REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

Civil Appeal No.65 Of 2018

MWINZI MULI..APPELLANT

VERSUS

JAMES KENNETH KIARIE...1ST RESPONDENT

FAITH MUNGUTI KANINI..................2ND RESPONDENT/APPLICANT

RULING

1. This ruling is the subject of a Notice of Motion dated 16th August, 2019. By the said application, the 2nd Respondent/Applicant herein seeks that he be granted leave to produce additional evidence in this appeal, being a certified judgement in Kangundo Traffic Case No. 103 of 2016 – **R vs. Abel Ndeti Kituku** and a certified copy of the receipt for payment of fine in the said traffic case. Accordingly, he seeks that this court gives directions on the taking of the said additional evidence.

2. According to the Applicant, the 1st Respondent was the Plaintiff in the Magistrate's Court in which he sought to recover damages arising from a road traffic accident which occurred on 5th July, 2014 involving the Applicant's motor vehicle registration number KBN 541Z and the Appellant's motor vehicle reg. no. KBN 854K.

3. According to the Applicant, she was the 1st Defendant in the subordinate Court. At the material time she was driving motor vehicle registration number KBN 541Z when the same collided with the Appellant's motor vehicle KBN 854K which was being driven by one **Abel Ndeti Kituku** who was the Appellant's witness in the lower Court. Following the said accident, the Appellant's said driver was charged with the offence of causing death by dangerous driving in Kangundo Traffic Case No.103 of 2016 a fact the Applicant pleaded in her amended defence. By the time the said Appellant's driver was testifying before the trial court, the said traffic proceedings were still pending. It was averred that the suit in subordinate was determined on 11th May, 2018 while the said traffic case was determined on 16th May, 2018, a period of about one week after determination of the civil case. In the traffic proceedings, the Appellant's said driver was found guilty in the said traffic proceedings and was fined Kshs 50,000/= and in default to serve one year imprisonment.

4. The Applicant contends that the finding of guilt against the Appellant's driver has a bearing on the issue of negligence and would have changed the mind of the trial magistrate in the matter had the same been available at the time of the trial. It is due to the foregoing that the Applicant now seeks that the certified copies of the said judgement in the traffic proceedings and the said receipt be admitted as additional evidence and that the court gives directions on the taking of the same.

5. It was the Applicant's case that she was not to blame for the accident hence it would be in the interest of justice that she be allowed to adduce the said additional evidence as no prejudice would be occasioned to the parties if the application is allowed.

6. The application was opposed by the appellant. According to him the introduction of additional evidence on appeal is not permissible as it would cause great prejudice to him at this stage. It was averred that before the trial court, his advocate on 11th May, 2017, made applications for adjournment of the scheduled hearing in order to await the outcome of the traffic case so as not to have two conflicting judgements on the same subject matter. That application was however opposed by the 2nd Respondent's advocate on the basis that they had not indicated that they wished to rely on the traffic proceedings which objection was sustained by the court. Further, the Applicant's advocate pointed out that the evidence to be used in the traffic case as well as the witnesses in the traffic case were to be used in the trial court.

7. According to the Appellant, though both the traffic case and the civil suit were before the same magistrate, the trial magistrate declined to recuse herself from the matter. It was therefore contended that the new evidence sought to be adduced would have been available during the trial had the Applicant's advocate not objected to await the determination of the ongoing traffic case as the delay would not have occasioned

any miscarriage of justice to the parties.

8. It was the Appellant's view that admitting the additional evidence as sought by the Applicant herein would amount to res judicata and occasion a gross miscarriage of justice against the Applicant and the Appellant. According to him, the nature, context and material of the additional evidence is complex and would require a rebuttal by himself as a party which will not be availed to him.

9. It was therefore contended that the Applicant has not demonstrated that the proposed additional evidence could not have been obtained with reasonable due diligence during the hearing.

10. The Application was not opposed by the 1st Respondent.

11. It was submitted on behalf of the Applicant that the Appellant does not dispute the fact that his driver was indeed charged with the traffic offence of causing death by dangerous driving. It is also not disputed that after a full trial in the traffic case the Appellant's driver was convicted and sentenced to pay a fine of Kshs.50,000/=, which he paid. There is no averment or proof that the Appellant's driver challenged the finding in the traffic case by way of an Appeal. Further, it is not and it cannot be disputed that the traffic case was determined after the suit in the subordinate Court.

12. The Judgment in the traffic case was therefore not available at the time of trial of the civil case in the subordinate Court and it is for this reason that the Second Respondent is seeking to adduce more evidence as sought in the said Application.

13. It was submitted that there would be no prejudice unless there is a pending Appeal against the finding in the traffic case.

14. While admitting that on 11th May, 2017 the Appellant's advocate made an Application to adjourn the trial in the civil case to await the outcome in the traffic case and that counsel for the Respondents opposed the application for adjournment, it was however submitted that since the Appellant in effect sought a stay of proceedings in the civil matter pending the hearing and determination of the traffic case, the Appellant should have filed a formal application. There was no evidence at that time as to what traffic offence the Appellant's driver had been charged with so as to determine whether the issues in the traffic case were also arising in the civil case. In any event the Appellant was denied the adjournment and he did not Appeal against the denial. Further, the Appellant had not indicated that he wanted to rely on the proceedings and/or Judgment in the traffic case.

15. In the Applicant's view, the Appellant cannot oppose her Application merely because he is afraid that the evidence sought to be adduced may have a bearing on the finding of this Court in this Appeal, noting that the said evidence remains undisputed.

16. The court was therefore urged to allow the application.

17. On behalf of the Appellant it was submitted that the applicant herein has brought the notice of motion under Order 43 rule 27 of the ***Civil Procedure Rules***. The said rules do not envision a situation where a party seeks leave from the court to put in additional evidence. It is the Court itself which may determine that the taking of additional evidence is necessary for the Court to pronounce judgement or for any other substantial cause. According to the Appellant, the applicant has not in any event demonstrated a *"substantial cause"* to move the Court in making the order sought.

18. It was submitted that even if the Court were to expand its scope of thought more broadly to the case in the Court of Appeal, where a party has sought to put in additional evidence at the point of appeal, under Rule 29(1) (b) of the ***Court of Appeal Rules***, the principle adopted is that the Court will allow the introduction of additional evidence *"for sufficient reason"*. The rule does not explain the meaning of sufficient reason but guidelines have been developed from practise.

19. The Appellant referred to the case of **Dorothy Nelima Wafula vs. Hellen Nekesa Nielsen & Paul Fredrick Nelson [2017] eKLR** and **Mzee Wanje & 93 Others vs. A K Saikwa (1982-88) 1 KAR 462,**

20. It was the Appellants submission that the Notion of Motion dated 16 August 2019 filed by the 2nd Respondent is without merit and if the Court was to grant the orders sought, the Appellant would suffer grave prejudice. It was therefore urged that this Court should dismiss the application with costs to the Appellant.

Determination

21. I have considered the application, the affidavits in support of and in opposition to the application, the submissions made and the authorities relied upon. Order 42 rules 27, 28 and 29 of the ***Civil Procedure Rules*** provides as follows:-

> **27 (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—**
>
> > ***(a)*** **the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or**
> >
> > ***(b)*** **the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.**

(2) Wherever additional evidence is allowed to be produced by, court to which the appeal is preferred the court shall record the reason for its admission.

28. Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.

29. Where additional evidence is directed or allowed to be taken the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.

22. It is clear that the instant application falls within the ambit of Order 42 rule 1(b) of the ***Civil Procedure Rules*** since it is the opinion of the applicant that the additional evidence is required to enable this court to pronounce judgment, or for any other substantial cause. It is however contended that under that rule there is no room for an application being made as the applicant has done in this application and that it is for the court on own motion to make such a determination. The applicant has however not pointed out any provision that bars the making of such an application and I am unable to read into the rules such a restrictive interpretation. How else is the court supposed to determine that the is a substantial cause which warrants the admission of additional evidence unless the parties address the court on the issue particularly in an adversarial system of litigation. In my view there is no bar to the parties moving the court for the purposes of admission of additional evidence in an appeal. This is my understanding of the decision of the Court of Appeal in **Aga Khan Hospital vs. Busan Munyambu KAR 378; [1976-1985] EA 3; [1985] KLR 127** where it was held that:

"On any appeal from the decision of a Superior Court sitting in the exercise of its original jurisdiction, the Court of Appeal has the power, in its discretion, for sufficient reason, to take additional evidence. ***There must be an affidavit in support of the application attesting that the evidence sought to be called was not available at the trial, is relevant to the issue in appeal, is credible, in the sense that it is capable of belief and, in all the circumstances, in the interest of justice the application should be allowed.*** **In a civil appeal, except on grounds of fraud or surprise, generally leave will only be granted if the evidence could not, with reasonable diligence, have been obtained for use at the trial, if it will probably have an important influence on the result of the appeal, and is apparently credible, though it need not be uncontrovertible. It will be admitted if some assumption basic to both sides has been clearly falsified by subsequent events and to refuse the application would affront common sense or a sense of justice."** [Emphasis added].

23. What then are the conditions for admission of additional or fresh evidence? In **G M Combined (U) Ltd vs. A. K. Detergent Ltd and Others [1999] 1 EA 84**, it was held that:

"Justice must be administered according to the law and it is well settled that additional evidence is taken on appeal in exceptional circumstances and the exceptional circumstances are usually that the evidence was not available at the time of the trial or could not have been obtained using reasonable diligence and that the evidence is credible and likely to influence that result of the case."

24. In **Joginder Auto Services Ltd vs. Shaffique & Another [2001] KLR 97** the Court of Appeal held that:

"The power of the Court and more particularly the Court of Appeal, to receive further evidence is discretionary, which discretion is exercised on the broad principles, namely:

1. The applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial

2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and

3. The evidence must be apparently credible, although it need not be incontrovertible.

These are general principles but are not the only ones since the relevant rule authorising the adduction of additional evidence uses a general phrase, namely, "sufficient reason". Surprise or fraud are grounds upon which further evidence may be admitted. Fraud is a false representation by means of a statement or conduct made knowingly or recklessly in order to gain a material advantage. What is reasonable depends on the facts and circumstances of each case as the Court, in cases of this nature, is exercising discretionary jurisdiction. The discretion has to be exercised bearing in mind, where applicable as here, that a party who has been shown to have acted in such a way as to take advantage over another should as far as possible not be allowed to take full benefit of his wrong."

25. According to **Chesoni, AJA** in **Mzee Wanje & 93 Others vs. A K Saikwa** (supra) the rule:

"…gives the court power on any appeal from a decision of a Superior Court acting in the exercise of its original jurisdiction, in its discretion, for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court. The rule requires the applicant to establish sufficient reason for receipt of such further evidence, and the court can exercise the discretion to receive further evidence only after sufficient reason has been shown. The principles that guide the court in deciding whether or not to receive additional evidence are (i) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial (ii) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive (iii) the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible…This rule is not

intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The rule does not authorise the admission of additional evidence for the purpose of removing lacunae and filing in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."

26. In this case, what the Applicant intends to introduce are proceedings in the traffic case. As regards the relevancy of criminal or traffic proceedings to civil proceedings, it must always be remembered that the decision of who to charge where a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other or no one at all cannot be taken to be conclusive evidence of who between the two drivers is culpable. This was the position adopted by the Court of Appeal in **Calistus Ochien'g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996**, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

27. In **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434,** it was held that:

"It is trite and rudimentary that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit although the record can be used for certain purposes, for instance, to contradict a witness by facing him with what the witness had stated in the trial of the criminal case. But the proceedings and the result of the criminal trial cannot be made the basis for proof of a civil claim…"

28. In **Jimnah Munene Macharia vs. John Kamau Erera Civil Appeal No. 218 of 1998**, it was held by the Court of Appeal that:

"Admitting in evidence the record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings as it is always open to the advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of the facts deposed to therein, although the witness is not called as a witness in the civil suit, provided the agreement is clear and unambiguous…It is not for the Judge to read proceedings in the traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness…Equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent and tendering the police file as an exhibit is a short cut which advocates should avoid and call the police officer who drew the sketch map for cross-examination."

29. Platt, JA in **Chemwolo and Another vs. Kubende [1986] KLR 492; [1986-1989] EA 74** opined that:

"It was not for the Judge to read the proceedings in the Traffic case as if the evidence recorded there was the final position in the case since not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness. It was therefore premature to come to the conclusion that not even *prima facie* case of contributory negligence could be established. It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of the proceedings in the traffic case…It was correct for the learned Judge to refer to the conviction because section 47A of the Evidence Act (Chapter 80) declares that where a final judgement of competent court in criminal proceedings has declared any person to be guilty of criminal offence, after expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. But that does not matter because it may also be that the other party was also guilty of carelessness and despite the other party's conviction, the issue of contributory negligence may still be alive if the facts warrant it and this may affect the quantum of damages."

30. According to **Apaloo, JA** (as he then was) in the same case:

"It was not competent for the Judge to merely peruse the record of the criminal trial and conclude that a *prima facie* case on contributory negligence cannot be established. If the averments of contributory negligence are proved at the trial, the Court may well feel that the plaintiff was in part to blame for the accident and the Court would then come under a duty to assess his own degree of blameworthiness and depending on the Court's assessment of responsibility for the accident, such apportionment may affect, perhaps in a substantial manner, the quantum of damages to which the plaintiff is entitled. Or it may affect it in a negligible way. Whatever it is, there is a triable issue on the plea of contributory negligence."

31. Accordingly, in **Ochieng vs. Ayieko [1985] KLR 494**, **O'kubasu, J** (as he then was) held that:

"Looking at the evidence before it, the court is entitled to make its own independent evaluation and come to its own conclusion. It does not mean that since the defendant was acquitted in the traffic case by the Resident Magistrate's Court then he is not liable. The Court has to look at the evidence as a whole and reach its own conclusion. The fact that the defendant was acquitted in the traffic case is certainly significant and cannot be ignored."

32. Mwera, J (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007** was of the opinion that:

“Much as other court proceedings can be placed before a trial court as an exhibit, the trial court is bound to proceed and determine a dispute before it on the evidence of witnesses who appear before it… Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings. It is always open to advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of facts deposed to therein, although the witness is not called as a witness in the civil suit, provided this agreement is absolutely clear and unambiguous. It is not for the Judge to read proceedings in traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, but it is also well-known that both parties to an accident might have driven carelessly for their respective types of carelessness. If the contents of a record of traffic proceedings arising out of a motor accident cannot become evidence in a civil suit arising out of that accident, equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent…The practice by advocates, not to call the relevant witnesses but opt to produce as exhibits proceedings like in the traffic case or police investigation files is to be deprecated. Therefore the learned trial Magistrate was not bound to accept the evidence of the eyewitness in the traffic case, as final in the civil case before him.”

33. It must always be remembered that the decision of who to charge where there is a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other cannot be taken o be conclusive evidence of who between the two drivers is culpable. Not much therefore should be read into the fact that the Appellant was charged and acquitted of the traffic offence.

34. In her judgement the learned trial magistrate was well aware of this as she stated that just because **Faith** (the Applicant herein) was not charged does not mean that she was not negligent. Based on the evidence adduced before her, the learned trial magistrate found both **Abel** (the Appellant’s driver) and the Applicant herein negligent. Whether or not she was right in coming to that conclusion is a matter which can only be determined upon the hearing of this appeal. In my view, the fact that the result of traffic proceedings was not before the trial court is immaterial. It follows that whereas the evidence in the traffic case was not available before the trial court when the trial court made its judgement, I am not satisfied that the evidence to be adduced is such that, if given, would probably have an important influence on the result of the case. That evidence only shows that at least one driver was negligent but that does not exonerate both drivers. In other words, there is no hindrance to this court in re-evaluating the evidence presented before the trial court and arriving at its own conclusion on liability. As was held in **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434 (SCU).**

“There may be occasions when criminal or traffic offences are committed without giving rise to civil liability.”

35. Having considered the material placed before me in this application, it is my view and I find that the applicant herein has not satisfied all the conditions that warrant the grant of leave to admit or adduce additional or fresh evidence on appeal.

36. In the premises the application fails and is dismissed with costs. It is so ordered.

Read, signed and delivered in open Court at Machakos this 27th day of April, 2020

G V ODUNGA

JUDGE

Delivered at 9.30 am in the absence of the parties having been notified through their known email addresses.

CA Josephine