



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 68 OF 2017

JOSEPH WABUKHO MBAYI.....APPELLANT

VERSUS

FRIDA LWILE ONYANGO.....RESPONDENT

(Being an appeal from the Judgement and Decree of Honourable F. Makoyo, Senior Resident Magistrate in Butere PMCC Number 205 of 2014 read and delivered on 2nd June 2017)

JUDGEMENT

1. The appellant, having been dissatisfied with the decision of the trial magistrate aforementioned lodged this appeal on 8.11.2017 seeking *inter alia* that the appeal herein be allowed with costs and general damages be assessed accordingly to a figure that corresponds with the injuries suffered by the appellant based on comparable past decisions. The appellant relied on the following grounds: -

- a) The trial court erred in law and fact in dismissing the suit on account of the Appellant failure to prove the case on a balance of probabilities when there was sufficient evidence to make him find otherwise;
- b) The trial court erred in law and fact in misapprehending the law and facts placed before him and determined the suit beyond the standard of proof established in law for civil cases;
- c) The trial court erred in law and fact in considering and taking into account issues that were not placed before him for determination and relying on extrinsic evidence and issues not before him as to occasion a travesty of justice to the appellant; and
- d) The trial magistrate occasioned a travesty of justice by misapprehending the law and facts placed before him and failing to take into account the submissions placed before him by the appellant.

2. The appellant had sought general and special damages at the lower court, together with costs and interests, arising out of an accident that occurred on or about the 14th day of May, 2014 involving the appellant. The appellant claimed to have been a fare-paying passenger in the respondent's motor vehicle registration mark and number KAR 531V, and that the accident occurred along the Sabatia-Ebuyangu road, where the respondent's driver/servant and /or agent, so negligently, recklessly and/or carelessly drove the said motor vehicle registration mark and number KAR 531V that it was involved in an accident and as a consequence of which he was injured and suffered loss and damages.

3. The appellant claimed the accident was caused solely by the negligence on the part of the respondent's driver and/ or agent. The appellant relied on the doctrine of *res ipsa loquitur*, the Highway Code and the Traffic Act. he had requested for an *ex parte* judgment in default of entry of appearance by the respondent in the lower court. The said *ex parte* judgment was entered on 30th November 2015 for Kshs. 343,830.00 against the respondent. The *ex parte* judgement was set aside by consent, and the respondent was allowed to file defence. Both parties subsequently filed written submissions which were considered and a judgment was delivered on 2nd June 2017 dismissing the suit with costs.

4. This being a first appeal, I am bound by certain principles. Firstly, as a first appellate court, I have a duty to examine matters of both law and facts and subject the whole of the evidence to afresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that this court did not have an opportunity to hear the witnesses first hand and test the veracity of their evidence and demeanor. This is captured by section 78 of the Civil Procedure Act, Cap 21, Laws of Kenya, which espouses the role of a first appellate court as to '..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.' The principles were buttressed by the Court of Appeal in the case of *Peter M. Kariuki vs. Attorney-General* [2014] eKLR where court stated that

'We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and reevaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are

consistent with the evidence. See *Ngui v Republic*, (1984) KLR 729 and *Susan Munyi v Keshar Shiani*, Civil Appeal No. 38 of 2002 (unreported).’

5. In *Selle & another vs. Associated Motor Boat Co Limited & others* (1968) EA 123 stated the duty of the court in a first appeal to be as follows:

‘I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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, this 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 (*Abdul Hammed Saif vs. Ali Mohamed Sholan* (1955), 22 EACA 270).’

6. The Court of Appeal for East Africa in *Peters vs. Sunday Post Limited* [1958] EA 424 stated that: -

‘It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt – vs- Thomas (1)*, [1947] A.C. 484. “My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English -terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, 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 is really 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 the trial and especially if that conclusion has been 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 courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.’

7. The issues to be determined are whether the suit motor vehicle belonged to the respondent and, if it did, whether the respondent was vicariously liable for the accident; and whether the appellant was entitled to general and special to the damages sought.

8. It was the respondent’s case that the appellant had miserably failed to prove the issue of ownership of the suit motor vehicle registration mark and number KAR 531V. The appellant relied on the police abstract (P Exhibit 3) in concluding that the suit motor vehicle was owned by the respondent. The appellant, testifying as PW1 stated that the suit motor vehicle belonged to the respondent as it was always in her compound. The learned trial magistrate held that the suit motor vehicle belonged to the respondent based on the information on the police abstract.

9. Section 8 of the Traffic Act provides as follows:

‘8. Owner of vehicle

‘The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.’

10. In *Joel Muga Opija vs. East African Sea Food Limited*, Civil Appeal No.309 of 2010 where it was held that: -

‘... We agree that the best way to prove ownership would be to produce to the Court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in Court without any objection, its contents cannot be later denied ... In any case in our view, an exhibit in evidence and in this case, the appellant’s evidence that the police recorded the respondent as the owner of the vehicle and Ouma’s evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on a point of law on that aspect...’

11. The Court of Appeal in *Muhambi Koja vs. Said Mbwana Abdi* (2015) eKLR, stated that: -

‘...In a nutshell, a police abstract report or any other form of evidence will be proof of ownership of a vehicle and will displace the registration (log) book if it is demonstrated that the person named in the registration (log) book has since transferred and divested himself of its ownership to the person named in the abstract report or in that other form of evidence.’

12. The High Court in *Nancy Ayemba Ngana vs. Abdi Ali* eKLR observed that: -

‘There is no doubt that the registration certificate obtained from the Registrar of Motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle, and so the Act had an opening for any evidence in proof of such differing ownership to be given.

And in judicial practice, concepts have arisen to describe such alternative forms of ownership; actual ownership, beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership.

Indeed, the evidence adduced in the form of a police abstract showed on a balance of probabilities, that the 1st defendant was one of the owners of the mutata in question.’

13. Based on the above decisions and the fact that the respondent failed to rebut the contention of the appellant that she, the respondent, was the owner of the suit motor vehicle by at least producing a certificate of official search from the Registrar of Motor Vehicles to state otherwise, I am in agreement with the learned magistrate that the suit motor vehicle did indeed belong to the respondent on a balance of probability.

14. On whether the respondent’s driver was vicariously liable for the accident that occurred on the material date, it was conceded by the respondent that the driver, one Joseph Hindu Malaga, was employed by the respondent.

15. On the issue of vicarious liability, this court in *Jane Wairumu Turanta vs. Githae John Vickery & 2 others* [2013] eKLR, cited the celebrated case of *Morgan vs. Launchbury* (1972)2 All ER 606, where the doctrine of vicarious liability was expounded, and stated that: -

*‘...to establish agency relationship it was necessary to show that the driver was using the car at the owners request express or implied or in his instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner... The case of *HCM Anyanzwa & 2 others –vs-Lugi De Casper & Anor* (1981) KLR 10 stated that “vicarious liability depends not on ownership but on the delegation of tasks or duty.’*

16. In *Karisa vs. Solanki* [1969] EA 318 it was said .at page 322 paragraph 9G, that -

*‘Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see *Bernard v. Sully* (1931) 47 TLR 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.’*

17. In *Vincent Okello vs. Attorney General* [1995] III KALR 129, the High Court of Uganda held with respect to proof in cases of vicarious liability that: -

‘The law places the burden of proof in civil cases on he who would fail if no evidence at all was given from either side. In the instant case, the plaintiff claimed that the defendant’s servants had seized and detained the plaintiff’s motor vehicle and that despite several demands to return it, the defendant’s said servants have not returned the plaintiff’s vehicle which claim was denied by the defendant. By that denial the defendant had turned the evidential wheel to the plaintiff who would fail if no evidence was given from either side. To succeed, the plaintiff had to adduce evidence to prove that while the plaintiff was entitled to immediate possession thereof, the defendant’s servants had seized the plaintiff’s vehicle, that they did so in the course of their employment and that the plaintiff had made demands for the return of the said motor vehicle but the defendant’s servants have not returned the same. Only then can the plaintiff hope to succeed in his claim... The third issue is whether the defendant is vicariously liable for the acts of the soldiers and in this connection it is relevant to point out that a master is only liable for the tort committed by his servant in the course of his employment. It is therefore necessary that that relationship of “master and servant” must be pleaded and established by the plaintiff by evidence on the balance of probabilities to render a master liable. He must similarly establish that the Tort in question was committed by the defendant by the defendant’s servant acting in the course of his employment...The plaint was clearly defective in that it never averred that the NRA officers were servants of the defendant nor that in confiscating the plaintiff’s motor vehicle the officers were acting in the scope of their employment. It is instructive to note that Order 7 rule (1)(e) of the Civil Procedure Rules requires that a plaint must contain “the facts constituting the cause of action and when it arose”. That rule is mandatory and the failure by the plaintiff in this case to aver in this plaint that the NRA soldier who confiscated the plaintiff’s said motor vehicle was a servant and agent of the defendant was an error in the plaint.’

18. Basing on the respondent’s own admission together with the testimony of the appellant, it can be said that the suit motor vehicle was being driven by the respondent’s driver or servant or agent in the normal course of his duty and the said driver or agent or servant was under instructions from the respondent. It therefore follows that any act or omission of negligence by the respondent’s driver or servant or agent makes the respondent vicariously liable.

19. On whether the action or omission of the respondent’s driver was negligent so as to make the respondent vicariously liable, I agree with the trial court, and with the submissions of the respondent that there was no evidence adduced by the appellant showing that the respondent’s driver or agent or servant had been negligent. His claim that the brakes had failed ought to have been corroborated further by other evidence,

for example by a motor vehicle inspector indicating fault of the suit motor vehicle braking system. I further note that the police abstract (P. Exhibit 3) does not give an indication on how the accident might have happened. The traffic police officer or officers who might have investigated the matter were not called to testify as to the circumstances that led to the accident, if at all any investigations were done.

20. The appellant's testimony as to the circumstances of the accident fails for want of proof, and negligence cannot be inferred or presumed in the absence of such evidence as to the circumstances of the accident and the suit motor vehicle not being roadworthy. Apart from the pleadings which set out the particulars of negligence on the part of the respondent, there is no other evidence on record to show how the material accident occurred apart from the statement and evidence of the appellant.

21. The law is clear that he who alleges must prove hence it was incumbent upon the appellant to prove negligence or negligent acts on the part of the driver of the suit motor vehicle. The appellant failed to prove acts or omissions of negligence by the respondent and I cannot find the respondent to be liable for the accident.

22. Having found that the respondent was not liable for the accident, I move to the issue of quantum, and whether or not the appellant is entitled to any damages. The law requires that even if the plaintiff/appellant who has sued for damages does not prove liability the court, not being the final court, must assess what it would have awarded him, had he proved his case on a balance of probabilities. See Alfred *Kioko Muteti vs. Timothy Miheso & another* [2015] eKLR. The principles for assessment of damages were set out by the Court of Appeal for East Africa, and subsequently adopted by Court of Appeal of Kenya in a number of cases, among them being, *General Motors East Africa Limited vs. Eunice Alila Ndeswa & another* [2015] eKLR, *Kanga vs. Manyoka* [1961] EA 705, *Lukenya Ranching and Farming Co-Op. Society Ltd vs. Kavoloto* [1979] EA 414, *Kemfro Africa t/a Meru Express & Anor. vs. AM Lubia & Anor* [1982-88] I KAR 727 and *Zablon Mariqa vs. Morris W. Musila* CA No.66 of 1982 (unreported). From the above authorities, an appellate court will interfere with the exercise of discretion by the trial court when assessing damages if the trial court took into account an irrelevant fact, or Left out of account a relevant fact or the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

23. Ordinarily, an award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable awards made in the past for comparable injuries. In *Simon Taveta vs. Mercy Mutitu Njeru* [2014] eKLR, the Court of Appeal observed that -

'The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.'

24. In the celebrated case of *Butt vs. Khan* (1977) KAR 1 the court stated the principles that govern an appellate court in considering a request to review an award of general damages:

'An Appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which as either inordinately high or low.'

25. The Court of Appeal in *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. AM Lubia and Olive Lubia* (supra) said: -

'The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango vs. Manyoka [1961] E.A. 705, 709, 713; Lukenya Ranching and Farming Co-Operatives Society Ltd vs. Kavoloto [1970] E.A., 414, 418, 419. This Court follows the same principles.'

26. The appellant stated in his plaint, and as indicated in the P3 form, that he sustained the following injuries, namely head injuries, bruises and cuts on the face, blunt injuries on the chest, blunt injuries on the back and bruises and laceration on both lower and upper limbs. The medical legal report marked P. Exhibit 4 and prepared by Dr. LW Okombo stated that the appellant had not fully recovered and was still complaining of headache pains on the chest, back, left hand and legs as a result of soft tissue injuries.

27. In the appellant's submissions in the trial court, he stated that an award of Kshs. 200,000.00 would have been sufficient while basing his submission on the injuries sustained and similar awards given by courts in the past. It was the respondent's submission that the appellant is not entitled to any damages as he failed to prove his case on a balance of probability or prove the causal link between the respondent's negligence and his injuries. In its judgment, the trial court stated that it would have awarded general damages in the sum of Kshs. 80,000.00 for injuries suffered and Kshs. 1,500.00 as special damages.

28. The Court of Appeal in *Simon Muchemi Atako & another vs. Gordon Osore* [2013] eKLR, where the appellant suffered injury to the nose with nose bleeding; blunt injury to the chest; blunt injury to the right hip; cut wound on the base of the left thumb with partial loss of the nail; and bruise wound on the right knee, awarded damages of Kshs. 120,000.00. in *Patrick Mwiti M'Imanene & Another vs. Kevin Mugambi Nkunja* [2013] eKLR, where the respondent had suffered swollen scalp, right side; Tender, swollen and bruised left shoulder; Bruised right knee; Tender neck; Tender back; x-rays showed no fractures; Complaints of on and off headaches and lower back pain., the court awarded damages of Kshs. 170,000.00.

29. On special damages, the law is clear that not only must they be pleaded, but that they must be specifically proved. The appellant pleaded a sum of Kshs 37,600.00, being special damages in respect of medical legal report – Kshs. 1,500.00, P3 form – Kshs. 500.00. The appellant was only able to provide evidence of the expense on the medical legal report.

30. It is my finding that an accident did occur on 14th May 2014 involving the appellant, who sustained injuries on the head, chest, face and

lacerations on both lower and upper limbs as indicated in the P3 form. It is also my finding that the suit motor vehicle registration mark and number KAR 531V belonged to the respondent at the time of the accident and the said motor vehicle was being driven by someone who was in lawful employment of the respondent.

31. It was not a fatal accident, and no evidence was presented by eyewitnesses from which the court could infer negligence on the part of the respondent. the appellant was under a duty to place before the trial court evidence to sustain the averments in his plaint. even where there is no rebuttal, in a matter that requires proof, Section 107 of the Evidence Act applies, that whoever desires the court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. I find that an Appellant's allegation of liability on the part of the respondent fails for want of proof of the respondent's driver's negligence and of the suit motor vehicle not being roadworthy.

32. On quantum, based on the authorities aforementioned, which presented almost similar injuries, I would have awarded the sum of Kshs. 150,000.00 as general damages and Kshs. 1,500.00 as special damages had the appellant proved his case.

33. In light of the foregoing, I find that the appeal before me has no merit, and ought to be, as it is hereby, dismissed in its entirety. the trial court's decision is upheld and confirmed. the respondent shall have costs of the appeal as well as of the proceedings in the trial court.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29th DAY OF April, 2019

W MUSYOKA

JUDGE