REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 81 OF 2019

JACKSON NDWIGA.....APPELLANT

VERSUS

ELIZABETH THARA NGAHU.....RESPONDENT

JUDGMENT

1. The respondent herein was the plaintiff in the Chief Magistrate's Court at Embu Civil Suit No. 190 of 2014 in which she sued the appellant (1st defendant) together with Atieno J. Achola (2nd defendant) and Kennedy Mwangi (3rd defendant) for damages arising out of a Traffic Road Accident that is said to have occurred on the 9th day of February 2013 along Kawanjara – Karurumo road.

2. In her plaint filed in court on the 28th day of August, 2014, she averred that on the material date, she was a pillion passenger on motor cycle registration No. KMCF 010M along Kawanjara – Karurumo road when motor vehicle KAH 258Z which is owned by the appellant and Atieno J. Ochola was so negligently driven by one Kennedy Mwangi (3rd defendant) that it hit motor cycle KMCF 010M from behind causing the respondent to fall off the same as a consequence of which she was seriously injured. The particulars of the injuries, those of negligence and special damages are set out in paragraphs 9, 10 and 15 of the plaint.

3. She averred that following the accident, she was taken to Embu Provincial Hospital where she was hospitalized for three months before she was transferred to Kikuyu Hospital and later to Kenyatta National Hospital where she incurred medical expenses amounting to Kshs. 140,262/= in the three hospitals.

4. The respondent further pleaded that she was to incur further medical expenses in future treatment and surgery to repair her lacerated ear lobe and to adjust her right ankle which she had estimated at Kshs. 800,000/=. She averred that before the accident, she was earning Kshs. 50,000/= per month on the average from her business of selling groceries and cereals which she was unable to earn after the accident. She claimed loss of earnings for a period of three (3) years from the date of the accident, future medical expenses, general damages plus costs of the suit and interest.

5. The 1st defendant filed his defence on the 18th September, 2014 in which he denied being the owner of motor vehicle registration No. KAH 258Z or that the 3rd defendant was his authorized driver at the alleged time of the accident and therefore, he averred that he is not vicariously liable for the negligence on the part of the 3rd defendant.

6. Further, he denied the occurrence of the accident on the material date and that the respondent sustained injuries as pleaded in the plaint. He also denied the particulars of special damages as pleaded by the respondent.

7. A reply to the appellant's defence was filed on the 1st day of October, 2014 in which, the respondent herein reiterated the contents of the plaint.

8. The 2nd and 3rd defendants did not enter appearance following which, interlocutory judgment was applied for and entered against them, on the 21st September, 2016.

9. The 1st defendant who is the appellant herein listed seven (7) grounds of appeal in the memorandum of appeal dated the 18th day of December, 2019 and filed on even date. The appeal is on both the liability and the quantum of damages.

10. The appeal was disposed off by way of written submissions which both parties filed. The court has considered the said submissions, the grounds of appeal and has re-evaluated the evidence as its required of it, being the first appellate court.

11. As already stated in this judgment, the appeal is on both liability and quantum of damages but before this court can delve into the twin issues, I find it necessary to first deal with the fundamental issue of procedure that was adopted by the trial court, in "hearing" the matter.

12. This court has perused the court record and the same shows that, the case the subject matter of this appeal, was filed on the 28th day of August 2014. Upon service of the summons and the plaint, the 1st defendant did file his statement of defence, on the 18th day of September 2014. Both the 2nd and 3rd defendants did not file appearance and defence and on the 21st day of September, 2019, interlocutory judgment was entered against them.

13. The matter then came up for hearing on a number of occasions and on the 17th day of July 2017, parties recorded a consent in the following terms: -

> ***"By consent, parties are at liberty to file further evidence on ownership of the vehicle. Only the police officer and the 1st defendant to give viva voce evidence. Regarding the rest of the evidence, the court to adopt the witness statements as evidence".***

14. On the 4th day of September, 2017, Civil Suit No. 190 of 2014 was consolidated with Civil Suit No. 213 of 2014 and the above order was to apply to both cases. A further consent order was recorded on the 19th day of March, 2018 as follows:

> ***"By consent, parties to adopt the evidence filed without the need of their testifying in court. To file submissions by 7th day of May, 2018 when the case shall be mentioned".***

15. On the 7th May 2018, the matter was mentioned and fixed for a further mention on the 21st May, 2015 on which date, the court gave a date for judgment which was eventually delivered on the 10th September, 2018.

16. The court has read the aforesaid judgment. In it, the learned Hon. Magistrate has made reference to the medical report dated 4th day of June 2014 by Dr. Stephen Maina Wambugu and the injuries that the respondent herein sustained.

17. Further, the trial court referred to the witness statements by the respondent, Samuel Mugendi Njeru Muthee, an affidavit by Margaret Kagure Mambo, more statements by Joseph Njagi Gitonga, Mary Wanjiru Nyaga and Paul Njeru Muthee. In addition, the learned magistrate relied on several documents filed by the respondent.

18. The procedure of hearing of suits and examination of witnesses is provided for in **Order 18 of the Civil Procedure Rules (2010), Cap 21 Laws of Kenya**. The said order is very comprehensive on how a trial should proceed in court including the recording and production of evidence. Of importance to this court is **Order 18 Rules 1 and 2** which provide as follows: -

> ***1.The plaintiff shall have the right to begin unless the court otherwise orders.***
>
> ***2. Unless the court otherwise orders—***
>
> > ***(1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.***
> >
> > ***(2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.***
> >
> > ***(3) After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited.***

19. The Civil Procedure Act which commenced on 31st January, 1924 but has been amended several times, it was enacted to make provision for procedure in civil cases and in its short title and application, it states that it applies to proceedings in the High Court and, subject to the Magistrate's Courts Act, to proceedings in subordinate courts.

20. In view of the above provisions, can the procedure that was adopted by the parties said to have complied with the procedure as laid down in the Civil Procedure Act?

21. Before the trial court, the counsel consented to have the parties adopt the evidence without having to testify. Earlier, on the 17th July, 2017, they had agreed to adopt the witness statements as evidence. Nothing was said about the documents that the plaintiff filed or how the same were to be dealt with.

22. The court of appeal in the case of **Kenneth Nyaga Mwige vs Austin Kiguta and 2 others [2015] eKLR** had this to say on production of documents.

> ***The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the documents are filed, the documents though on the court file does not become part of the judicial record.***

Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document.

Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the reference and veracity of the contents. This is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the documents when called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone, but would take into consideration all facts and evidence on record.

23. The Court of Appeal further stated: -

Once a document has been marked for identification it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for is authenticity and relevance to the facts of the case. Once the foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit; it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an authenticated account.

24. In the case of **Des Raj Sharma Vs Reginan [1953] EACA 210**, the court held that there is a distinction between exhibits and articles marked for identification and that the term exhibit should be confined to articles which have been formally proved and admitted in evidence.

25. In the case before the trial court, no witness was called to testify and no document was referred to, by the counsel in their consents. It was not indicated that the parties were consenting to the production of certain documents filed with the pleadings. In fact, no reference at all was made to any such documents. The court was not addressed on what documents to rely on. However, the court relied on the copies of documents filed by the respondent herein as if there was a consent by the parties that the same were agreed on. It also relied on the submissions of the parties.

26. Order 18 of the Civil Procedure Rules is clear on how a hearing should proceed and how evidence should be recorded and produced. In this case, parties substantially deviated from the laid down procedure. This court is alive to the provisions of Order 11 and in particular Rule (7) which gives the court the discretion to order admission of statements without calling the makers as witnesses where, appropriate.

27. The problem this court has is; when a court exercises such discretion "*how does it interrogate the veracity of the evidence contained in such statements which are produced without calling the makers?"*

28. It is even more challenging when like in this case where the trial court allowed all the witness statements to be adopted without calling any of the parties or witnesses to testify.

29. It is my considered view that, such substantial deviation from a well laid down procedure is not acceptable.

30. If indeed parliament intended to give such wide discretion to the trial court to so substantially deviate, then it would have clearly so stated.

31. It is my further considered view that the discretion given to the court in Order 11 Rule (7) is not absolute but only limited and that explains the use of the words "*where appropriate*". That discretion cannot be taken to override the provisions of Order 18 on the recording and production of evidence. By so doing, the parties opted for a short-cut.

32. In the case of **James Njoro Kibutiri Vs Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1975-1985] EA 220**, the court had some advice to give on short cuts;

"that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure that they won't land you in a ditch".

33. In the case of **Lehmann's (East Africa) Limited Vs R Lehmann & Co. Limited [1973] EA 167**, the court held that:

The supposed short cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a court of Appeal can do other than to seek to make the best of an unsatisfactory position.

34. In view of all the foregoing and since the documents referred to in the list of documents were not formally produced in support of the suit, coupled with the fact that the correct procedure for recording and production of evidence as laid down in Order 18 Rules 1 and 2 was not complied with, the learned magistrate, with tremendous respect, fell into error and the whole trial was rendered a nullity. There was no trial at all as contemplated by the law.

35. In the premises, the order that commends itself to me and which I hereby grant is that the appeal succeeds, the judgment in Embu CMCC 190 of 2014 as consolidated with CMCC No. 213 of 2014 is hereby set aside.

36. The matter is hereby remitted to the trial court for hearing and determination in the manner stated hereinabove.

37. Since the parties had entered into a consent on the flawed procedure, each party should bear its own costs of the appeal.

38. It is so ordered.

Delivered, dated and signed at Embu this 22nd day of March, 2021.

L. NJUGUNA

JUDGE

…….……..for Appellant

……for Respondent