



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.246 OF 2018

SALAMA NGOME MPINGANO.....APPELLANT

VERSUS

ALICE NYAWELA KAMATHI.....RESPONDENT

(Being an Appeal from the Judgment delivered on 9th November, 2018 of Hon. MS J.A Kassam (Senior Resident Magistrate) in Mombasa CMCC No.145 of 2010)

JUDGMENT

1. The Appellant was the Plaintiff in **Mombasa CMCC No.145 of 2010**. The Appellant sued the Respondent on road traffic accident where the facts of the case were that on or about the **10th October, 2009** the Appellant was a lawful passenger aboard motor vehicle **No.KAV 667G** along Nairobi – Mombasa Highway at Kibarani road when the Respondent’s authorized driver recklessly and carelessly drove the same and as a consequence the Appellant sustained serious injuries.
2. In the **Plaint** dated **11th January, 2010**, the Appellant sought as against the Respondent *general damages; special damages of Kshs.2,330/= and costs plus interest.*
3. In response the Respondent filed a Defence on the **23rd September, 2011** and denied any accident occurred and that if there was any such accident, the occurrence was solely caused and/or substantially contributed to by the Appellant’s own negligence.
4. The Respondent further attributed the occurrence of the accident to a collision by a third-party driver who was driving **Motor Vehicle Registration No.KTW 584/ZC 1216**. The Respondent stated that he was driving lawfully on his side of the road and the third-party negligently drove **Motor Vehicle Registration No.KTW 584/ZC 1216** that it veered off of the road, hit the centre refuge and crossed over to the defendant’s lane and hit motor vehicle **No.KAV 667G** on the right side forcing it to roll downhill.
5. It was the Respondent’s averment that the suit did not disclose any reasonable cause of action against her and she sought that the Appellant’s suit be dismissed against her with costs.
6. The Appellant called three (3) witnesses while the Respondent did not call any witnesses but indicated to court that they will rely on their documents as placed on record.
7. PW1 was **Dr. Ajoni Adede** who stated that he prepared a medical report dated **2nd November, 2009** after examining the Appellant and he stated that the Appellant was fully recovered with no permanent disability. He further testified that he was paid Kshs.2,000/= for the report and his attendance fees of Kshs.4,000/=.
8. PW2 was the Appellant and stated that she was involved in a road accident on **10th October, 2009**. She stated that she was a passenger in **Motor Vehicle Registration KAV 667G Nissan Matatu** heading towards Mazaras Town.
9. It was PW2’s testimony that at Kibarani, the driver of **Motor Vehicle Registration KAV 667G** veered off the road to escape hitting a pedestrian, then moved in a zigzag manner since it was over speeding. She stated the driver lost control and the motor vehicle rolled off the road three (3) times after colliding with a lorry.
10. She testified that the motor vehicle landed in a ditch and she sustained injuries. She stated she was taken to hospital, she was treated and discharged. She later filed a police report at Makupa Police Station.

11. PW2 stated that she blamed the driver for over speeding and driving without due care and attention and prayed to be awarded damages and compensation as a result of the accident.

12. PW3 was **No 91381 PC Andai Swaleh** who was stationed at Changamwe Police Station who performed traffic duties. He stated that on **10th October, 2009** at about 7 am, an accident occurred at Kibarani where 2 vehicles **KAT W 584 Oblige ZC 1216 Mercedes Lorry** collided with a matatu **KAV 667 G**.

13. **It was PW3's statement that the lorry was headed towards Mombasa from Changamwe, unfortunately got a tyre burst and crossed to the opposite lane and rammed into a matatu in the opposite direction.**

14. PW3 stated that several passengers suffered various injuries classified as harm. He further stated that nobody was charged in the matter and a police abstract was issued **on 16th October, 2009**.

15. The Defendant did not call any witnesses.

16. The Trial Court after hearing the parties, delivered its **Judgment on 9th November, 2018** and dismissed the Appellant's suit with costs as there was no justifiable reason to hold the Respondent liable for the accident.

17. Being dissatisfied with the decision of the Trial Court the Appellant filed an appeal before this Court and raised the following ground: -

1. The Learned Magistrate erred in fact and law, in dismissing the Plaintiff's claim on grounds that the causation of the accident was a tyre burst.

2. The learned Magistrate erred in fact and law in failing to consider in totality the Appellants evidence on record in determining the issue of liability.

3. The Learned Magistrate erred in law and fact in failing to determine the liability of the third party.

18. The Appellant prayed that the Appeal be allowed and the court do set aside the Judgment of **9th November, 2018** and the honourable court be pleased to determine the matter afresh and that the costs of the Appeal be awarded to the Appellant.

19. Directions were then given on **18th September, 2020** that the Appeal be canvassed by way of written submissions. Accordingly, parties complied and filed their respective submissions. The Appellant filed submissions on the **2nd December, 2020** while the Respondent filed theirs on the **19th October, 2020**.

20. Parties relied on their written submissions in their entirety.

Analysis and determination

21. This being the first Appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions bearing in mind that it neither saw the witnesses nor heard the evidence when the parties were testifying to see their demeanour. (See the case of **Selle & Another –vs- Associated Motor Boat Co. Ltd. & Others (1968) EA 123**).

22. I have carefully considered the pleadings and submissions filed herein. The issues for determination are as follows: -

1) Whether the learned Magistrate erred in dismissing the Plaintiff's suit on grounds that the cause of the accident was tyre burst.

2) Whether the learned Magistrate failed to consider the Appellant's evidence on record on liability.

3) Whether the learned Magistrate erred in failing to determine the liability of the third party.

1) Whether the learned Magistrate erred in dismissing the Plaintiff's suit on grounds that the cause of the accident was a tyre burst.

23. There is no contention that an accident occurred on the **10th October, 2009**. It was the uncontroverted evidence of PW2 that the Respondent's driver was over speeding, that the motor vehicle veered off the road, moved in a zigzag manner and rolled off the road three (3) times after colliding with a lorry and finally landed in a ditch.

24. It was PW3 who testified that the accident was caused by a tyre burst that occurred on **ZC 1216 Mercedes Lorry** that caused it to cross over to the opposite lane and ram into the Matatu **KAT 584W**. The evidence of the police officer supported the defence of Respondent that the accident contributed by the negligence of the third-party driver, whose vehicle veered off the road hit the center refuge and crossed over to the defendant's lane and hit **Matatu KAT 584W**.

25. The Respondents on their part did not call any witnesses, relying instead on their documents and submissions. The Appellant was obligated to prove claim on the negligence of the driver of the **Matatu KAT 584W** and the particulars of the negligence was listed as: -

- a) *Driving carelessly and negligently;*
- b) *Failing to slow down, swerve, stop or in any way whatsoever manage or control the motor vehicle to avoid the accident;*
- c) *Deliberately and recklessly driving the motor vehicle;*
- d) *Failing to keep any sufficient lookout;*
- e) *Failing to observe traffic rules and regulations;*
- f) *Failing to take necessary precautions for the safety of the passengers.*

26. A tyre burst was never specifically pleaded by either of the parties herein, it was only PW3, the Police Officer who testified that it was the cause of the accident and in dismissing the Appellant's evidence on over speeding, the trial court relied on PW3's evidence that the accident was inevitable as it was due to tyre burst which he termed as an **"act of God"** and agreed that it was the probable cause of the accident.

27. PW3, did not give the cause of the tyre burst and thus the trial court's conclusion that it was an act of God. I disagree with this finding and refer to the Court of Appeal case of **Abdul Halim T/A Tawfique Bus Services -vs- Justus Thurairara (suing as legal representative of the estate of Kithinji M'irura (deceased) Civil appeal Case No. 305 of 2005 (Nyeri)**, where it was held: -

*"...In **Kenya bus Services Ltd v. Kawira [2003 2 EA 519]**, this court authoritatively stated of accidents such as this one, as follows;*

"Buses, when properly maintained, properly serviced and properly driven, do not just run over bridges and plunge into rivers without any explanation."

*In that case unlike this one, the doctrine of res ipsa loquitur was pleaded. We, however, think that on the facts and circumstances of this case, it does not matter whether the doctrine was pleaded or not. The evidence adduced by PW2 established negligence on the part of the Appellant's driver. **If the burst tyre was new, there is no explanation, other than that the tyre burst on hitting the bridge rails, to show why the tyre burst. New tyres do not just burst. It is either they run over a sharp object or surface or upon impact over an obstruction.** The Appellant, in effect, wants us to infer that because the bus had a burst rear right side tyre after the accident, then the tyre must have been the cause of the accident.*

With due respect to the Appellant, evidence having been adduced to the effect that the bus was moving fast, it was incumbent upon the defendant to show, by evidence, that it was not the speed and lack of proper control which were the cause of the accident..."

28. The Appellant's case was further that the trial court erred to consider the evidence of PW3 that the accident was due to a tyre burst as the same was not pleaded by either of the party.

29. It is trite law that parties are bound by their pleadings and unless the said pleading is amended, the evidence adduced shall not deviate from the pleadings. This was the position in the Court of Appeal case of **David Sironga Ole Tukai -vs- Francis Arap Muge & 2 Others [2014] eKLR**, where it was stated: -

"...It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense..."

30. The Respondent is the party that introduced a third party at paragraph 6 of her Defence and claimed that the accident was contributed by negligence of the driver of **Motor Vehicle Registration No.KTW 584/ZC 1216 Mercedes Lorry** who veered off the road hit the center refuge and crossed over to the Respondents lane and hit **Motor Vehicle Registration No. KAV 667G** on its right side forcing it to roll downhill.

31. It is therefore evident that there was no claim of a tyre burst from either party herein and it was only the elaborate evidence of PW3 that stated that the cause of the accident was tyre burst and should have therefore been disregarded by the trial court as held in **David Sironga Ole Tukai (supra)**.

32. I find that the trial court was wrong to consider the sole evidence of PW3 to conclude that the cause of the accident was a tyre burst, an issue that was not pleaded by either party thus was not available for determination.

2) Whether the learned Magistrate failed to consider the Appellant's evidence on record on liability.

33. The Appellant claims that the trial court did not in totality consider the Appellant's evidence on record on liability. The Appellant stated that her evidence was uncontroverted when she told the court that the driver of **Motor Vehicle registration No.KAV 667G** veered off the road to avoid hitting a pedestrian and lost control as it was over speeding when it rolled after it collided with a lorry.

34. The Respondent before the trial court closed her case without calling any witnesses. The court in the case of **North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi [2019] Eklr**, held: -

“It is settled law in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue

35. Further, in the case of **Motex Knitwear Limited –vs- Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002**, Lesiit, J. (as she then was) citing the case of **Avtar Singh Bahra & Another –vs- Raju Govindji, HCCC No.548 of 1998** appreciated that:

"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

36. Despite the uncontroverted evidence of the Appellant, the trial court found that liability had not been established against the Respondent as it relied on PW3's evidence that the cause of the accident was a tyre burst and that the driver was over speeding was dismissed.

37. In this case the Appellant was a passenger in **Motor Vehicle Registration No. KAV 667G**. She gave evidence on how the said motor vehicle was negligently driven and as a result it lost control and collided with **Motor Vehicle Registration No. KTW 584/ZC**. The Appellant produced documents, including a police abstract to confirm that indeed the accident occurred and that she was injured as a result of the accident.

38. On cross-examination by the Respondent's Counsel, the Appellant indicated that she was seated in the middle seat in the Respondent's motor vehicle and had worn a safety belt. On speed she testified that she could not tell the exact speed the car was driven at and she could also not tell if the driver applied brakes.

39. It is evident from the cross examination that no questions were put to the Appellant to cast doubt that **Motor Vehicle registration No. KAV 667G** was driven recklessly and that it lost control and rolled severally causing the Appellant injuries. Further, the fact that the Appellant stated she could not tell the exact speed the car was being driven was not enough to cast aspersions that the driver of **Motor Vehicle registration No.KAV 667G** was not speeding when the accident occurred.

40. I, therefore, disagree with the trial court's finding that the Respondent was not liable. I find that the Respondent was 100% liable for the accident that occurred on the 10th October, 2009.

3)Whether the learned Magistrate erred in failing to determine the liability of the third party.

41. Lastly, the Appellant claims that the trial court erred in failing to determine the liability of the third party. The Appellant stated that the trial court in its Judgment found that the Respondent failed to issue a third party notice to the owner of **Motor Vehicle registration No. KTW 584/ZC**, whereas the said notice had been issued and an interlocutory Judgment entered on the **6th August, 2018**.

42. According to the Appellant, the interlocutory Judgment against the third party has not been set aside and thus is valid and regular. The Appellant stated that the net effect of the interlocutory Judgment is it established that the third party was 100% liable and the trial court had no jurisdiction to interfere with the same.

43. From the trial court's proceedings, it is indicative that the Respondent filed and served a notice to the third party who it is indicated did not enter appearance nor filed a Defence and an interlocutory Judgment was entered on **6th August, 2018**.

44. On this issue, I find that the Respondent is the party that claimed the accident was due to the negligence of a third party, she was thus enjoined to prove the same, but she did not however, call evidence to establish her claim against the third party. That being said, no liability was established against the third party and the interlocutory Judgment is meaningless without proof of such negligence as alleged against the third party. I therefore disagree with the Appellant's submission that the interlocutory Judgment is valid and regular.

Quantum of damages

45. As I have established above, that the Respondent is 100% liable I must decide on the damages payable to the Appellant.

46. On quantum, the Appellant stated that it was not in dispute that she was injured and that evidence was corroborated by a doctor who testified as PW1. The injuries of the Appellant were said to be: -

a) Blunt object injury to the head and neck

b) Blunt object injury to the right shoulder and right leg

c) Bruises on the right elbow

47. The Appellant has argued that her injuries had no permanent disability and proposed an award of Kshs.380,000/= placing reliance on the cases of Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi [2005] eKLR and Francis Ochieng & another v Alice Kajimba [2015] eKLR where the courts awarded the Plaintiffs general damages of Kshs.350,000/=, Kshs.300,000/= and substituted an award of Kshs.500,000/= with an award of Kshs.350,000/= for simple soft tissue injuries.

48. The Appellant has further sought for Special damages that he claims is pleaded and proved of Kshs.6,130/=.

49. The Respondent on the other hand submitted that Kshs.90,000/= will be enough for the Appellant's injuries and reliance was placed on the cases of Nyambati Nyaswabu Erick -vs- Toyota Kenya Limited

& 2 Others [2019]eKLR, Ndungu Dennis -vs- Ann Wangari Ndirangu & another [2018] eKLR and Hassan Farid & Another -vs- Sataiya Ene Mepukori & 6 Others [2018] eKLR where the courts awarded the Plaintiffs Kshs.90,000/=; an award for Ksh.300,000/= was substituted to Kshs.100,000/= and an award of Kshs.200,000.00 was substituted for an award of Kshs.100,000/= for similar injuries as the Appellant's.

50. I have considered the injuries sustained, the submissions by parties and comparable authorities. In my view the authorities relied on by the Respondent are more applicable to the case herein. From the evidence it is clear that the Appellant sustained soft tissue injuries with no permanent liability, taking all factors into consideration, I find an award of **Kshs.150,000/=** sufficient in the circumstances.

51. The upshot is that the Appeal succeeds partially. The following are the orders of the court: -

i) The Appeal is allowed and the decision of the trial court is set aside.

ii) The Appellant is awarded.

a) General damages - Kshs.150,000/=

b) Special damages- Kshs.2,130/=

Total award- Kshs.152,130/=

iii) Interest from the date of Judgement in the lower court.

iv) The Respondent to bear the costs of the Appeal

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF OCTOBER 2021

D. O. CHEPKWONY

JUDGE

In the presence of:

NO APPEARANCE FOR AND BY EITHER PARTY

COURT ASSISTANT - GITONGA