Disciples of Mercy Trust v Patel (Civil Appeal 16 of 2020) [2022] KEHC 15808 (KLR) (30 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15808 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 16 OF 2020

JN KAMAU, J

NOVEMBER 30, 2022

BETWEEN

DISCIPLES OF MERCY TRUST .... APPELLANT

AND

SHILABEN M. PATEL .... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon S. N. Telewa (SRM) delivered at Kisumu in Chief Magistrate's Court Case No 446 of 2018 on 24th February 2020)

JUDGMENT

Introduction

1. In her decision of February 24, 2020, the learned trial magistrate, Hon S. N Telewa (SRM) found the appellant to have been wholly liable for the accident herein and entered judgment in favour of the respondent against the appellant herein as follows:-General damages Kshs 1,500,000/=Special damages Kshs 253,247/=Plus costs and interest thereon.
2. Being aggrieved by the said decision, on April 9, 2020, the appellant filed a memorandum of appeal dated March 11, 2020. She relied on three (3) grounds of appeal.
3. Her written submissions were dated and filed on December 7, 2021 while those of the respondent were dated and filed on March 17, 2022.
4. The judgment herein is based on the said written submissions which the parties relied upon in their entirety.

Legal Analysis

5. 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.

6. 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.

7. Having looked at the grounds of appeal and the respective parties' written submissions, it appeared to this court that the appellant had only challenged its liability herein on the ground that the learned trial magistrate erred in having found that it was the registered owner of the motor vehicle that was involved in the accident herein. The court dealt with all the grounds of appeal together as they were all related.

8. The appellant submitted that the burden of proof lay with the person who was bound to prove the existence of any fact. In this regard, it placed reliance on the cases of *Daniel Otieno Migore v South Nyanza Sugar Co Ltd* [2018] eKLR, *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR and *Raila Amolo Odinga & another v IEBC & 2 others* [2017] eKLR where the common thread was that parties were bound by their pleadings and that any evidence led by parties which did not support the averments in the pleadings must be disregarded.

9. It pointed out that the case proceeded on the basis of the plaint dated September 17, 2018 to which it filed a defence dated February 12, 2019 and that in paragraph 4 therein, it denied having been the owner of motor vehicle registration number KBC 609 M (hereinafter referred to as the "first subject motor vehicle"). This is the motor vehicle that the respondent testified was involved in the accident.

10. It was emphatic that no evidence was adduced before the trial court to show that it owned the said first subject motor vehicle or that it was under the control of its agents and averred that it was therefore unfair for the trial court to have held that it was the owner of the said first subject motor vehicle.

11. It invoked section 107 of the *Evidence Act* and argued that there were two (2) elements in the assessment of liability, namely causation and blameworthiness and that before establishment of the said principles, there must be a nexus. It added that devoid of the same, a vacuum was created and the law did not work in vacuum.

12. It was its contention that the respondent sued it but failed to prove that it was the owner of the said motor vehicle. It thus urged this court to allow its appeal with costs.

13. On her part, the respondent conceded that her pleadings contained an obvious typographical error which led to the mishap. She stated that her pleadings indicated the first subject motor vehicle as having been the vehicle that collided with KBN 240 Nissan Wingroad instead of KCB 609M Isuzu Bus (hereinafter referred to as "the second subject motor vehicle) which was the right number plate as was demonstrated in the evidence she placed before the trial court.

14. She argued that for determination of any case to be complete, the court had to consider not only the pleadings but also the evidence that had been placed before it. It was her submission that it was an established principle that averments in pleadings were not evidence.

15. She was emphatic that based on the evidence that was led in her case, the whole suit was against the owner of the second subject motor vehicle and as such she had sued the right party and led correct evidence against that party.

16. It was her case that the typographical error in her pleadings should not warrant dismissal of the suit. In this respect, she relied on the case of *Ali Okata Watako v Mumias Sugar Co Ltd* [2012] eKLR where the court held that a typographical error could be amended orally or by the court itself as provided for under section 100 of the *Civil Procedure Act* and dismissing a suit on account of such a discrepancy was not fair.

17. In this regard, she placed reliance on the case of *CMC Aviation Ltd v Cruisair Ltd (No 1)* [1978] KLR 103; [1976]-801 1 KLR 835 where the court held that pleadings contain the averments of the parties concerned and until they are proved or disproved or there was an admission of them or any of them by the parties, they were not evidence and no decision could be founded upon them.

18. She pointed out that the only way to prove a case to the required standard of proof was by calling evidence in support of the averments in the pleadings. She asserted that she produced a copy of a police abstract report which indicated the registration numbers of the vehicles that were involved in the accident as KBN 240 Nissan Wingroad and KCB 609M Isuzu Bus, the "second subject motor vehicle and further produced a copy of records which showed the appellant herein as the registered owner of the second subject motor vehicle as at June 12, 2018. It was her contention that the appellant did not challenge this evidence.

19. She placed reliance on the case of *Wellington Nganga Muthiora v Akamba Public Road Services Ltd & another* [2010] eKLR where the Court of Appeal held that where a police abstract was produced and there was no evidence that was adduced by a defendant to rebut it or if it was not challenged on cross-examination, then the police abstract being *prima facie* evidence could be relied upon as proof of ownership as proof in civil cases was within the standards of probability.

20. It added that if the said police abstract was challenged by evidence or in cross-examination, then the plaintiff was required to produce a certificate from the registrar or any other proof such as an agreement for sale which would be conclusive evidence. She referred this court to the case of *Joel Mugo Opija v EA Sea Food Ltd* [2013] eKLR where the Court of Appeal made a similar finding.

21. She also relied on section 8 of the *Traffic Act* cap 403 (Laws of Kenya) which provides that the person in whose name a vehicle is registered shall unless the contrary is proved, be deemed to be the owner of the said vehicle.

22. She further submitted that there was an exception to the general rule that parties were bound by their pleadings. In that respect, she relied on the case of *Joseph Amisi Omukunda v Independent Elections & Boundaries Commission & 2 others* Nairobi civil application No 14 of 2014 (eKLR citation not given) where it was held a court could determine an issue even though it was not pleaded where the parties had raised an unpleaded issue and left it for the decision of the court.

23. She was emphatic that it was a fact that an accident did occur and the circumstances of the accident had not been challenged. She added that the appellant was at all times aware that its second subject motor vehicle was involved in a road traffic accident in which it was blamed for negligence and could not therefore claim that it was taken by surprise if the trial court's judgment was not altered or varied.

24. It was her contention that by allowing the appeal, she stood to suffer grave injustice as she would be denied a chance to benefit from the fruits of the judgment. She added that the time for filing another suit for negligence had lapsed since it was currently more than three (3) years from the time of the

occurrence of the accident. She averred that her family which had lost its breadwinner stood to be locked out from ever getting any compensation because of a typographical error in the pleadings and submitted that the said typographical error in her pleadings should not be used as a conduit to occasion injustice upon her.

25. The degree of proof in civil cases was well enunciated in the case of *Miller v Minister of Pensions* [1947] cited with approval in *D.T Dobie Company (K) Limited v Wanyonyi Wafula Chabukati* [2014] eKLR where the court held:-

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', thus proof on a balance of probabilities means a win however narrow."

26. Further, section 107(1) of the *Evidence Act* cap 80 (Laws of Kenya) states that:-

> "Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exists."

27. A reading of the record of appeal showed that the plaint dated September 14, 2018, the police abstract report and copy of records, which were tendered in court with the consent of the parties, indicated that it was the second subject motor vehicle that caused the accident and that the same was owned by the appellant herein. The appellant closed its case without calling any witness.

28. Notably, in its defence, the appellant denied ownership of the first subject motor vehicle which in the plaint was indicated as having caused the accident. The documents the respondent produced in court were at variance with the averments in the plaint.

29. Although the respondent had explained that this discrepancy was a typographical error, the explanation could not cure her pleadings which cited the wrong motor vehicle.

30. This court had due regard to the cases of *Daniel Otieno Migore v South Nyanza Sugar Co Ltd* (supra), *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* (supra), *Raila Amollo Odinga & another v Independent Electoral & Boundaries Commission & 2 others* (supra) where the Supreme Court held that parties were bound by their pleadings.

31. It was undisputed that the documents that were tendered in evidence during trial referred to the second subject motor vehicle which belonged to the appellant as envisaged in section 8 of the *Traffic Act*. Once it denied that it owned the first subject motor vehicle, it put the respondent on notice that she was required to adduce evidence that it was the owner of the said first subject motor vehicle.

32. The appellant was under no duty to make an assumption that the respondent had intended the registration of the motor vehicle that was involved in the accident to have been its second subject motor vehicle. Indeed, the appellant was under no obligation to adduce any evidence to counter the respondent's assertions that it owned the first subject motor vehicle. It had no responsibility to assist the respondent prove her case. It was also under no duty to raise the issue in its written submissions at the lower court. instead, the burden lay on the respondent to prove that the appellant owned the first subject motor vehicle as had been set out in the plaint.

33. It is trite law that the incidence of burden lays on the person who would fail if no evidence was given by either side. Section 108 of the *Evidence Act* states 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."

34. Further, section 109 of the *Evidence Act* stipulates 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.

35. In addition, section 110 of the *Evidence Act* provides that:-

    The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

36. At no point did the burden of proof shift to the appellant as contemplated in section 111 of the *Evidence Act*. The indication of the first subject motor vehicle as having been the vehicle that was involved in the accident may very well have been a typographical error. However, that was an error that ought to have been amended in line with section 100 of the *Civil Procedure Act* cap 21 (Laws of Kenya).

37. The said section 100 of the *Civil Procedure Act* states as follows:-

> " The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding."

38. This amendment could only have been made before the Respondent closed her case. If the same had been amended, the appellant may very well have called witnesses to demonstrate that it was not liable for the accident. Failing to amend the pleadings denied the appellant an opportunity to cross-examine the respondent regarding the involvement of the second subject motor vehicle which was not mentioned anywhere in the respondent's pleadings.

39. A plaintiff is required to adduce oral and documentary evidence that support the averments in its pleadings. Short of that, it would amount to trial by ambush. This was not a procedural technicality that could be cured by article 159(2) (d) of the *Constitution* of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities.

40. The typographical error was a substantive issue that went to the root of the respondent's case. Purporting to amend the same under section 100 of the *Civil Procedure Act* under its power of sitting as a court with original jurisdiction as envisaged in section 78 (2) of the *Civil Procedure Act* would cause gross miscarriage of justice to the appellant herein as it would have been denied the opportunity to rebut the respondent's evidence.

41. This court had several options. It could have found in favour of the appellant herein because it was indeed correct that the respondent did not prove her case against it. However, the court was alive to the fact that the real issues were not determined for the reason that the respondent did not realise that there was a typographical error until the appeal herein was filed. Allowing the appeal on the facts of the case herein would therefore be too draconian and cause a travesty of justice to the respondent herein.

42. It would be unfair for a court to allow a defendant who may have caused serious injuries or death to go scot free due to a technicality that remained unnoticed due to an inadvertent error on the part of an

advocate of a plaintiff. Indeed, it is trite law that no party should be punished for the mistakes of his advocate no matter how serious the blunder was, if that blunder can be compensated by way of costs.

43. As was held in the case of *Republic v Speaker Nairobi City County Assembly & another Ex Parte* [2017] eKLR which this court fully associated itself with in the case of *Kelvin Lwangu Kibisu v Isaac Muchiri Njuguna & another* [2020] eKLR, blunders by advocates will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

44. In the mind of this court, failure to amend the pleadings amounted to negligence on the part of the respondent's advocates' part. As has been stated hereinabove, this court had the option of dismissing the appeal herein. This could have thrown the advocates under the bus opening them to be sued for negligence after allowing the appeal herein. Noteworthy, advocates are required to take out professional indemnity insurance policy to cover themselves in such cases of negligence.

45. However, this court was prepared to give the respondent's advocates the benefit of doubt that the omission to amend the plaint was due to an inadvertent error on their part. Notably, the denial of ownership of the first subject motor vehicle would also have taken the same format as in the case of the second subject motor vehicle if the standard denial averment in defences is anything to go by leading to the respondent's advocates not paying much attention to paragraph 4 of the defence, much to the detriment of the respondent herein.

46. Paragraph 4 of the defence stated that:-

> "The defendant denies that at all material times the defendant has been the registered owner of motor vehicle registration number KBC 609M and the (sic) to strict proof thereof (emphasis court)."

47. Although the alleged accident was said to have occurred on August 26, 2017, this was a civil case which was based on documents that had been agreed upon by the parties. Both parties were still present to adduce their evidence before the trial court making a retrial the best option in the circumstances of the case.

48. The power by the High Court to order a retrial can be found in section 78(1) (e) of the *Civil Procedure Act*. Section 78 (1) of the *Civil Procedure Act* stipulates that:-

> " Subject to such conditions and limitations as may be prescribed, an appellate court shall have power:-

a. to determine a case finally;

b. to remand a case;

c. to frame issues and refer them for trial;

d. to take additional evidence or to require the evidence to be taken;

e. to order a new trial."

49. Hence, weighing the extent of hardship the respondent would suffer if the appeal herein was allowed and the inconvenience and delays that would be suffered herein, this court found and held that it would be in the interests of justice that this matter be referred for retrial to enable the real issues in controversy between the parties herein be determined.

50. In the premises foregoing, this court did not find grounds of appeal Nos 1, 2 and 3 of the memorandum of appeal to have been merited and the same be and are hereby dismissed.

Disposition

51. For the foregoing reasons, the upshot of this court's decision was that the appellant's appeal that was lodged on April 9, 2020 was not allowed and the same be and is hereby dismissed. However, pursuant to powers bestowed on this court by section 78(1) (e) of the *Civil Procedure Act*, it is hereby directed that the decision of Hon S. N Telewa (SRM) delivered at Kisumu in Chief Magistrate's Court CMCC No 446 of 2018 on 24th February be and is hereby set aside and/or vacated and in its place, it is hereby directed that CMCC No 446 of 2018 be heard afresh by another magistrate other than Hon S.N Telewa.

52. It is hereby directed that the lower court file be returned to the Chief Magistrate's Court at Kisumu and the same be placed before the Chief Magistrate on December 8, 2022 for further orders and/or directions.

53. In view of the circumstances of the case, the respondent's will pay the appellant throw away costs of this appeal in the sum of Kshs 50,000/= within thirty (30) days from the date of this ruling.

54. In default of payment as aforesaid, the appellant will be at liberty to institute proceedings for the recovery of the same.

55. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF NOVEMBER 2022

J. KAMAU

JUDGE