



REPUBLIC OF KENYA



KENYA LAW
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Mutua v Munyili (Civil Appeal 08 of 2020)
[2022] KEHC 15622 (KLR) (23 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15622 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 08 OF 2020
GMA DULU, J
NOVEMBER 23, 2022

BETWEEN

PATRICK MUSYOKI MUTUA APPELLANT

AND

JEREMIAH MBANDI MUNYILI RESPONDENT

(Being an Appeal from the judgment of Hon. M.K. Mutegi (SRM) in Tawa Senior Resident Magistrate's Court Civil Case No.14 of 2018, delivered on 29th January, 2020)

JUDGMENT

1. In a judgment delivered on January 29, 2020, the trial magistrate dismissed the plaintiff's (appellant's) case and concluded as follows -

“In the end, I find that the plaintiff has failed to prove negligence on the part of the driver of motor vehicle Reg No KBY 039A and as such has failed to prove his case on the balance of probabilities against the defendant and I dismiss the case in its entirety with costs to the defendant.”

2. Dissatisfied with the decision of the trial court, the appellant who was the plaintiff, has come to this court on appeal on the following grounds –
 1. That the learned magistrate erred in law and in fact in dismissing the suit when there was sufficient and overwhelming evidence on record to the contrary thereby arriving at an erroneous conclusion.
 2. That the learned magistrate erred in law and fact in holding that the plaintiff had not proved his case yet the defendant admitted occurrence of the subject accident thereby arriving at an erroneous conclusion.



3. The learned trial magistrate erred in law and fact in applying the wrong principles of law thus arriving at an erroneous conclusion.
3. The appeal, which was filed through counsel M/s Tombe & Company, was canvassed through filing of written submissions. In this regard, I have considered the submissions filed by Tombe & Company advocates for the appellant and the submissions filed by AM Mbindyo & Company for the respondent.
4. This being a first appeal, I am required to examine the evidence on record afresh and come to my own independent conclusions see *Selle vs Associated Motor Boat Co Ltd* (1968) EA 123.
5. This being an appeal against the trial court's finding that the appellant did not prove negligence, I have to bear in mind the provisions of section 107 of the Evidence Act (cap 80), that he who alleges has the burden to prove the allegation. This being a civil case, the standard of proof is on the balance of probabilities, which standard was explained in the old English case of Miller vs Minister of Pension (1947) ALL ER 373 that –

“If the evidence is such that the tribunal can say; we think it more probable than not, then the burden is discharged, but if the probabilities are equal, it is not”.
6. In the present case, the appellant called 2 witnesses. Pw1 was himself and stated that he was a passenger seated in the front of the motor vehicle, when the driver took a corner and the vehicle rolled and that he was injured and treated at Mbooni. He stated that an employee in the vehicle Frankline Muli Muindi died in the accident. In cross examination he said the driver was sleeping though the vehicle was not over speeding.
7. Pw2 was Albanus Mutua a Health Records Information Officer at Mbooni sub-county hospital, who stated that the hospital facility treated Patrick Musyoka Mutua on March 3, 2017. Pw3 was Dr Obed Omuyoma from Nakuru who produced a medical examination report of the plaintiff/appellant and said that he charged Kshs 50,000/= for his services, after examining him on December 1, 2017. The injuries suffered were soft tissue in nature.
8. The respondent, who was the defendant did not bring any witness to court, but parties' counsel agreed to file written submissions which they did. In their submissions counsel for the appellant asked for general damages of Kshs 250,000/= and special damages of 50,000/=.
9. On his part, counsel for the respondent denied liability on the ground that negligence had not been proved, and did not suggest a figure for general damages, but stated that Dr Obed had indicated in his report that he only charged Kshs 10,000/=.
10. Having considered the evidence on record, I have to bear in mind that this case relates to the same accident as Civil Appeal No 06 of 2020. Since the motor vehicle KBY 030A was in the exclusive control of the driver, the respondent had an obligation to explain why and how it overturned in order to exonerate himself, from negligence.
11. As this court found in Appeal No 6 of 2020, the vehicle (lorry) KBY 030A was stationary when it overturned and caused an accident in which one person died. The respondent having chosen not to testify and explain, how the accident occurred cannot say through submissions that negligence was not proved. As I found in appeal 06 of 2020, the driver of the lorry was 60% to blame for the accident. The appellant however, having known that the vehicle was parked dangerously should not have gone near there to work. Thus the appellant was 40% to blame in negligence.



12. With regard to injuries suffered by the appellant, in my view the appellant only proved injuries recorded in the treatment notes at Mbooni hospital. These were described by Pw2 Albanus Mutua, wherein counsel did not cross examine on same. There was no visible bruise or injury recorded in the outpatient card.
13. In my view, therefore, the appellant did not suffer any physical injuries even though he might have suffered anxiety, which is also a presupposition, as there is no evidence tendered by him to that effect.
14. Thus, though I find that negligence was proved against the respondent to the extent of 60%, I find that the appellant did not prove that he suffered injuries in the accident, thus he cannot be awarded any damages.
15. I thus vary the trial magistrate's judgment and make the following orders –
 1. That the appellant proved that the respondent was 60% liable in negligence for the occurrence of the accident.
 2. That the appellant did not prove on the balance of probabilities that he suffered injuries.
 3. That the court will thus not award any damages to the appellant.
 4. That the parties will bear their respective costs of appeal and of proceedings in the trial court.

DELIVERED, SIGNED & DATED THIS 23RD DAY OF NOVEMBER, 2022, VIRTUALLY AT MAKUENI.

GEORGE DULU

JUDGE

