



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.69 OF 2018

BERNARD THURANIRA GICHUNGE.....APPELLANT

-VERSUS-

ROY PARCEL SERVICES.....RESPONDENT

(Being an appeal from the decision of the Chief Magistrate Court

at Nakuru Hon, Eunice Kelly dated 18th may 2018 in Civil Case No.456 of 2017)

JUDGMENT

INTRODUCTION

1. This appeal arise from suit filed by the appellant/plaintiff seeking special and general damages against the defendant for the injuries he sustained while working as a turnboy in the respondent's/defendant's motor vehicle registration number KAV 184Q. The trial magistrate found that the plaintiff does not disclose a cause of action against the defendant and dismissed the suit with no orders as to costs.

2. The appellant being dissatisfied with the said decision, filed this appeal on the following grounds:-

- i. That the trial magistrate erred in law and fact by dismissing the whole of plaintiff's claim.
- ii. That the trial magistrate erred in law and fact by finding that the plaintiff did not prove his case on a balance of probabilities.
- iii. That the trial magistrate erred in law and fact by failing to consider the plaintiff's evidence and submissions.
- iv. That the trial magistrate erred in law and fact by failing to find the defendant liable for the accident.

APPELLANT'S SUBMISSIONS

3. The appellant submitted that the accident occurred at the time the appellant was an employee of the respondent; that on 2nd February 2011, the driver failed to take caution while on the road and rammed into a stationery vehicle causing plaintiff/appellant to sustain severe injuries on his head, legs and fracture of ulna and radius.

4. Appellants submitted that he adduced evidence blaming the driver of the respondent for failing to take adequate precaution for his safety and produced treatment record and medical report indicating that he sustained 20% permanent disability.

5. Appellant submitted that he particularized negligence and breach of statutory duty contrary to finding of the court.

6. He further submitted that whereas the job ID and pay slip were not listed in the list of exhibits, the documents were produced in court and failure to list them was not contested in the trial.

7. On observation by trial court that the plaintiff stated he was a driver in a vehicle owned by plaintiff, the appellant submitted it's a typographical error as it is clear from evidence that the appellant was respondent's turnboy and that the respondent owned the vehicle; that the police abstract and copy of search confirm ownership of the vehicle; that mistake of Advocate should not be visited on innocent client.

8. In respect to finding that, the plaintiff did not disclose the person who was driving the vehicle nor the date of the accident. Appellant submitted that, the trial magistrate should have looked at evidence submitted by appellant; that the trial magistrate failed to take into consideration submissions filed by the appellant/plaintiff as they disclosed the owner of the vehicle and that the appellant worked as a

turnboy; that it is a mistake to believe that the appellant was the owner of the vehicle.

9. Appellant submitted that the plaintiff's suit discloses cause of action against the respondent/defendant and has high chances of success.

10. Appellant urged the court to find the respondent 100% liable.

RESPONDENT'S SUBMISSIONS

11. The respondent submitted that the appellant failed to disclose the link of causation between defendant/respondent's negligence to the accident and that the appellant mentioned existence of a contract without stating who was the employer and who was the employee and that being the case, how did the respondent breach statutory duties under **Occupational Health and Safety Act, 2007**. Respondent submitted that it is not the court's duty to presume work status of parties.

12. On issue of the plaintiff being indicated as owner of the vehicle, the respondent cited several authorities where courts held that parties are bound by their pleadings and should prove their case on a balance of probabilities; and that appellant failed to prove that he was an employee of the defendant/respondent.

13. Respondent submitted that no document was produced to prove that an accident occurred; that no police abstract was produced. Respondent cited the case of **Harrison Mbogo vs. Attorney General [2004] eKLR** where the court declined to allow the claim because there was no production of police abstract to prove that the accident occurred; further, that the appellant also failed to disclose the driver of the vehicle on the date of the accident.

14. Respondent submitted that the trial magistrate did not err in dismissing the suit; that it is important to link injuries of the appellant with the negligence of the defendant/respondent.

15. Respondent further submitted that, the appellant had ample time to produce documents to support his case during formal proof.

16. In conclusion, the respondent submitted that the appellant's pleadings were vague in nature; further that he has failed to prove the respondent's liability and cause of action against the respondent; that the appellant's pleadings are bad in law and abuse of court process and urged court to dismiss this appeal.

ANALYSIS AND DETERMINATION

17. My duty as first appellate court is to reevaluate evidence adduced in the trial court and arrive at an independent determination.

18. I have considered arguments by parties' herein. I have also perused the court record, submissions by parties and find the following as issues for determination:-

- a) Whether the appellant was employee of the respondent.
- b) Whether plaintiff/appellant proved that the accident occurred and if so whether the respondent was negligent.
- c) Whether plaintiff is entitled to damages.

19. I note from the proceedings that the appellant/plaintiff adopted his witness statement as evidence. In the statement, he said that he was employee of respondent and on 2nd February 2011 around 5 a.m., he was travelling with the driver in motor vehicle registration number KAV 184Q which hit a vehicle ahead; and he sustained injuries in the process.

20. Appellant produced discharge summary and medical report to prove injuries he sustained. He also produced job card and pay slip to prove that he worked for the respondent.

21. I however note that police abstract was not produced to prove that an accident occurred.

22. As to whether appellant was employed by the respondent, there is doubt that the job card and pay slip and even if not initially listed as exhibit, they were produced and admitted by court as exhibit; production of the said documents confirm that the appellant worked for the respondent. Having been admitted as exhibited the court cannot again say that employment contract was not proved. On that issue, I find that the trial court erred.

23. In respect to injuries treatment record, confirm that the appellant was injured. What is in issue however is how was he injured? Without police abstract there is no prove that, an accident occurred and the injuries sustained cannot be linked to an accident while travelling in the respondent's vehicle.

24. In his statement, the appellant blamed the defendant for negligence. He stated that the driver hit a vehicle which was ahead; negligence is therefore attributed to respondent's driver whose name is not given. If police abstract was produced, it would have shown who was driving the vehicle, where the accident occurred and who was to blame. Such questions could have been answered through evidence adduced, witness statement filed and documents produced as exhibits.

25. There is no doubt that employment and injury was proved but evidence should have been adduced to demonstrate how the injury occurred and who was to blame. There has to be prove of negligence attributed to the respondent. There has to be prove that an accident occurred before looking at who was to blame for its occurrence. Without such prove, the court cannot be left to guess. I agree with submissions by counsel for the respondent that parties are bound by their pleadings and the courts cannot fill gaps for them. Parties should not assume that since a matter proceeded exparte, the standard of proving their case is lowered.

26. Having made the above finding, I find that the appellant failed to prove negligence on part of the respondent and it follows therefore that, he has failed to prove that he is entitled to damages from the respondent.

27. From the foregoing, I find that the trial Magistrate was right in finding that the appellant failed to prove his case on a balance of probabilities.

28. FINAL ORDERS

1. Appeal is hereby dismissed.

2. Costs to the respondent.

Judgment dated, signed and delivered at Nakuru this 30th day of January, 2020

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer - Court Assistant

Mr. Sambu holding brief for Mwangi Counsel for Appellant

Mr. Karanja Munyoki holding brief for Muchela Counsel for Respondent