Gacheru Fredrick t/a Gacheru Homebest Transporters v MA (Minor Suing through Next Friend and mother EA) (Civil Appeal E015 of 2020) [2022] KEHC 14480 (KLR) (25 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14480 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E015 OF 2020

JN KAMAU, J

OCTOBER 25, 2022

BETWEEN

GACHERU FREDRICK T/A GACHERU HOMEBEST TRANSPORTERS ..... APPELLANT

AND

MA (MINOR SUING THROUGH NEXT FRIEND AND MOTHER EA) ..... RESPONDENT

(Being an appeal from the Judgment of Hon C.L Yalwala (PM) delivered at Maseno in Principal Magistrate's Court Case No 335 of 2009 on 14th October 2020)

JUDGMENT

Introduction

1. In his decision of October 14, 2020, the Learned Trial Magistrate, Hon C.L Yalwala (PM) entered Judgment in favour of the Respondent against the appellant on a hundred (100%) per cent basis as follows:-General Damages Kshs 120,000/=Special Damages Kshs 1,500/=Plus interest thereon

2. Being aggrieved by the said decision, on November 13, 2020, the Appellant filed a Memorandum of Appeal dated November 12, 2020. He relied on seven (7) grounds of appeal.

3. His Written Submissions were dated April 3, 2022 and filed on 4th April 2022 while those of the Respondent were dated and filed on April 1, 2022. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were:-

    a. Whether or not the Learned Trial Magistrate erred in having found the Appellant to have been to blame for the accident herein warranting interference by this court;

    b. Whether or not the Learned Trial Magistrate erred in having found that the appellant was wholly liable for the accident herein;

    c. Whether or not the Learned Trial Magistrate erred in having awarded the respondent herein damages when she was not involved in the accident; and

    d. Whether or not the Learned Trial Magistrate erred in having awarded the respondent damages that were excessive in the circumstances warranting interference by this court.

7. The court therefore found it prudent to determine the said issues under the following distinct and separate heads.

I. Liability

8. Grounds of Appeal Nos (1), (2), (3) and (7) of the Memorandum of Appeal were dealt with under this head as they were related.

9. The appellant submitted that the respondent failed to prove, on a balance of probability, that she was a passenger in his motor vehicle registration number KAW 673 B Nissan Bus (hereinafter referred to as "the subject Motor Vehicle") onApril 4, 2009and that she did not call an independent witness to support that allegation. He explained that the Police Abstract, P3 form and treatment notes from Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) were only marked for identification during Trial and were never produced as exhibits.

10. He pointed out that No 79116 PC Evanson Kibet (hereinafter referred to as "DW 1") testified that the Respondent's name was not listed in the Occurrence Book for the material date and that he had denied having issued her with a Police Abstract Report as was alleged by Eunice Achieng (hereinafter referred to as "PW 1") who testified on behalf of therespondent who was a minor. It was his contention that P3 form and Police Abstract which PW 1 was purportedly issued with at Luanda Police Station were fraudulent and had been revoked by the OCS, Luanda Police Station.

11. On her part, the respondent submitted through PW1 that she had adduced evidence during trial that she had travelled together with PW 1 and that they were both injured and treated at Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH). She submitted that the driver of the subject Motor Vehicle was to blame for the self-involving.

12. It was her argument that PW 1 witnessed the accident first hand and as the appellant failed to call the driver of the subject Motor Vehicle or any eye witness to lead contrary evidence, her evidence was uncontroverted and liability could not be contested at all. She was emphatic that the Learned Trial Magistrate did not err when he apportioned liability on a hundred (100%) per cent against the appellant herein.

13. It was not in dispute that an accident involving the subject Motor Vehicle occurred on the material day and that the same was reported at Luanda Police Station. What was in contention therefore was whether or not the respondent herein was a passenger in the subject Motor Vehicle and whether or not the accident was caused by the negligence on the part of the appellant's driver.

14. According to the evidence that was adduced by the respondent, together with her brother, Elias Ouma aged six (6) years and PW 1, on the material day, they boarded the subject Motor Vehicle which overturned at Luanda. As a result, they were all injured. The respondent blamed the driver of the subject Motor Vehicle for driving carelessly and speeding while drunk.

15. According to DW 1, the accident involving the subject Motor Vehicle that was being driven from Busia to Nairobi was reported at Luanda Police Station on April 4, 2009. He testified that according to the Occurrence Book, several passengers were injured with one (1) person sustaining fatal injuries.

16. He was categorical that the respondent's name was not in the Occurrence Book and that the OCS Luanda Police Station issued a letter dated May 10, 2011listing the persons who were not involved in the aforesaid accident, which persons included the respondent, her brother and PW 1. He produced the OB Extract and the said Letter as Exhibit D1 and D2 respectively.

17. A perusal of the proceedings showed that PW 1 produced a passenger's ticket datedApril 4, 2009, which receipt was not contested by the Appellant. The same was in her name.

18. In his judgment, the Learned Trial Magistrate took judicial notice of the fact that in the Kenyan Public Service Transport, children were neither assigned a separate seat nor charged fare and as such the respondent, who was a child, was not expected to have been issued with a separate receipt for fare paid which could be produced in court as proof that she travelled with PW 1, her mother on the material date and was thus persuaded that the respondent was in the appellant's subject Motor Vehicle at the material time.

19. In his evidence, DW 2 alluded to having tendered in evidence the Occurrence Book No (6) and (8) which showed that the Respondent's name was missing from the Occurrence Book. He was categorical that the Police Abstract Report that was purportedly issued was null and void as per the letter dated 10th May 2011 from the OCS Luanda Police Station. This evidence was given in CMCC No 337 of 2009 which was adopted in CMCC No 335 of 2009 in which the respondent herein was the Plaintiff.

20. On being cross-examined, PW 1 denied having been shown the Occurrence Book. She, however, admitted to having been shown the aforesaid letter from the OCS indicating that the Respondent's name was not in the list. This court looked at the documents the Appellant adduced in evidence but did not see the Occurrence Book. There was also no indication from the proceedings that the said Occurrence Book was tendered in evidence.

21. On his part, No 79116 PC Evanson Kibet hereinafter referred to as (DW 1) testified in CMCC No 335 of 2009. His evidence was adopted in CMCC No 337 of 2009. He was the Senior Records and Information Officer at JOOTRH. His duty was to keep records. He said that he was the custodian. He tendered in evidence a letter dated 16th September 2015 by Tom Morike who had since been transferred to the County Records Department.

22. He pointed out that the respondent's name was not in their records and that OP No 6841/09 in respect of the respondent herein belonged to another patient who was treated on July 25, 2009. He averred that the OP No in use at the time was 03050/09 to 03081/09. He was emphatic that the documents that were tendered were thus not genuine. He averred that he did not carry the 2009 Register as it was in the Archives.

23. The Learned Trial Magistrate relied on the Police Abstract that was issued on June 3, 2009 at Luanda Police Station that showed that the Respondent herein was a passenger in the subject Motor Vehicle. He also determined that theappellant did not adduce in evidence the Occurrence Book to support the contents of the letter dated May 10, 2011from the OCS Luanda. He concluded that since the details of the accident were fresh at the time the Occurrence Book was written, the appellant failed to establish the alleged basis of the issue of the conflicting information in the Police Abstract Report.

24. This court took a different view from that of the Learned Trial Magistrate. DW 1's evidence could not be taken in isolation. DW 2 was also emphatic that the Respondent herein was not treated at Joorth. The respondent did not present any evidence to demonstrate that DW 1 and DW 2 who were officials of different government agencies had any ulterior motive so as to testify that she was not involved in the accident.

25. DW 2 had authority to adduce the letter dated September 16, 2015 by Tom Morike in line with section 35(1)(a)(i) of the *Evidence Act* cap 80 (Laws of Kenya) that states that:-

> "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 either if the maker of the statement had personal knowledge of the matters dealt with by the statement... 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."

26. On the other hand, the respondent failed to adduce evidence to support that she was involved in the said accident. A perusal of the proceedings in CMCC No 335 of 2009 showed that the Treatment Notes, P3 Form, Police Abstract Report were not tendered in evidence. They were only marked for identification. It was not clear why the same were not tendered in evidence when the receipts and copy of records were produced in court and marked as exhibits.

27. This very court dealt with the issue of repercussions of not tendering in evidence a document that had been marked for identification in the case of *Omar Yusuf Mwinchumu v Republic* [2017] eKLR. The purport of the said decision was that failure to tender in evidence a document that had been marked for identification denied the court an opportunity to weigh the evidence that was adduced by parties to the dispute.

28. In this particular case, the appellant was denied the opportunity to cross-examine the respondent on the veracity or otherwise of the contents of the said documents that had been marked for identification. If she had tendered the said documents as her evidence and it was proven that the same were genuine, the issue of conflicting information in the Police Abstract Report as the Learned Trial Magistrate had concluded would have allowed this court to weigh which of the evidence that was produced between the appellant and therespondent was more persuaded.

29. In the mind of this court, the Learned Trial Magistrate erred in having relied upon and/or attaching weight to documents that had not been produced as evidence and had been legally excluded from the court record to determine that therespondent was involved in the accident herein.

30. This court's position was fortified by the holding in the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR where the Court of Appeal rendered itself as follows:-

> " We have considered the persuasive decision and reasoning in the case of *Timsales Limited v Harun Thuo Ndungu*, Civil Appeal No 102 of 2005. In this case, there was additional evidence through the testimony of the medical doctor; in the present case, the respondents having opted not to call any witness, there was no evidence on record in support of the respondents' defence. A significant distinction with the Timsales case (*supra*) is that the High Court observed that
>
> "such evidence could only be doubted if there was some material evidence demonstrating differences..." In the present case, there are material differences in the typed proceedings of the court and the alleged handwritten photocopy of proceedings of the court marked as "MFI 2." These differences needed a witness to explain the authenticity of the handwritten photocopy, this could only be done if the document marked for identification as "MFI 2" were produced in evidence as an exhibit by the maker or any other competent witness. Failure to produce amounted to non-reception and legal exclusion of the document (emphasis court)."

31. Without belabouring the point, this court came to the firm conclusion that therespondent did not prove that she was involved in the accident herein to the required standard, which in civil cases is on a balance of probability and hence her entire case collapsed.

32. However, in the event that she had been able to demonstrate and/or prove that she was a passenger in the subject Motor Vehicle, liability would have been wholly against the Appellant herein unless he would have demonstrated that the Respondent contributed to the causation of the accident herein.

33. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3) and (7) of the Memorandum of Appeal were merited and the same be and are hereby allowed.

II. Quantum

34. Grounds of Appeal Nos (4), (5) and (6) were dealt with under this head as they were all related.

35. Having found that the Respondent did not prove that she was involved in the accident herein, the question of how much quantum would have been awarded was rendered moot. However, in the event she would have proven her case, it was the view of this court that the quantum of Kshs 120,000/= general damages would not have been inordinately high in the circumstances and this court would not have disturbed the same. This court would not also have disturbed the award of special damages if the same had been proven.

36. In the premises foregoing Grounds of Appeal Nos (4), (5) and (6) were not merited and the same be and are hereby allowed.

Disposition

37. For the foregoing reasons, the upshot of this court's decision was that the appellant's appeal that was lodged on November 13, 2020was merited and the same be and is hereby allowed. The effect of this

decision was that the decision of Hon C. L. Yalwala (PM) that was delivered on October 14, 2020in Maseno Principal Magistrate's Court Civil Case No 335 of 2009 be and is hereby set aside and/or vacated and replaced with the Judgment that the respondent's suit in the lower court be and is hereby dismissed. As the respondent was a minor, each party will bear its own costs of the suit in the lower court and of this Appeal.

38. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER 2022

J. KAMAU

JUDGE