



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 51 OF 2017

JULIUS KIMANI MWANGI.....APPELLANT

VERSUS

JOHN GATHURI NJUGUNA.....1ST RESPONDENT

LAWRENCE WAIGANJO.....2ND RESPONDENT

JUDGMENT

1. The appellant, *Julius Kimani Mwangi* instituted suit against the two respondents seeking general and special damages following injuries sustained in a road traffic accident whose occurrence he blamed on the negligence of the 1st respondent in the manner in which he drove or controlled motor vehicle registration number KAV 829T (the subject vehicle) which was owned by the 2nd respondent.

2. In his plaint, the appellant pleaded that on or about 14th July 2012 at about 5pm, he was pushing a handcart at Kariokor in Nairobi when the 1st respondent who was the 2nd respondent's agent negligently drove, managed or controlled the subject vehicle causing it to hit the handcart which then fell on him; that as a result of the accident, he sustained a major crush injury on his big toe.

3. The particulars of the 1st respondent's alleged negligence were pleaded in paragraph 4 as follows:

- a. Drove at a very high speed in the circumstances.*
- b. Overtook or attempted to do so when it was unsafe.*
- c. Drove off the lawful lane.*
- d. Failed to keep any or any proper look out or have due regard for other road users.*
- e. Failed to take any or any reasonable avoiding action.*
- f. Drove onto the wrong lane.*
- g. Caused the accident by driving recklessly and/or dangerously.*
- h. Failed to exercise any or any effective control or lost control over the vehicle.*

4. Upon being served with summons, the respondents filed a joint statement of defence dated 30th October 2014 in which they denied any liability as alleged in the plaint or at all and put the appellant to strict proof thereof.

5. After a full hearing, the learned trial magistrate, *Hon. I Gichobi (SRM)* determined that the appellant had not proved his claim against the respondents and dismissed his suit with costs.

6. Aggrieved by the trial court's decision, the appellant proffered this appeal. In his memorandum of appeal filed on 16th February 2017, the appellant advanced eight grounds of appeal as follows:

- a) THAT the learned trial magistrate misapprehended the appellant's evidence.*

- b) *THAT the learned trial magistrate failed to take into account relevant matters and/or took into account irrelevant ones.*
- c) *THAT the learned trial magistrate erred in finding that the claim was fictitious.*
- d) *THAT the learned trial magistrate failed to apply correct legal parameters applicable in analyzing evidence.*
- e) *THAT the learned trial magistrate applied a balance higher than that of preponderance of probabilities.*
- f) *THAT the learned trial magistrate erred by not making a finding on liability.*
- g) *THAT the learned trial magistrate failed to take judicial notice of notorious things/facts.*
- h) *THAT the learned trial magistrate erred by making an award of damages which was too low.*

7. On the date the appeal was scheduled for hearing, the parties consented to having the appeal prosecuted by way of written submissions. However, only the appellant filed his submissions. The respondents, though given an extension of time within which to file their submissions, failed to do so.

8. In his brief written submissions, the appellant contended that his suit was erroneously dismissed because of discrepancies in the dates shown in the P3 form and the police abstract as the date on which the accident occurred; that the date indicated in the P3 form was an error which should not be blamed on the appellant.

9. Relying on the authorities of *Joel Muma Opija V EA Sea Food Limited, [2013] eKLR*; *Securicor Kenya Ltd V Kijumba Holdings Limited, [2005] eKLR* and *Anne Ayuma Harrison V Simon Githure Mawingo, [2014] eKLR*, the appellant submitted that contents of a police abstract are sufficient proof of what is contained therein and that the learned trial magistrate erred when she disregarded the contents of the police abstract produced in evidence in support of his case.

10. The appellant urged the court to find that he had proved his case on a balance of probabilities and allow his appeal with costs. He implored me to substitute the award of KShs.230,000 the trial court indicated it would have awarded him had he succeeded in his case with an enhanced award of KShs.500,000.

11. Having carefully considered the grounds of appeal, the pleadings and the evidence on record as well as the appellants written submissions and the authorities cited, I find that this appeal turns on whether the learned trial magistrate erred in law or fact in her finding that the appellant had failed to prove his case to the standard required by the law and in dismissing the suit with costs.

12. As the first appellate court, I am alive to my duty which as succinctly summarized in *Selle & Another V Associated Motor Boat Company Limited & Others, [1968] EA 123*; *Peters V Sunday Post Limited, [1958] EA 424* is to revisit the evidence presented before the trial court and to arrive at my own independent conclusions bearing in mind that I did not have the benefit of hearing and seeing the witnesses.

13. It is however important to note that an appellate court should be slow to interfere with findings of fact made by the trial court. The Court of Appeal in *Ephantus Mwangi & Another V Duncan Mwangi Wambugu, [1982-88] 1 KAR* emphasized this point and stated that:

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did....”

14. Guided by the above principles, I now turn to consider whether or not the trial court erred in dismissing the appellant’s suit with costs.

15. Having read the trial magistrate’s judgment and considered the evidence on record, I am unable to agree with the appellant’s submissions that his case was dismissed on account only of disparity of dates appearing in the police abstract and in the P3 form regarding the date the accident in which he was injured occurred.

16. Though the learned trial magistrate noted the contradictions in the dates recorded in the P3 form, the police abstract and the discharge summary issued by Kiambu District Hospital and the fact that the appellant failed to adduce evidence to explain or reconcile the said contradictions, she also noted that the appellant had failed to tender evidence to prove how the accident in question occurred.

17. The evidence on record shows that in support of his case, the appellant testified as PW2 and called one additional witness, *PC Jesse Mwololo* who testified as PW1. The respondents closed their case without calling any witness.

18. In his evidence, PW1 produced a police abstract dated 14th July 2012 on behalf of the police officer who had allegedly investigated the accident one *PC Phyllis*. Upon cross examination, PW1 stated that as he was not the investigating officer, he could not tell the circumstances in which the accident occurred.

19. On his part, the appellant adopted his written witness statement as part of his evidence in chief and added that on 14th July 2012, he was standing at Kariokor off the road with a handcart when motor vehicle registration number KAV 829T hit him. He sustained injuries on his right leg big toe for which he was treated at Kiambu District Hospital where he was admitted for one month.

20. Upon cross examination, he testified that at the time the accident occurred, he was assisting someone to push a handcart. He did not know the speed at which the vehicle that hit him was being driven but he was sure that the driver was on his lawful lane.

21. It is trite law that he who asserts or pleads must prove by way of evidence the existence of the facts pleaded or alleged. This is the import of Sections 107 to 109 of the Evidence Act. When interpreting those sections, the Court of Appeal in Kenya Power & Lighting Company Limited V Pamela Awino Ogunyo, CA No. 315 Of 2012 held, *inter alia*, as follows:

“A party who asserts or alleges that certain facts exists has a legal burden to prove those claims – sections 107-109 of the Evidence Act which places a burden of proof or what may be called evidential burden of proof on the party making the assertion. ...”

22. In this case, having asserted that the accident in which he was injured was occasioned by the 1st respondent’s negligence for which the 2nd respondent was vicariously liable, the appellant was legally bound to prove on a balance of probabilities, the particulars of negligence attributed to the 1st respondent in his plaint in order to succeed in his claim.

23. Though the evidence on record proves that indeed an accident occurred at the time alleged involving the appellant and the subject vehicle which was being driven by the 1st respondent, the evidence does not disclose that the 1st respondent caused the accident by negligently driving or controlling the subject vehicle as pleaded in the plaint.

24. The appellant did not claim that the 1st respondent was driving recklessly or at a high speed or that he committed or omitted to do any act which was negligent. He in fact confirmed that the 1st respondent was driving on his proper lane when the accident occurred.

25. The police abstract though confirming occurrence of the accident did not help the appellant’s case since it did not shed any light on who among the appellant and the 1st respondent was responsible for the accident. It did not attribute any blame on the 1st respondent. It only indicated that the matter was pending investigations. In the premises, it is my finding that the appellant failed to adduce any evidence to substantiate or prove his claim that the 1st respondent caused the accident by negligently driving or controlling the subject vehicle.

26. In dismissing the appellant’s suit, the learned trial magistrate stated as follows:

“The onus was upon the plaintiff to show that indeed the accident occurred as pleaded and for any contradictions to adduce whatever evidence or call whatever witness could clarify the said contradictions. He never did the same making his claim herein appear fictitious notwithstanding that he sustained some injuries. [HCG1] But as to how and when the said injuries occurred was not proved and when the matter was reported to police is highly doubtful.

Consequently, the plaintiff’s case against the defendants is dismissed.” [Emphasis added]

27. From the above passage, it is clear that the learned trial magistrate was alive to the requirement of the law that he who alleges must prove. It is also evident that she analysed the appellant’s case and came to the conclusion that he had not proved that the accident occurred due to the 1st respondent’s negligence as pleaded in the plaint.

28. After my independent evaluation of the evidence presented before the trial court, I am unable to fault the learned trial magistrate’s decision. Though she did not expressly state her finding on liability, it is clear that she found that the appellant had failed to prove his claim against the respondents to the standard required by the law hence her dismissal of his suit with costs. My reading of the trial court’s judgment does not show or suggest that in making her decision, she misapplied or misapprehended the evidence on record or applied any wrong legal principle.

29. Having found that the appellant failed to establish liability against any of the respondents, I do not find it necessary to consider the adequacy or otherwise of the award the trial magistrate indicated would have been payable to the appellant had he proved his case.

30. In view of the foregoing, I find that this appeal lacks merit and it is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of October, 2020.

C. W. GITHUA

JUDGE

In the presence of:

Ms Kanana holding brief for Mr. Kaburu for the appellant

Ms Wainaina for the respondents

[\[HCG1\]](#)