



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 194 OF 2017

NICHOLAS WAMBUA MUTETI..... APPELLANT

VERSUS

RACOS TRANSING LIMITED1ST RESPONDENT

GITENE JAMES2ND RESPONDENT

PETER KIRANGU GITHUKA 3RD RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate's Court of Kenya at Nairobi (Ms. Hon. L.W. Kabiria (SRM) Delivered on the 3rd day of April, 2017, in Chief Magistrate's Court Civil Case No. 2012 of 2014)

JUDGMENT

This appeal arises from the judgment of the lower court delivered on 3rd April, 2017. The appellant had sued the respondents herein for damages arising from a road traffic accident that took place on 29th August, 2010. The appellant was a passenger in motor vehicle registration No. KAT 206Q which collided with motor vehicle registration no. KBF 765U. The appellant sustained some injuries and blamed the respondents for the injuries so sustained. The respondents' denied the appellant's claim in the statement of defence, which was followed by a full hearing. The lower court was not persuaded by the appellant's evidence and proceeded to dismiss his suit. It is that judgment that led to this appeal.

In the memorandum of appeal dated 27th April, 2017 the lower court was variously blamed for not upholding the appellant's case, more particularly that it was wrong for the court to dismiss the case for being statute barred, yet the appellant had obtained leave to file the same.

The lower court was then faulted for vacating the leave obtained whereas it was a discretion which had not been challenged by the defence. In addition, the lower court was accused of holding that there was no evidence to show the 1st and 3rd respondents were owners of motor vehicle registration No. KAT 206Q yet there was sufficient and uncorroborated evidence that the appellant was an employee of the 1st respondent and was injured in the course of his duties.

Further, the court was wrong to hold that the 2nd respondent was the registered owner of the motor vehicle. Finally, the lower court was faulted for holding that the 1st and 2nd respondents were not vicariously liable for the actions of the 3rd respondent yet there was no evidence by the respondents to controvert the appellant's evidence that the 3rd respondent was their employee and or driver.

I am required to reconsider and evaluate the evidence presented in the lower court with a view to arriving at an independent conclusion.

In determining the issues raised by the parties, it is always necessary for the trial court to be guided by the pleadings and the evidence presented before it. On the other hand, an appellate court may not be in a position to appreciate all the evidence adduced because it does not have the advantage to see, hear and observe the demeanour of witnesses, unlike the trial court.

Caution must therefore be exercised in any departure from what the lower court has determined. With that in mind, I appreciate the submissions made by both parties in this appeal.

I reiterate the position that parties are bound by their pleadings. Any evidence that is not in tandem with the pleadings should not find its way in the body of any judgment, because that will disadvantage the opposite party. It is the pleadings that give notice to the opposite party of the nature of the case it is supposed to face. In the absence of such a notice, then justice is not likely to be done. See **Peter Ojala Nyandare vs. South Nyanza Sugar Co. Limited (2018) e KLR.**

The appellant had moved the court seeking leave to institute his suit against the respondents out of time, which leave was granted. However, in the defence filed by the respondents, it is clear that limitation was a triable issue and the court cannot be faulted for making determination on an issue that had been pleaded. The finding that the appellant had not satisfied the requirement of Section 27 of the Limitation of Actins Act was therefore correctly before the court, and in vacating the same the learned trial magistrate cannot be faulted.

The subject of ownership of the motor vehicle was also addressed by the trial court in arriving at the decision that it did. After addressing itself to that issue, the court concluded that there was no evidence that either the 1st or 3rd respondents owned the vehicle at the time the accident took place. On that basis, vicarious liability could not attach.

The evidence produced by the appellant before the lower court did not prove, on a balance of probability, the ownership of the motor vehicle in question. The motor vehicle was either owned by one Mohamed Izaak Abdi or the company Ragos Trancing Limited named as the 1st respondent in this case. Mohamed is an individual while Ragos Trancing Limited is a limited liability Company and therefore ownership of the motor vehicle had to be established, to the satisfaction the court for purposes of liability. This was not done and it is not enough to state that the police abstract identified the owner as Mohammed c/o the 1st respondent. Even after the trial court is said to have identified the 3rd respondent as the employer of the appellant, evidence was required to confirm the 1st respondent was indeed the employer and that the 3rd respondent was driving the said motor vehicle on the authority of, instruction of, employee and or agent of the said employer. The evidence presented by the appellant fell short of that requirement.

There is yet another issue that appears in the pleadings in that, paragraph 6 of the plaint stated there was a collision between two motor vehicles registration Nos. KAT 206Q and KBF 765U. For some reason the appellant did not allege any negligence or contributory negligence on the part of the other motor vehicle, yet the particulars appear in the police abstract contained in the list of documents he filed.

After careful evaluation of the evidence on record, I have arrived at the conclusion that the lower court cannot be faulted in the conclusions arrived at in that judgment.

Had the lower court upheld the appellant's suit however, on the basis that the leave granted to lodge the suit out of time was justified, the proposed awards in the subject of quantum would have been upheld.

In the end I find that, just like his failure to persuade the lower court by way of evidence to sustain his pleadings, the appellant has equally failed in this court to justify the appeal he lodged following the lower court judgment. In the end, this appeal is dismissed, but each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 19th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE