



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 115 OF 2017**

**MICHAEL KELI NGUI ALIAS MICHAEL KELI.....APPELLANT**

**VERSUS**

**HASSANALI SHABIRHUSSEIN AZIZALI.....1<sup>ST</sup> RESPONDENT**

**VINCENT KUNGU.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the judgement of the Chief Magistrate's Court at Machakos before Honorable C A Ocharo – Principal Magistrate delivered on the 10<sup>th</sup> August, 2017 in Machakos CMCC No. 689 of 2015)**

**BETWEEN**

**MICHAEL KELI NGUI ALIAS MICHAEL KELI.....PLAINTIFF**

**VERSUS**

**HASSANALI SHABIRHUSSEIN AZIZALI.....1<sup>ST</sup> DEFENDANT**

**VINCENT KUNGU.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The appellant herein sued the Respondents for damages arising from a road traffic accident which was alleged to have occurred on 6<sup>th</sup> March, 2015 along Kitui-Machakos Road. It was pleaded that on that day the Plaintiff was travelling in motor vehicle reg. no. KAQ 361S when the Defendants' driver, agent or servant as a result of negligence, carelessness or recklessness caused motor vehicle registration no. KAT 952E to make an abrupt U-turn on the said main road thereby causing it to collide with motor vehicle reg. no. KAQ 361S. As a result of the said collision, the Appellant sustained severe injuries and suffered loss and damage. The Appellant therefore prayed for general damages, costs and interests.

2. On 30<sup>th</sup> August, 2016 default judgement was entered against the 1<sup>st</sup> Defendant and the matter was set down for hearing. On 29<sup>th</sup> November, 2016 when the matter came up for hearing, **Ms Shabuya** who was holding brief for **Mrs Onsombi** for the 2<sup>nd</sup> Defendant informed the Court that the suit was vide an order made in Civil Case No. 503 of 2015 stayed. The Court allocated time for learned counsel to avail a copy of the said order and when the proceedings resumed later at 11.30 am, there was no show for counsel for the 2<sup>nd</sup> Defendant and the matter was directed to proceed.

3. In his evidence, the Appellant who testified as PW1 relied on his witness statement in which he stated that on the said day he boarded motor vehicle reg. no. KAQ 361S at Machakos-Makutano Junction and at Car Wash Area motor vehicle reg. no. KAT 952E which was ahead of them without indication suddenly made an abrupt U-turn and collided with motor vehicle reg. no. KAQ 361S causing it to roll several times and landed into a ditch. As a result, he sustained blunt injury to the right hand, bruises to the right elbow, bruises to both right knee and sprained right side ribs. He reported the accident at Machako Police Station and was issued with a P3 Form and police abstract. Upon investigations he found that the owner of the offending motor vehicle was Vincent Kungu though the same was registered in the name of **Hassanali Shabbirhussein Azizali**.

4. He then produced the P3 form, treatment card and notes, receipts for treatment expenses, records of the motor vehicle, medical report and demand notice as exhibits and prayed for damages and costs.

5. The Appellant then called as his witness, **PW2, PC John Kanyuru**, who testified on behalf of PC Kimathi who was on transfer to a different station but with whom he had worked for two years. In his evidence, he referred to a file for an accident which was reported on 6<sup>th</sup> March 2015 as having occurred along Machakos-Kitui Road involving motor vehicles KAQ 361X and KAT 952E. According to him, the latter which was from a car wash collided with the former as a result of which passengers including the Appellant sustained injuries. According to the investigations officer, the driver of motor vehicle KAT 952E was to blame for the accident for failing to give way. He then produced the police abstract as an exhibit. The case was then closed.

6. In her judgement, the learned trial magistrate found that there were contradictions versions between the evidence of the Appellant and that of PW2 on how the accident took place. She found that in light of the particulars of negligence by the 2<sup>nd</sup> Respondent in the defence regarding the driver of the vehicle in which the Appellant was travelling, it is not sufficient for a party against whom the allegations are made to deny its contents. The Court was of the view that it would have been prudent for the Appellant to prove by additional evidence that the driver in the vehicle he was travelling was not negligent in any way more so as the police abstract indicated that no one was to blame for the accident which was still pending investigations. The Court wondered why the Appellant did not sue the driver of the vehicle in which he was travelling or call him as a witness. The learned trial magistrate in light of the foregoing found that the Appellant failed to prove negligence on the part of the 2<sup>nd</sup> Respondent. She proceeded to set aside the interlocutory judgement against the 1<sup>st</sup> Respondent and dismissed the suit with costs.

7. Notwithstanding the foregoing, and rightly so in my view, the learned trial magistrate to assess the damages she would have awarded if her finding would have been otherwise and held that she would have awarded the Appellant Kshs 70,000/- as general damages.

### **Determination**

8. I have considered the foregoing as well as the submissions on record. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

**“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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.”**

9. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

10. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

**“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge’s conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”**

11. It was therefore held by the Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

**“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”**

12. In this appeal, it is clear that the determination of this appeal revolves around the question whether the appellant proved his case on the balance of probabilities. That the burden of proof was on the appellant to prove their case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

**“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”**

13. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

**“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”**

14. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

**“Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say:-**

**“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”**

15. Therefore, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondents even if the appellant chose to remain silent. However, in this case, there was an interlocutory judgement against the 1<sup>st</sup> Respondent who defaulted in entering an appearance and to file his defence. The position as regards liability where an interlocutory judgement has been entered is now clear.

16. In **Charles Ogendo Ayieko vs. Enoch Elisha Mwanyumba Mombasa HCCC No. 1035 of 1983**, the Court held that:

**“Where an ex parte interlocutory judgement has already been entered against the defendant the Court does not have to decide on the question of liability.”**

17. The reason for that, according to the Court of Appeal in **Makala Mailu Mumende vs. Nyali Gulf & Country Club Civil Appeal No. 16 of 1989 [1991] KLR 13** is that that:

**“Judgement in default of appearance presupposes that there is a cause of action...The judge cannot set aside a Judgement without an application before him, as he has no jurisdiction to do so...Justice though must be done to both parties must be done in accordance with the law...Where judgement is entered in default liability is admitted and the Court must proceed to assess damages.**

18. This was echoed in **Julius Murungi Murianki vs. Equitorial Services Ltd. & Another Nairobi HCCC No. 2714 of 1988** where it was held that:

**“The defendants herein filed no defence and they are deemed to have admitted the facts complained of under Order 6 rule 9(1) of the Civil Procedure Rules since failure to file a defence operates as an admission of all the allegations in the plaint except damages.”**

19. That decision was based on the decision in **Cleaver-Hume vs. British Tutorial College (Africa) Ltd [1975] EA 323** to the effect that:

**“The effect of Order 6 rule 9 (which deems to be admitted pleadings not traversed) is to ensure that the parties are ultimately, but definitely, brought to an issue, and that at the close of the pleadings the issues between the parties are clearly and precisely defined. Thus if no defence is served in answer to the statement of claim or no defence to counterclaim is served in answer to the counterclaim, there is no issue between the parties; the allegations of fact made in the statement of claim or counterclaim are deemed to be admitted and the plaintiff or defendant, as the case may be, may enter, or apply for, judgement in default of pleading...A failure to file a defence must now be regarded, save as to damage, as an admission of each of the allegations in the plaint. This is a far-reaching provision which should reduce in some measure the expense and delays in undefended suits.”**

20. What these decisions state is that once a default judgement is entered, the issue of liability is also determined and the only issue for determination is quantum of damages, if any. The Court cannot either ignore the fact of the said judgement or purport to *suo moto* set it aside after hearing evidence on quantum and then proceed to dismiss the suit against the defaulting party as the learned trial magistrate respectfully did. Accordingly, as far as the 1<sup>st</sup> Respondent was concerned liability against him was a foregone conclusion.

21. Regarding the 2<sup>nd</sup> Respondent, the only evidence on record as regards how the accident occurred was given by the Appellant and his witness. According to the Appellant, they were following the Respondents' motor vehicle which suddenly made a U-turn giving rise to the collision. According to PW2, the Respondent's vehicle was from a car wash and collided with the vehicle in which the Appellant was travelling. Apart from saying where the Respondents' vehicle was, PW2 did not state that the Respondents' vehicle did not make a U-turn. He stated that there was a collision. In my view there was no material contradiction between the evidence of PW1 and PW2.

22. The learned trial magistrate took issue with the fact that the Appellant neither sued the driver of the vehicle in which he was travelling nor called him as a witness in light of the allegations of contributory evidence made by the 2<sup>nd</sup> Respondent in the Defence.

23. That averments in pleadings are not evidence was appreciated in **Francis Otile vs. Uganda Motors Kampala HCCS No. 210 of 1989** where it was held that the court cannot be guided by pleading since pleadings are not evidence and nor can they be a substitute therefor. Before that the then East African Court of Appeal held in **Mohammed & Another vs. Haidara [1972] E.A 166** that the contents of a plaint are only allegations, not evidence. According to **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997**, where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In **CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835**, Madan, J (as he then was) expressed himself as hereunder:

**“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”**

24. It therefore follows that the Appellant's case could not be dismissed on mere allegations of negligence made against a third party against whom a third party notice had not been taken out. As was held in **Loyce Anyona Olum vs. Benjamin Kimondo Kisumu HCCC No. 105 of 1993** a defendant should apply for a third party notice if allegations are made against the third party. Having failed to do so there is no basis upon which the Appellant's case could be dismissed based on bare averments particularly when there was a reply to the defence denying the allegations in the said defence.

25. What then are the consequences of a party failing to adduce evidence? In the case of **Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002**, Lesiit, J citing the case of **Autar Singh Bahra and 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 defence rendered by the 1<sup>st</sup> 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”.**

26. Again in the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

27. In the case of **Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988**, Makhandia, J (as he then was) held that:

**“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”.**

28. In **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007** Ali-Aroni, J. citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997** held that:

**“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.**

29. Similarly, in the case of **Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000**, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

30. If one is still in doubt as to the legal position reference could be made to the case of **Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996** where **Rawal, J** (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.

31. By failing to appreciate that there was interlocutory judgement entered against the 1<sup>st</sup> Respondent, purporting to set aside the same without an application in the judgement for assessment of damages, taking issue with the failure by the Appellant to either sue the driver of the vehicle in which he was travelling when the Appellant had no issue with him, taking the allegations in the defence as if amounting to evidence, the learned trial magistrate clearly took into account matters which were not relevant and failed to take into account relevant ones and failed to take account of the particular circumstances and probabilities material to the estimate of evidence hence arriving at an incorrect decision in dismissing the suit.

32. In the premises, this appeal succeeds, the decision dismissing the case is hereby set aside. Judgement is hereby entered jointly against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. As for the damages, there is no basis upon which I can interfere with what was proposed by the learned trial magistrate which I find reasonable in the circumstances. Accordingly, I award the Appellant Kshs 70,000.00 with interest from the date of the judgement in the lower court till payment in full. The Appellant will have the costs of the proceedings in the lower court and in this appeal.

33. Orders accordingly.

**Judgement read, signed and delivered in open Court at Machakos this 16<sup>th</sup> day of June, 2020.**

**G V ODUNGA**

**JUDGE**

**Delivered the presence of:**

**Mr Hassan for Mrs Wambua for the Appellant**

**CA Geoffrey**