



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 250 OF 2015

FRED ODUOR ATARO.....APPELLANT

AND

WYCLIFFE WANJALA KISIANGANI.....RESPONDENT

(Being an appeal from the Judgment of Obulutsa, SPM delivered on 17th April, 2015 in Nairobi Chief Magistrate's Court Civil Case Number 6062 of 2012.)

JUDGMENT

1. By a plaint dated 2nd October 2012 and amended on 23rd April, 2014 the **Fred Oduor Ataro**, (hereafter the Appellant), had sued the **Wycliffe Wanjala Kisiangani**, (hereafter the Respondent) claiming damages for injuries allegedly sustained on 13th November, 2011, after being hit by the Respondent's motor vehicle registration number **KBK 033H**, while allegedly lawful walking along **Landhies Road**, Nairobi. The Appellant averred the Respondent's driver, servant and or agent so negligently and/ or carelessly drove the said motor vehicle that he caused it to knock down the Appellant, as a result of which he sustained severe bodily injuries. The Appellant sought special and general damages.

2. The Respondent filed a statement of defence dated 28th February, 2013 and amended on 5th May, 2014 primarily denying the occurrence of the accident and liability for the accident. The matter subsequently proceeded to full hearing. Both parties gave evidence, and the Appellant called two witnesses. In his judgment the learned trial Magistrate found that liability on the part of the Respondent had not been established, and dismissed the suit.

3. Aggrieved with the outcome, the Appellant preferred the present appeal against the entire judgment. The Appellant raised three grounds in his Memorandum of Appeal as follows:-

“1) That the learned magistrate took into account irrelevant issues and arrived at a wrong conclusion.

2) That the learned magistrate misdirected himself in both law and fact and arrived at a wrong conclusion dismissing the suit herein.

3) That the learned magistrate failed to consider the solid evidence tendered by the plaintiff witness.” (sic)

4. On 28th January 2021 the court directed that the appeal be canvassed through written submissions. The parties have duly complied.

5. Counsel for the Appellant began by restating the duty of a first appellate court as held in **Selle & Another v Associated Motor Boat Co. Ltd & others (1968) EA 123**. The first issue raised was that the accident occurred on 13th November, 2011 and not 18th November, 2011 and that pleadings to the contrary arose from mistake by the Appellant's counsel which error was subsequently rectified by way of amendment. Counsel contended that the error of Counsel ought not to be visited on the innocent client. To support this line of argument, counsel cited several decisions, including **Shital Bimal Shah & 2 Others v Akiba Bank Limited [2006] 2 EA 323** and **Bosire Ogero v Royal Media Services [2015] eKLR**. His view was that the mistake was a matter of form and not substance, thus curable by dint of the overriding objective and Article 159(d) of the Constitution of Kenya. Counsel further submitted that documentary and oral evidence tendered at the trial supported the Appellant's case and the fact that the accident occurred on 13th November, 2011. He dismissed the Respondent's written statement and oral evidence as contradictory and intended to mislead the court.

6. Further placing reliance on the case of **Stapley v Gypsum Mines Ltd (2) (1953) AC 663**, counsel asserted that the Appellant's evidence established his case on a balance of probabilities and the Respondent ought to be held 100% liable for the accident. Consequently, the court

was said to have erred by failing to weigh the conflicting evidence, especially concerning the make of the accident vehicle and proceeding to dismiss the case on the basis that the Appellant failed to identify the make of the said vehicle. On damages, it was submitted on the authority of the decisions in **John Kamore & Another v Simon Irungu Ngugi [2014] eKLR**; **James Njau Kariuki v Mary Goreti Wakwibubi & Another [2007] eKLR**; **Regina Mwikali Wilson v Stephen M. Gichuhi & Another [2015] eKLR** and on the basis of the medical evidence tendered at the trial, an award of Kshs. 3,000,000/- would be reasonable compensation.

7. The Respondent defended the finding of the trial court while equally submitting that on a first appeal the court is obligated to re-evaluate the evidence as pronounced in **Selle & Another v Associated Motor Boat Co. Ltd Case** and **Peters v Sunday Post Limited [1958] EA 424**. Counsel contended that the Appellant failed to discharge the burden of proof concerning the identity of the accident vehicle, and that it was not correct that the case was dismissed merely on account of failure by the Appellant to identify the make or model of the accident vehicle. It was pointed out that the Appellant's documentary and oral evidence referred to a saloon and not a station wagon whereas the Respondent stated that his vehicle was a station wagon.

8. It was further submitted that parties are bound by their pleadings which form the foundation of any court proceedings. Consequently, the Appellant's failure to plead the correct date of the accident is a substantial issue and not a mere procedural technicality regarding which the court cannot be asked to invoke its judicial discretion. On this point, reliance was placed on the holding in **Galaxy Paint Company Limited v Falcon Guard (2000) eKLR**; **Gandy v Cooper (1956) EACA 139**; and **Associated Electrical Industries Limited v William Okoth (2004) eKLR**. It was therefore the position of the Respondent that the trial court did not err in dismissing the Appellant's suit.

9. This is a first appeal. The Court of Appeal for Eastern Africa set out duty of the first appellate court in **Selle –Vs- Associated Motor Boat Co. [1968] EA 123** in the following terms:-

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

10. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] IKAR 278**).

11. The court has considered the record of appeal, the lower court file and submissions by the respective parties. In the court's view, the three grounds of appeal can be condensed into one question, namely, whether the Appellant proved on a balance of probabilities, the case pleaded before the trial court. Pertinent to the determination of the issue are the pleadings, which are the basis of the parties' respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters.

12. In the case of **Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91**, the Court of Appeal stated in this regard that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (Emphasis added).

13. The Appellant by the plaint filed on 11th October, 2012 averred at paragraph 4 that:

“On or about the 18th November, 2011 the plaintiff was lawfully and carefully walking along Landhies Road when the said motor vehicle registration number KBK 033H was so negligently and/or carelessly driven and/or controlled and thereby knocking down the plaintiff as a result of which he sustained severe bodily injuries and has since suffered loss and damage....” (sic)

14. The Respondent filed a defence denying the occurrence, date, place and parties to alleged accident and pleaded at paragraph 5 that:

“The defendant denies that an accident took place on the 18th day of November, 2011 involving motor vehicle KBK 033H or at all and the plaintiff is put to strict proof thereof...”

15. Subsequently, the Appellant successfully moved the court *via* a motion dated 21st March, 2014 and was granted leave to file an amended plaint. The said amended plaint carries a single amendment at paragraph 4. The relevant sentence in the said paragraph indicates two dates, namely 18th day of November, 2011 and 13th November, 2011, in that order. However, the latter date is struck out in red and the former underlined in red, with the effect that the pleaded date of the accident remained 18th November, 2011, as before. Once more the Respondent filed a defence denying the occurrence of the accident on 18th November, 2011, parties involved and place of accident. For his part the Appellant filed a reply to the amended defence reiterating the contents of the amended plaint. This therefore was the state of the pleadings at the time of the trial.

16. The Appellant's witness statement filed on 11th October, 2012 with the original plaint stated that the accident occurred on 18th November, 2011. On 17th April, 2013 the advocates for the respective parties filed a joint statement of agreed issues. Among the agreed issues were:

“1. Was there an accident on or about the 18th day of November 2011 involving the plaintiff and motor vehicle registration number KBK 033H and if yes, what time and at what place was the accident?

2. If the answer to 1 is in the affirmation, was the accident the subject matter hereof caused due to the negligence on the part of the defendant and/or the defendant's driver, agent and/or servant....”.

17. Despite the subsequent amendments, the statement of agreed issues was not amended. Indeed, the original date of the accident having been retained in the amended plaint, there would have been no reason for the amendment of the statement of agreed issues.

18. When the hearing commenced on 16/02/2015 **PC Ole Tuiya (PW1)** of Central Police Station who gave evidence for the Appellant produced an abstract of the accident as **P.Exh 2**. It is dated 24/07/2012 and states that the accident occurred on 13/11/2011. However, it bears evidence of alteration of the date by application of white-out and superimposition of the digit '3'. PW1 claimed that the date of the accident (presumably 18th November 2011) may have been an error when referred to the police notice to the Respondent dated 10/05/2012 and issued by the Divisional Traffic Officer (DTO), Central Nairobi (**D. Exh. 1**) which showed that the accident occurred on 13/11/2011. It is unfortunate that the typed record of proceedings does not appear to be sufficiently accurate or clear, but it seemed that more than two abstracts were issued by the traffic police.

19. Looking through the Respondent's documents filed with the witness statements, there is a copy of an abstract bearing the same date, that is, 24/07/2012, as **P. Exh2**. It however reflects the date of the accident to be 18/11/2011 at 9.10pm on Landhies Road. Like **P.Exh. 2**, this abstract shows that the accident vehicle was blamed for the accident. **P. exhibit 2** which should bear the same details has the altered date I have referred to but the **P3 form**, also produced by **PW1** as **P. Exh.1**, the discharge summary by Kenyatta National Hospital and medical report (**P.Exh.4**) by **Dr. Okere (PW2)** bear the 13th of November 2011 as the date of the accident. A copy of the former report (abstract indicating accident on 18.11.2011) is at page 38 of the Record of Appeal (ROA). The index to the ROA indicates that document to be the police abstract produced at the hearing. This is obviously inaccurate as the one produced was the altered one reflecting the date of accident as 13/11/2011.

20. It appears that a further abstract was issued to the Respondent on 3/12/2012 concerning the same accident *vide* OB no. 13/3/9/ 2012, which similarly has alterations on the second digit of the date, and states that the accident occurred on 13th (or other date) of November 2012 on Landhies Road at 10.30am! **PW1** on being questioned about discrepancies especially on the date of accident did not give a proper account and neither did the Appellant. Without saying more, it was clear by the end of the testimony of **PW1** that there discrepancies had surfaced concerning the date of the accident, among others. After the testimony of **Dr. Okoth Okere (PW2)**, the Respondent took to the witness box as **PW3**. Despite the anomalies highlighted in the evidence of **PW1**, no attempt was made to amend the dates of the accident even at that stage. The Appellant testified that the accident occurred on 13/11/2011. It seems that it only dawned on Appellant's counsel to address the discrepancy on the accident date during closing submissions after the trial.

21. On this appeal, counsel for the Appellant has attempted to explain away these discrepancies as merely relating to form and casting the Appellant as the hapless victim of the serial errors by police and his counsel. The trial court should have but did not in its judgment address the discrepancies in the Appellant's pleadings and evidence concerning the date of the accident. This was not a matter of form but an issue going to the heart of the Appellant's pleaded case.

22. As has been held in many authorities, parties are bound by their pleadings. See **Galaxy Paints Company Ltd V. Falcon Guards Ltd (2000) eKLR**; and **Gandy Vs. Caspair [1956] EACA 139**. In **Associated Electrical Industries Ltd V. William Okoth (2004) eKLR, Visram J.** (as he was) stated:

“I entirely agree with the Appellant's submissions that parties are bound by their pleadings. The Respondents have plead one thing and sought to prove another. In such a situation the defendant/appellant was highly prejudiced. It sought to defend the case against it as stated in the plaint. And the case stated in the plaint was never proved”.

23. No doubt the learned Judge was echoing the words of the Court of Appeal in **Galaxy Paints** where the court stated:

“It is trite law, and the provisions of OXIV of the CPR, are clear that issues for determination in a suit generally flow from the pleadings, and unless the pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of OXXr4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination”.

24. The Appellant had many opportunities to amend the date of the accident. He did not. The impleaded date on which a cause of action

arose is an important fact and a defendant will prepare his defence accordingly. In this case, the Respondent pleaded and testified that on either the dates in question (13/11/2011 and 18/11/2011) he was in Thika and did not drive his car or had it driven to Nairobi.

25. This brings me to the other contested issue whether indeed the accident vehicle was KBK 033H, owned by the Respondent. The applicable law as to the burden of proof is found in Section 107 (1) of the Evidence Act which states that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Further section 108 provides 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.”

26. The Appellant was the alleged victim and sole witness to the accident which occurred at night. By his brief evidence-in-chief the Appellant identified the vehicle KBK 033H as the one which knocked him down. He said the driver fled when a crowd gathered. During cross examination, he stated:

“The incident happened at 9.00pm--- I saw the motor vehicle (approach)--- after it hit me it happened (sic) that is when (sic) I saw the number plate. The vehicle was at a speed and not going in one line ---- it was a saloon motor vehicle. It had silver/white color.”

27. It appears from this account that the witness allegedly read the registration particulars of the vehicle after the accident. He had just been knocked down and sustained two fractures. It was night and the vehicle had allegedly approached at speed and barely stayed at the scene. The police notice to the Respondent (**D. exhibit 1**) suggests that this was a hit -and- run case but describes the vehicle as a *Toyota Station Wagon*. When the vehicle was availed for examination, it was found to be a Nissan X-Trail station wagon (**D. exhibit 3**). Indeed, the Appellant’s own **P.Exh. 5a** being the copy of records indicates that the vehicle KBK 033H was a Nissan Station Wagon, and not a saloon car. Although the vehicle inspection happened several months after the accident, no evidence of damage was noted by the police motor vehicle inspector. The Respondent testified that the vehicle was in his possession on 13th and 18th November, 2011 and was not driven to Nairobi or involved in any accident.

28. In such a situation, it is not surprising that the trial court was unpersuaded by the purported identification of the accident vehicle. The circumstances of the accident as described by the Appellant himself did not favour positive identification of the accident vehicle, and his mis-description of the make of the vehicle was confirmation of this fact. The Appellant’s counsel has in submissions attempted to smooth over the rough edges of the Appellant’s evidence by explaining away the glaring gaps and inconsistencies. What the Appellant failed to adduce by way of evidence cannot be substituted by submissions which border on evidence from the bar. The Appellant’s evidence on the most basic facts as to the date of the accident and the identity of the accident vehicle was riddled with inconsistencies.

29. The trial court may have written a brief judgment as pointed out by the Appellant, but it contained all the necessary ingredients and was well reasoned. The learned trial magistrate observed:

“The plaintiff says he was hit by motor vehicle KBK 033H which sped and drove off. He said it was a saloon with silver white color----. The police notice to the defendant indicating the motor vehicle as a station wagon Toyota and the Defendant responded stating that his car is an X-Trail.

It is noted the plaintiff says he was knocked at 9.00pm, it was dark, he says it stopped and he saw the number plate. There appears to be contradiction. He also says it did not stop. If he saw the number plate, he identified the car as a saloon. In the police report the motor vehicle is described as a Toyota Station Wagon, yet the defendant says his car is an X-Trail. All the developments do not point to one car. It is possible that since it was night the plaintiff was not in a position to note the make and number of the motor vehicle that hit him. On a balance of probability, the plaintiff has failed to prove he was knocked by the Defendant’s motor vehicle who (sic) was in Thika at the material time....“.

30. The learned trial magistrate did not dismiss the Appellant’s case merely because the Appellant mis-described the make of the vehicle **KBK 033H** but gave cogent reasons above, as to why the identification of the vehicle by the Appellant was doubtful. Reviewing the evidence, I cannot find any reason to fault his findings. The Appellant’s entire evidence regarding the date of and accident vehicle was in tatters and the only reasonable finding to be made was that the Appellant had not discharged the burden of proof. This court is therefore persuaded that the Appellant’s suit was properly dismissed and finding no merit with the instant appeal, will equally dismiss it with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 12TH DAY OF AUGUST 2021.

C.MEOLI

JUDGE

In the Presence of:

For the Appellants: Mr Ngige

For the Respondent: Mrs Githae

Court Assistant: Carol