Rentworks East Africa Limited v Arodi & 2 others (Civil Appeal E143 of 2021) [2022] KEHC 15687 (KLR) (23 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15687 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E143 OF 2021

RE ABURILI, J

NOVEMBER 23, 2022

BETWEEN

RENTWORKS EAST AFRICA LIMITED ..... APPELLANT

AND

HEZBORNE ONYANGO ARODI ..... 1ST RESPONDENT

OFFICE OF THE INSPECTOR GENERAL ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

(An appeal from the judgement and decree of Hon R.K Sang P.M in Nyando SPMCC No. 4 of 2017 delivered on 15th June, 2021)

JUDGMENT

1. The subject of this appeal is palpable from paragraph 5 of the amended plaint in which the 1st respondent who was the plaintiff in the lower court pleaded his cause of action as follows:

> On or about the 13th February, 2016, the plaintiff was driving along Kisumu-Ahero Road when the driver of motor vehicle registration GKB 140J drove the aforesaid motor vehicle carelessly, recklessly and negligently that it lost control, veered off its correct lane and hit motor vehicle registration number KAQ 633U which the plaintiff was driving causing the plaintiff severe bodily harm.

2. The 1st respondent attributed the occurrence of the accident to the then defendants' negligence and the 2nd respondent vicariously liable.

3. The defendants entered appearance and filed their statements of defence denying negligence attributed to them. They also attributed the occurrence of the accident to the plaintiff's own negligence which they pleaded.

4. The evidence adduced before the trial court was as follows: Hezborne Oyango Arodi, the 1st respondent herein and the plaintiff in the trial court testified as PW-1 and recalled that on the material day, he was driving his motor vehicle along the Ahero-Kisumu road when he was hit by the appellant's motor vehicle. According to him, the appellant's vehicle was being driven on the wrong lane of the road and its headlights were off.

5. As a result of the accident, the plaintiff/1st Respondent's vehicle was written off. He also sustained serious injuries and that he remained in the ICU for one week and later 2 weeks in the surgical ward. At the time of testifying, he could not use his hand fully and that his ribs had not fully healed.

6. PW-2 Prof Were Okombo testified that the 1st respondent had been examined by one Dr. Okumu in the year 2016 and the examination showed that he had sustained both soft and bone tissue injuries from which he had not fully recovered at the time of examination. He recommended afurther treatment. The medical report and the X-ray report were both produced as exhibits.

7. PW-3 PC William Rono testified and produced the police abstract which indicated that the Driver of GKB 140J was to blame for the accident.

8. PW-4 Eliud Mungai Mureithi produced the assessment report placing the cost of repairs of the plaintiff/1st Respondent's motor vehicle at Kshs 851,320/ although the vehicle was not repaired. he testified that had the motor vehicle been repaired, it could take approximately 24 days.

9. The defence closed their case without calling any witness. The trial court after considering the evidence adduced by the plaintiff found the defendants jointly and severally liable at 100% and awarded the plaintiff damages as follows:

   Liability 100% jointly and severally

   General damages Kshs 1,800,000/=

   special damages Kshs 8,000/=

   costs of KAQ 633U Kshs 900,000/=

   TOTAL Kshs 2, 708,000

10. Aggrieved by the judgment and award of the trial court, the appellant herein preferred this appeal which is anchored on the following grounds:

    1. The learned trial magistrate erred in law by failing to determine that issues regarding material damage to property cannot be dealt with as special damages as pleaded by the respondent.

    2. The learning trial magistrate erred in law and fact by exercising his discretion to award extremely high amounts of money in general damages which amounts do not conform to the injuries allegedly sustained by the respondent.

    3. The learned trial magistrate erred in law by failing to give a reasoning on how he arrived at the apportionment of liability at 100% against the appellant.

    4. In totality, the appellants herein were not accorded fair hearing.

11. This appeal was canvassed by way of written submissions. On behalf of the appellant, it was submitted on the first ground of appeal that the plaintiff had not repaired the motor vehicle and that therefore there was no basis for the reimbursement of an amount not spent. The authorities in *Capital Fish Kenya Limited v The Kenya power and Lighting company limited* (2016)eKLR, *David Bagine v*

Martin Bundi (1997) eKLR and *Jackson Mwabili v Peterson Mateli* (2020) eKLR were relied on in support of that argument.

12. On the second ground, was submitted that the general damages awarded do not indicate the basis upon which the same were arrived at and that the trial court thus abused its discretion by failing to consider the authorities cited by the appellant. In this regard; *ASAL v Muge and Another* (2001) eKLR, *Butt v Khan w*(1981) KLR, 349, *Shabani v City Council of Nairobi* (1985) KLR, 516 have been cited in support.

13. On the third ground, counsel for the appellant submitted, faulting the trial magistrate for failing to set out the issues for determination and arguing that the judgement therefore fell short of the mandatory provisions of Order 21 Rule 4 and 5 and Section 78 of the *Civil Procedure Act*.

14. On the fpowers of an appellate court, counsel or the appellant relied on the cases of *Selle & Another v Associated Motor Boat Co. Ltd & Others* 1968 EA. 123, *Edward Kiiru & another v Blackwood Hodge (K) Limited* [2019] eKLR, *Butt V Khan* (1981)KLR, 349, *Shabani case* (*supra*) to support the orders that the appellate court can grant in the exercise of its appellate jurisdiction.

15. In urging the court to interfere with the awards made and substitute the same with a sum of Kshs. 600,000, counsel for the appellant relied on the following authorities: *Mwavita Jonathan v Silvia Onunga* (2017) eKLR, *Joseph Mwangi Thuita v Joyce Mwole* (2018) eKLR, *Pauline Gesare Onami v Samuel Changamure & Another* (2017) eKLR and *Sammy Mugo Kinyanjui & Another v Kairo Thuo* (2017) eKLR.

16. The 1st respondent's submissions answered the issues as presented in the memorandum of appeal. On the first ground, Counsel for the 1st respondent submitted that it was proven that an accident occurred in which the 1st respondent's motor vehicle was written off. that an assessment was done and produced a report to that effect. It was submitted that in a case of damage to a motor vehicle, the specific damages be pleaded and strictly proven.

17. On the second ground of appeal, it was submitted that courts must exercise their discretion basing on the law and evidence presented, that the authorities relied upon by both parties concern both soft tissue injuries and fractures. In support of this contention, Counsel or the 1st respondent relied on the authority in *Joseph Jumba Egala v Meshack Omurunga Sande (suing as legal administrator of the Estate of Sarah Makonjio Sande)* [2015] eKLR for the proposition that the award was reasonable and within limits.

18. On the third ground, it was submitted that the court had the discretion to look at the evidence, pleadings and arguments tendered by both parties, before making its findings on liability which was sound in the circumstances.

19. For the 2nd and 3rd respondents, it was submitted on the ground that the trial magistrate erred by awarding excessive general damages given the injuries that in awarding the general damages the court took into account irrelevant factors and the award is inordinately high. Further submission was that the trial court did not provide reasons for the award. For this proposition, counsel or the 2nd and 3rd respondents relied on the cases of: *Morris Miriti v Nahashon Muriuki and Another* (2018) eKLR, *Gogni Construction Company Limited v Francis Ojuok Olewe* (2015)eKLR, *Mwavita Jonathan v Silivia Onunga* (2017) eKLR.

20. On the issue of liability, it was submitted in contention that the trial court's judgement does not conform to the requirements of Order 21 Rules 4 and 5 for want of reasons for the finding. Further reliance was placed on the definition of liability according to *Blacks Law Dictionary*, 10th Edition.

21. The other ground submitted on by the 2nd and 3rd respondents was that the learned trial magistrate failed to determine that material damage to property cannot be dealt with as special damages. In this regard, it was submitted in contention that special damages must be specifically pleaded and proved since they are not the direct natural or probable consequences of the act complained of. The authorities in *Hahn v Singh* (1985) eKLR and *Capital Fish Kenya Limited* (*supra*) were relied on in support of that argument.

Analysis and determination

22. I have considered the grounds of appeal, the evidence adduced before the trial court and the rival submissions by the parties' respective counsel on record. The issues that can be discerned from this appeal are on the trial court's finding on liability; the quantum of damages awarded and the propriety of the judgement rendered by the trial court.

23. The duty of the first appellate was stated in *Peters v Sunday Post Limited* (1958) EA 424 where Sir Kenneth O'Connor stated as follows:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

24. On the issue of liability, it was held in *Karanja V Melele* (1983) KLR 142 that:

> " I agree with what Law JA said in Malde v Angira civil appeal No. 12 of 1982(unreported) that apportionment of blame represents an exercise of discretion with which this court will interfere only when it is clearly wrong or based on no evidence or on the application of a wrong principle."

25. In the circumstances of this appeal, there is uncontroverted evidence that the accident occurred when the 1st respondent's motor vehicle was hit by the 2nd respondent's motor vehicle registration number GKB 140J while overtaking. PW-3 confirmed in his testimony that GKB 140J's driver was to blame for the accident.

26. The defendants in the trial court tendered no evidence in rebuttal that evidence adduced by the 1st respondent plaintiff on how the accident occurred and as pleaded by him. It is now trite law that uncontroverted evidence is weighty and courts will rely on it to prove facts in dispute. The evidence cannot be controverted by allegations in the statement of defence if the defendants fail to call a witness to adduce evidence and be cross-examined to test the evidence. It follows that the statement of defence is nothing but a mere allegation. An allegation remains an allegation until it is proved to be true. The issue of uncontroverted evidence was addressed Mwongo J in the case of *Peter Ngigi & Another (suing as legal representative of the Estate of Joan Wambui Ngigi) -v-Thomas Ondiki Oduor & Another* 2019 eKLR where the learned judge stated, and I fully agree with him that:

> "

> " 22. There are any authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is

that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements.

23. In the case of Shaneebal Limited v County Government of Machakos [2018] eKLR, Odunga, J, relied on the cases below in reaching his judgment. In Trust Bank Limited v. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

Similarly, in *Janet Kaphiphe Ouma & Another v. Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

> "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

25. In Interchemie EA Limited v. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. Mulwa J, however in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR stated:

> > "I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.

26. In light of all these authorities, I am of the view that the position taken by the trial magistrate in dismissing the suit was not warranted. I would reverse the lower court's determination and substitute with this court's determination, that the plaintiffs proved their case on balance of probabilities, and are entitled to damages.

27. In this regard, no evidence of apportionment of liability being available, 100% liability is attributed to the defendants jointly and severally."

27. In the instant case, the failure by the defendants to adduce evidence, not only to challenge the evidence adduced by the plaintiff now 1st respondent but to give their side of the story on how the material accident occurred must impact this appeal negatively. The defendants did not controvert the evidence tendered by the plaintiff. It is only the plaintiff who led evidence on how the accident occurred due to the manner of driving by the defendant's driver and/or agent. In the circumstances, I find and hold

that the trial magistrate's finding on liability cannot be faulted. It was proper and accorded with the evidence tendered before him that proved liability on a balance of probabilities. I decline to interfere with the finding on liability and uphold the findings of the trial magistrate on the same.

28. On the issue of quantum, under general damages for pain and suffering on the injuries suffered, the 1st respondent submitted that he had sought Kshs 2,000,000/- based on the authorities in *Hellen Atieno Oduor v S.S Mehta & sons Ltd & Muthitu Nanua* (2015) eKLR and *Mehari Tewoldge t/a Mehari transporters Ltd v Damus Muasya Maingi* (2013)eKLR. The defendants on their part proposed the sum of kshs 500,000/- and supported by *Civicon Ltd v Richard Njomo Omwancha & 2 others* (2019)eKLR.

29. The injuries sustained by the 1st respondent as pleaded in the plaint are as follows:

    a. Mild closed head injury

    b. Blunt chest injury

    c. Multiple rib fracture on right chest

    d. Bilateral/haemopneumothord

    e. Blunt abdominal trauma - lower grade liver injury with hemoperitoneum

    f. Closed right human's fracture

    g. Multiple soft tissue/skin abrasion and contusion/bruises

30. In the medical report, the following injuries were stated to have been sustained by the plaintiff:

    a. Mild closed head injury

    b. Blunt chest injury - multiple rib fractures on right chest

    - Bilateral/haemopneumothords

    c. Blunt Abdominal Trauma - lower grade liver injury with hemoperitoneum

    d. Closed Right Human's fracture

    e. Closed chest clavicular fracture

    f. Multiple soft tissue/skin abrasions and contusions/bruises

31. The injuries pleaded were confirmed by the medical report and the doctor who testified on the same. There was no contrary evidence to suggest that the plaintiff/ 1st respondent herein did not sustain the injuries pleaded and testified on. Those injuries in my humble view were serious and near fatal as the 1st respondent was kept in the intensive care unit for one week before being taken to the surgical ward for another week.

32. It is settled law that the award of damages is within the discretion of the trial court and the appellate court is not entitled to interfere unless the award is manifestly high or low as to represent an erroneous award as was observed in *Catholic Diocese of Kisumu v Tete* (2004)eKLR where it was held that:

> "It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of

damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate."

33. I have carefully reviewed the authorities relied on by all counsel both in the trial court and in this court and find that those decisions cited by the appellant are on the lower scale. They represent injuries that are not comparable with the injuries sustained by the 1st respondent. In the circumstances, I find that the award of Kshs 1,800,000/= made by the trial magistrate was reasonable compensation to the plaintiff for the serious injuries that he sustained in the material accident.

34. On the award of special damages, the sum of Kshs 1, 108,000/= had been pleaded. However, during the trial, only one receipt Pexh 4 was produced being monies paid for preparation of the assessment report. In the circumstances, the sum of kshs 8,000/- as proved is awarded.

35. According to the assessment report and PW-4s testimony, the motor vehicle's pre accident value was 1,100,000/-, the salvage value was Kshs 275,000/=. He also found that the cost of repairs would be Kshs 851, 324/= hence the conclusion that the vehicle was a write-off. On his part, the trial magistrate awarded Kshs 900,000/=.

36. In *Permuga Auto Spares & another v Margaret Korir Tagi* [2015] eKLR, the court stated that:

> " It is the court's view that once a vehicle has been written off, the only compensation is the pre-accident value, less salvage value as assessed and other reasonable consequential expenses that are subject to proof. There would ordinarily be assessment charges, towing charges, excess but not loss of user. The payment of the pre-accident value is made to bring the owner to as near as possible to the state he would have been if not for the accident and loss."

37. The above position was earlier on advanced in the case of *Concord Insurance Company Limited v David Otieno Alinyo & Another* [2005] eKLR where the Court of Appeal while discussing the measure of damage to chattels agreed with the principles laid down by Herman LJ in *Darbishire v Warran* [1963] 1 WLR 1067 at page 1070 thus:

> " The principle is that of restitution integrum, that is to say, to put the plaintiff in the same position as though the damage never happened. It has come to be settled that in general the measure of damages is the cost of repairing the damaged article, but there is an exception if it can be proved that the cost of repairs greatly exceeds the value in the market of the damaged article. This arises out of the plaintiff's duty to minimise his damages ..."

38. In *Burdis v Livey* [2002] 3 WLR 702, the English Court of Appeal stated at page 792 paragraph 84:

> " When a vehicle is damaged by the negligence of a third party, the owner suffers an immediate loss representing the diminution in value of the vehicle. As a general rule, the measure of that damage is the cost of carrying out the repairs necessary to restore the vehicle to its pre–accident condition."

39. It has been held in numerous cases that the purpose of compensation is not to enrich the wronged party but to bring him to the position he would have been had it not been for the tort feasor's actions. Therefore, discounting the salvage value from the pre-accident value, the 1st respondent is entitled to the sum of Kshs 825,000/- arrived at as follows: Kshs 1,100,000-275,000=825,000/- which I hereby find to be awardable to the 1st respondent.

40. On the propriety of the judgement rendered by the subordinate court, the appellants contended that the same does not conform to the provisions of Order 21 Rule 4 and 5 which provides that:

> 4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.
>
> 5. In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate decision on each issue.

41. The provisions of Section 78 of the *Civil Procedure Act* have also been cited and I note that the Section provides for the powers of an appellate court. Any reference to that Section for purposes of buttressing the contents of a judgement is therefore erroneous.

42. The importance of giving reasons in a judgement was stated in the English case of *Flanner v. Halifaz Agencies Ltd* [2001] ALL ER 273 where it was held that:

> " 1. The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex parte Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind, if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.
>
> 2. The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given, it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself..."

43. A similar position was stated in *South Nyanza Sugar Co. Ltd v Omwando Omwando* (2011) eKLR where the court stated that:

> " Ordinarily and in law a judgment should deal with issues raised and should not be scanty. A judgment must comply with the mandatory provisions of order 21 rule 4 of the *Civil Procedure Rules* which provide that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision. In the circumstances of this case, it cannot be said from the extract of the judgment I have set out above the trial magistrate complied with this mandatory provisions of the law. The trial magistrate by not setting out points for determination and reasons for his decision contrary to the aforesaid provisions of the law abdicated his judicial responsibility. As a judicial officer he was under a duty to state in writing the reasons which made him arrive at a particular decision on liability and the apportionment thereof. It could not have been done in vacuo. Any judgment that does not contain the aforesaid essential ingredients is not a judgment and an appellate court will frown at such a judgment and indeed impugn it as I hereby do. This ground alone would have been sufficient to dispose of the appeal."

44. I have carefully perused the judgement of the trial court to ascertain whether it meets the threshold under the aforesaid provisions of the law. The learned magistrate stated in part that:

> "I have read and considered the pleadings, witness testimony on record and the written submissions filed by counsel for the parties herein..."

45. Section 78 of the *Civil Procedure Act* sets out the powers of an appellate court and these are:

> "To determine a case finally; or remand the case or frame the issues and refer them for trial; or take additional evidence or require such additional evidence to be taken; or order a new trial."

46. These options are granted depending on the circumstances of each case. In the instant case, I have exercised the powers of the first appellate court in accordance with the provisions of section 78 of the *Civil procedure Act*, the grounds of appeal, the pleadings before the trial court, the oral testimonies of witnesses who testified and the parties' respective submissions and I am of the view that the ends of justice would best be achieved by a final determination of the suit based on the material on record and not by the use of many words which are in my view just a style used by each judicial officer in the interest of expedition, considering the heavy workloads.

47. I find that no prejudice was occasioned to the appellant by the brevity statement used by the trial court wherein he was clear that he had considered all the pleadings, evidence and submissions before arriving at his decision that he did.

48. Iam fortified on this by the various decisions of this Court and the Court of Appeal wherein it has been held that failure to frame issues for determination is not fatal to a case as issues are joined in the pleadings.

49. In *Ngugi Peter Ngumi Gichoho Alias Peter Ngumi Gichoho Ngugi v Ambrose Wanjohi Migwi T/A Migan Hardware Store* Nyeri HCCA No. 138 of 2003 Sergon J stated as follows:

> "A perusal of the record shows that the learned Principal Magistrate did not frame up the issues for determination which he was enjoined to do under Order 22 rule 5 of the Civil Procedure Rules. But the deficiency in failing to evaluate the evidence can be corrected by the first appellate court. Though the learned Principal Magistrate did not frame up the issues, he nevertheless ably analysed the evidence presented before him."

50. Odunga J (as he then was) added his voice on this subject and stated as follows in *Moses Ndolo Ndambuki v Andrew Linge Mutua* [2020] eKLR

> "However, the failure to frame issues is not necessarily fatal as was held by the East African Court of Appeal in Norman v. Overseas Motor Transport (Tanganyika) Limited Civil Appeal No. 88 of 1958 1959] EA 131 where it stated that:
>
> > "If, though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the court, and the court decides the point, as if there was an issue framed on it, the decision will not be set aside on appeal on the ground merely that no issue was framed...In the instant case it would seem that the failure of the court to frame issues was to some extent the fault of counsel on both sides. Nevertheless, the failure to frame the issues is an irregularity and the question is whether, notwithstanding the failure to frame the issues, the parties at the trial

> knew what the real question between them was, that the evidence on the question had been taken and the court duly considered it."

It was accordingly held by the same Court in *S N Shah v. C M Patel and Others* [1961] EA 397 that:

> "Whereas there would have been considerable advantage in framing the issues before the evidence was called, issues had been joined upon the pleadings and it was not, therefore, obligatory upon the learned Judge to frame issues. The fact that he did not do so would be no justification for upsetting his decision."

51. The upshot of the above is that the appeal is partially allowed in the following terms:

Liability 100%

General damages Kshs 1,800,000/=

Special damages Kshs 8,000/=

Cost of motor vehicle Kshs 825,000/=

TOTAL Kshs 2,633,000/=

52. I order that each party bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF NOVEMBER, 2022

R.E. ABURILI

JUDGE