.)***

***(Senior Resident Magistrate) delivered on 4<sup>th</sup> November, 2019***

***in Milimani CMCC no. 2543 of 2017)***

**JUDGMENT**

1. The respondent in this instance lodged a suit before the Chief Magistrate's Court vide the plaint dated 12<sup>th</sup> April, 2017 and prayed for reliefs in the nature of general and special damages plus costs of the suit and interest thereon against the appellant, arising out of a road traffic accident.
2. The respondent pleaded in the plaint that on 17<sup>th</sup> November, 2015 she was aboard the motorcycle registration number KMCU 718X ("the motorcycle") as a lawful passenger passing along Beijing Junction, old Mombasa Road in Nairobi when the motor vehicle registration number KBV 217J Toyota Double Cabin ("the subject motor vehicle") being at all material times owned by the appellant and driven by its agent, hit the motorcycle, causing the respondent to sustain serious bodily injuries.
3. The respondent attributed the accident and injuries sustained to negligence on the part of the appellant's agent by setting out the particulars thereof under paragraph 4 of the plaint.
4. On being served with summons, the appellant entered appearance and put in its statement of defence filed on 9<sup>th</sup> June, 2017 to deny the averments made in the plaint.
5. Thereafter, the appellant took out a third party notice and served the same upon Super Motorcycles Limited, in relation to the motorcycle.
6. At the trial, the respondent testified and called two (2) additional witnesses.
7. When it came to the defence hearing, the advocate for the appellant sought for leave of the court to file a witness statement and which leave was denied by the trial court on 4<sup>th</sup> November, 2019. Consequently, the trial court marked the defence case as closed and issued directions on the filing of written submissions on the claim.
8. Going by the record, it is apparent that the appellant being aggrieved by the abovementioned order, lodged the memorandum of appeal dated 25<sup>th</sup> November, 2019 to challenge the same, by putting in the following grounds:

***i. THAT the learned trial magistrate erred in law and fact in proceeding and/or allowing the plaintiff to produce the police abstract and yet she was not the maker without any legal and/or evidential justification.***

***ii. THAT the learned trial magistrate erred in law and fact in proceeding to close the defendant's case without giving the defendant an opportunity to cross-examine the police officer.***

**iii. THAT the learned trial magistrate erred in law and fact in proceeding with the hearing without recognizing that there was a third party notice and issue directions to that effect.**

9. Pursuant to the directions by this court, the parties filed and exchanged written submissions on the appeal.

10. On the one part, the appellant faulted the trial court for allowing the respondent to produce the police abstract without calling its maker and in the absence of prior consent between the parties herein on the production of documents without calling their makers.

11. The appellant further contends that it therefore stands to be prejudiced since it is unable to challenge the authenticity of the document produced and cites the case of **Variety Flooring Works Limited v Fredrick Mutinda Mutuku [2020] eKLR** held that:

**“During the pre-trial stage, there was no indication whether the parties had agreed on the production of any documents without calling the makers thereof or whether the copies of the originals could be produced. What was produced were the photocopies of the original documents and without the calling of the makers. Order 11 Civil Procedure Rules was not fully complied with. The questioned documents therefore ought to have been produced in accordance with the provisions of the Evidence Act.”**

12. The appellant therefore urges that the evidence tendered by the respondent be expunged from the court record or in the alternative, the same be produced by the actual makers.

13. The appellant also faulted the trial court for declining to have the police officer who testified, recalled for cross-examination by the appellant’s advocate.

14. Moreover, it is the final submission by the appellant that the trial court did not take into account the third party notice on record and issue appropriate directions on the same.

15. For the foregoing reasons, the appellant urges this court to allow the appeal and to set aside the order made on 4<sup>th</sup> November, 2019.

16. The respondent on the other part submits that the appeal is unfounded for the reasons that the subject of production of documents without calling their makers was not challenged at the pre-trial stage and hence could not appropriately be raised at the hearing stage.

17. The respondent further submits that the appellant did not seek to enjoin the intended third party in the proceedings and also did not raise the subject before the trial court in order for directions to be given on the same.

18. Consequently, the respondent is of the view that the appeal is deserving of dismissal with costs.

19. I have considered the contending submissions and authorities cited on appeal. I have also re-evaluated the material which was placed before the trial court. Upon doing so, I will tackle each of the three (3) grounds of appeal under the following limbs.

20. The *first* limb concerns itself with whether the learned trial magistrate erred in allowing the respondent to produce the police abstract without calling its maker.

21. The record shows that while giving her testimony, the respondent sought to have the police abstract produced as an exhibit, which production was objected to by the advocate for the appellant on the basis that the documents in question ought to be produced by the makers.

22. The advocate for the respondent retorted by arguing that at the pre-trial stage, no requirement had been made for the documents to be produced by their makers and hence the objection is an afterthought, adding that the document which was produced was an original.

23. The learned trial magistrate upon considering the rival arguments, reasoned that the issue of production of documents by their makers was not raised at the pre-trial stage and cannot therefore be raised at the trial, further reasoning that should the appellant have any reservations, it has a right to summon a police officer to clarify any pending issues.

24. Upon my perusal of the record, there is no indication as to whether the subject of production of documents without calling their makers was ever raised or addressed at the pre-trial stage.

25. Suffice it to say that it is apparent from the record that the respondent produced the original police abstract and not a copy thereof as averred by the appellant.

26. The provisions of **Section 35** of the **Evidence Act** stipulate as follows:-

**“1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say-**

**a. if the maker of the statement either-**

**i. had personal knowledge of the matters dealt with by the statement; or**

*ii. where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and*

*b. if the maker of the statement is called as a witness in the proceedings:*

*Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.*

*2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence-*

*a. notwithstanding that the maker of the statement is available but is not called as a witness;*

*b. notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.”*

27. In the present instance, while it is not in dispute that the maker of the police abstract was not called as a witness, I observed that the respondent produced the original thereof and that the evidence was further supported by the testimony of an eye witness who was PW3 (Collins Sinclair).

28. In view of the foregoing, I am satisfied that the learned trial magistrate acted reasonably in admitting the police abstract as evidence in the circumstances. Consequently, ground (i) of the appeal cannot stand.

29. The *second* limb of the appeal touches on whether the learned trial magistrate denied the appellant an opportunity to cross-examine the police officer and if so, whether this was prejudicial to its case.

30. The record shows that save for the respondent, a doctor and an eye witness testified.

31. Upon close of the respondent's case, the advocate for the appellant by way of an oral application, sought for leave to file a witness statement and which application was opposed by counsel for the respondent.

32. The learned trial magistrate noted that leave to file a witness statement had been brought upon close of the respondent's case and almost two (2) years following close of pre-trials, despite the appellant being granted a period of 45 days within which to comply, on 16<sup>th</sup> November, 2017.

33. The learned trial magistrate therefore found the delay to be inordinate and inexcusable and declined to grant leave, thereby marking the defence case as closed.

34. Subsequently, the appellant filed the application dated 27<sup>th</sup> November, 2019 and sought to have the proceedings of 4<sup>th</sup> November, 2019 set aside; as well as leave to re-open the respondent's case for the purpose of recalling the police officer for cross-examination; and a further prayer for re-opening of the defence case to enable the appellant file the witness statement and put in evidence.

35. Upon hearing the parties on the aforementioned application, the trial court by way of the ruling delivered on 13<sup>th</sup> December, 2019 dismissed the application with costs.

36. From my re-examination of the material and trial proceedings; and as already established above, there is nothing to indicate that the respondent ever summoned a police officer to give testimony in order to require an order for recall for purposes of cross-examination.

37. I therefore agree with the reasoning by the learned trial magistrate that such ground is untenable and provided no proper basis for re-opening the respondent's case. As a result, ground (ii) of the appeal equally cannot stand.

38. The *third* and final limb of the appeal has to do with whether the learned trial magistrate overlooked the third party notice and/or proceedings.

39. Upon my study of the record, I established that a third party notice was issued by the appellant on 20<sup>th</sup> March, 2019 to Super Motorcycles Limited.

40. It is apparent from the record that the third party was not enjoined in the proceedings and yet it ought to have been the duty of the appellant to diligently pursue such enjoyment but it did not. There is also nothing to indicate that the subject of the third party was raised before the trial court thereafter.

41. In the premises, I cannot fault the learned trial magistrate for not making a determination on the third party, in the absence of anything to

indicate that it had officially been made a party to the suit. Ground (iii) of the appeal therefore holds no water.

42. Upon taking into account all the foregoing factors hereinabove, I see no reason to interfere with the decision by the learned trial magistrate.

43. The upshot therefore is that the appeal is hereby dismissed for lack of merit, with costs to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25<sup>TH</sup> DAY OF MARCH, 2022.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

.....for the Respondent