



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 2 OF 2015

NZOIA SUGAR COMPANY LIMITED.....APPELLANT

VERSUS

DAVID KARANJA KARIRI.....RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court at Nairobi by the Honourable Leah W. Kabaria (Ms) Resident Magistrate delivered on 5th December 2015 in Chief Magistrate's Civil Suit Number 5080 of 2015)

JUDGMENT

INTRODUCTION

1. In her decision of 5th December 2015, the Learned Trial Magistrate, Hon Leah Kabaria (Ms) delivered judgment in favour of the Respondent against the Appellant herein for the sum of Kshs 114,808/= together with interest thereon from the date of filing suit until payment in full plus costs.
2. Being dissatisfied with the said decision, the Appellant filed a Memorandum of Appeal dated 2nd January 2015 on even date. It relied on five (5) grounds of appeal.
3. Its Written Submissions were dated 5th April 2019 and filed on 8th April 2019 while those of the Respondent were dated 30th April 2019 and filed on 3rd May, 2019.
4. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.
6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

7. Having looked at the grounds of appeal and the parties' respective Written Submissions, it appeared to this court that the only issue that had been placed before it was to determine whether or not the Learned Trial Magistrate erred in having found the Appellant liable for the accident herein.
8. The Appellant submitted that it was not in dispute that an accident occurred on 14th November 2006 but that what was in dispute was whether Motor Vehicle Registration Number KAN 669U was the same vehicle whose log book was submitted in evidence and which vehicle belonged to it.

9. It denied that the alleged Motor Vehicle registration Number KAN 669U (hereinafter referred to as “the subject Motor Vehicle”) that was involved in an accident on the material date along Thika road was its vehicle because its Motor Vehicle Registration Number KAN 669U was in Bungoma area as was evidenced by work tickets that were tendered in evidence.

10. It was its evidence that the farthest its Motor Vehicle had gone to was Eldoret Morgue. It denied that the Mr Jackson who had been named in the Police Abstract was its driver and averred that its said vehicle was being driven by Mr E.K. Makokha on that material date.

11. It was emphatic that PC Patrick Njau (hereinafter referred to as “PW1”) a police officer attached to GVA15 Nairobi, the department that deals with Government and parastatal vehicles, did not explain why the accident was reported at three (3) different police stations. It stated that he also testified that he never attended the scene of accident.

12. It also pointed out that the owner of Motor Vehicle Registration Number KAU 527N that was involved in the accident, David Karanja Kariri (hereinafter referred to as “PW3”) did not get details of the motor vehicle that was involved in the accident but rather, that he got the same from the Police Abstract Report.

13. It added that the Respondent did not also produce any photos of Motor Vehicle Registration Number KAN 669U or produce the Occurrence Book from the police station where the accident was reported or call any police officer to prove Co-operate Insurance Company was its Insurer.

14. It relied on Section 8 of the Traffic Act Cap 403 (Laws of Kenya) which stipulates that

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

15. It further placed reliance on the provisions of Sections 107,108 and 109 of the Evidence Act Cap 80 (Laws of Kenya) and argued that the Respondent had failed to prove that Motor Vehicle Registration Number KAN 669U belonged to it or that the said Jackson Mutuku Kitheka was driving the said Motor Vehicle for its benefit. It therefore denied having been vicariously liable for the accident involving Motor Vehicle Registration Number KAN 669U and urged this court to allow its Appeal.

16. In this regard, it relied on the case of Court of Appeal Number 119 of 1986 – Mombasa Khayigila vs Gigi & Co Ltd & Another where it was held that:-

“In order to fix liability on the owner of a car for the negligence of its driver, it was necessary to show either that the driver was the owner’s servant, or that at the material time the driver was acting on the owner’s behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner’s request, express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner.”

17. On his part, the Respondent placed reliance on the case of Peter Kanithi Kimunya vs Aden Guyo Haro [2014] eKLR which cited several cases where the common thread was that an appellate court ought to be slow to differ with the findings of a trial court.

18. He submitted that the daily work ticket was prepared by the Appellant and that the same could be manipulated.

19. He added that the Appellant never contested the liability of Jackson Mutuku Kitheka and that in any event, he adduced evidence to prove that he was the owner of Motor Vehicle Registration Number KAU 527N Nissan Matatu and that he lost earnings during the time his Motor Vehicle was being repaired after the accident on the material date.

20. It was his submission that he had proved his case on a balance of probability and in this regard, referred this court to the case of D.T. Dobie & Co (K) Ltd vs Wanyonyi Wafula Chebukati [2014] eKLR.

21. This court carefully perused the proceedings and noted that from PW1’s evidence, the accident on the material date was reported at another station before it was reported at Parklands Police Station. His further testimony was that a Police Abstract Report was issued to Peter Mungai but stated that they never visited the scene of the accident.

22. During his Cross-examination, he stated that Motor Vehicle Registration Number KAN 669U was a parastatal vehicle with blue number plates and that the said vehicle was a Toyota Hilux. He said that he got this information from the records.

23. Alex Matata (PW2) was a Motor Vehicle assessor. He adduced in evidence, an Assessment Report.

24. The Respondent who was PW3 in the proceedings stated that he worked in a Matatu. His testimony was that he conducted a search and sued the Appellant for Kshs 94,308/= being repair costs as a result of the said accident.

25. When he was Cross-examined, he testified that he was in the Motor Vehicle but he was not driving. He averred that Motor Vehicle Registration Number KAN 669U was a brown Toyota Hilux with the body of a mini-bus and had blue number plates. He said that he did not see the registration number of the Toyota Hilux but in the same breadth said that he saw the registration number and wrote it down.

26. Patrick Baraza Masinde (DW1) was the Appellant’s Quality Assurance Officer. He was emphatic that Motor Vehicle Registration Number KAN 669U was in Bungoma on the material date as was demonstrated by the Daily Work ticket that he tendered in evidence. His

evidence was that the said vehicle first went to Bungoma at 8.30a.m. and returned to Nzoia at 11.00a.m. It went back to Bungoma at 6.00p.m. and returned to Nzoia at night.

27. He explained that the features of lights on top of the vehicle and the red writing of “Ambulance” at the front and back of the vehicle could not have been confused. He tendered in evidence a logbook showing that the body was for special purpose. His further evidence was that the Appellant sold the said Motor Vehicle in 2010.

28. On being Cross-examined, he admitted that its Motor Vehicle had blue number plates and was a Toyota Hilux, a minibus with special features. He denied of having known Jackson Mutuku Kithimu.

29. When he was Re-examined, he stated that the last time the vehicle came to Nairobi was in 2002 when it was picked from Toyota Kenya.

30. The Learned Trial Magistrate determined that in the absence of any explanation how the driver of Motor Vehicle Registration Number KAN 669U came to hit the Respondent’s Motor Vehicle, she was persuaded that liability attached fully against the Appellant on a balance of probability.

31. She correctly concluded that evidence of ownership could be discerned from Copy of Records which the Appellant failed to rebut.

32. Having said so, the Respondent ought to have called the police officer who visited the scene of the accident as the same was not a hit and run accident. According to his evidence, both vehicles stopped after the accident occurred. The evidence of the police officer who visited the scene of the accident was crucial as it would have unlocked the mystery of whether or not the Appellant’s Motor Vehicle Registration Number KAN 669U was actually involved in the material accident as the Appellant had denied that its Motor Vehicle was at Nairobi on the material date and time. The officer would also have confirmed if the said Motor Vehicle had been an ambulance. If it was an ambulance, this court would have assessed his evidence vis-a-vis the Respondent’s testimony that the Appellant’s Motor Vehicle was a Toyota Hilux but with a body of a mini bus. If it was an ambulance, this court would have found that the Respondent would not have struggled to see what was written on it. This of course was purely speculative at this stage.

33. It was therefore incumbent on the Respondent to have called witnesses who would have made his case water tight. Failure to tender crucial evidence of the police officer(s) who visited the scene greatly weakened his case. This was particularly because none of the drivers were found to have been to blame for the accident. The matter was in fact referred to insurance companies to deal.

34. This court thus agreed with the Appellant that the fact that PW1 did not attend the scene of the accident, he could not authoritatively give a description of its Motor Vehicle Registration Number KAN 669U because he was not a direct witness.

35. The court noted that the Appellant adduced in evidence a work ticket to show that its Motor Vehicle was in Nzoia and Bungoma on the material date. It, however, did not adduce in evidence photos showing how its Motor Vehicle looked like or comment about the postal address of the said Jackson in the Police Abstract Report so as to exonerate itself. It did not also call the driver of its Motor Vehicle on the material date to shed light on his movements on the said date. He was a critical witness. Instead, the Appellant called DW1 who was its Quality Assurance Officer.

36. Having considered the evidence that was tendered by both the Appellant and the Respondent, this court formed the opinion that both parties fell short of the standard required in prosecuting and defending a case. The Police Abstract Report did not list the witnesses save for a police officer.

37. This court also took the view that the Respondent’s evidence was not consistent. At one point he stated that he did not take the registration number of the Appellant’s Motor Vehicle and at another point, he said that he checked the registration number and wrote it down.

38. In addition, his conduct contradicted the conduct of an owner of a Motor Vehicle. He stated that after the accident, he did not check to see who the insurers of the Appellant’s Motor Vehicle were. This was critical because although he was a passenger in Motor Vehicle Registration Number KAU 527N, he was its owner. It was expected that since his vehicle had been damaged and would require to be repaired, it was in his best interests to establish who the Respondent’s Insurers were so that it could not escape liability. His inconsistent testimony made this court question whether he was really at the accident scene at the material time.

39. The above notwithstanding, the burden was on the Respondent to prove his case on a balance of probability. The Appellant was under no obligation to adduce evidence to prove that its Motor Vehicle was not at Thika Road on the material date. The converse was, however, true. The Respondent was expected to go all out to prove that indeed the Appellant’s Motor Vehicle was at Thika Road on the material time by adducing sufficient evidence. As DW1 informed the Trial Court that the Appellant’s Motor Vehicle was sold in 2010, the Appellant was not expected to have obtained photos of its Motor Vehicle as it would not have known in 2010 that the Respondent would sue it in 2015.

40. Indeed, Section 107 of the Evidence Act provides as follows:-

(1) Whoever desires any 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

41. Section 108 of the Evidence Act further provides that:-

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

42. Section 109 of the Evidence Act states that:-

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

43. Although the issue was not raised by the Appellant, this court could not restrain itself from observing that the Respondent did not adduce any evidence to prove that he was the registered owner of Motor Vehicle Registration Number KAU 927N. This was critical as it was necessary to have established that he was indeed the owner of the said Motor Vehicle and thus entitled to the repair costs.

44. Going further, this court noted that the accident occurred in 2006. The Respondent had until 2009 to have filed suit seeking material damage. Indeed, no extension of time can be given under the Law of Limitations Act Cap 22 (Laws of Kenya) for a claim for material damage and it was not clear whether such extension to file suit out of time was granted.

45. This court therefore took the firm position that the Learned Trial Magistrate erred in having found that the Respondent had proved his case on a balance of probability because in the mind of this court, based on the evidence that had been adduced in court, he did not.

DISPOSITION

46. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated and filed on 2nd January 2015 was merited and the same is hereby allowed. The Respondent's suit is hereby dismissed with costs to the Appellant. The Respondent will bear the Appellant's costs of this Appeal.

47. It is so ordered

DATED and DELIVERED at NAIROBI this 26th day of September 2019

J. KAMAU

JUDGE