



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

(CORAM: R. MWONGO, J)

CIVIL APPEAL NO. 65 OF 2016

DANIEL MUKABWA 1ST APPELLANT

GEORGE MBURU.....2ND APPELLANT

VERSUS

MAGGIE KITUI MUYALA..... RESPONDENT

(Appeal against the judgment of Hon. P. Gesora in Chief Magistrates' Civil Case No. 598 of 2014 in Naivasha (formerly Milimani CMCC no.648 of 2013)

JUDGMENT

Background

1. This is an appeal against the judgment in the Chief Magistrates Court in Naivasha, The case was, however, first filed in Nairobi in 2013, but heard afresh in 2015. It concerns an accident that occurred near Kekopey on Nakuru- Nairobi highway, on 25th February, 2010, at about 8.30 am, wherein the respondent was a fare paying passenger in registration no KAT 866F.
2. On account of the breadth of the appeal, it is apt that I evaluate all the evidence and reach my own findings as provided by **Section 78(2) of the Civil Procedure Code** and held in **Oluoch Eric Gogo -Vs- Universal Corporation Limited [2015] eKLR**, the court restated the duty of an appellate court as follows:

*“As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123**, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.....*

.....From the above decisions which echo section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.”

3. According to the evidence of the respondent, PW1, she was in vehicle no KAT 866F which was allegedly negligently driven by the 1st appellant at high speed. It collided with a lorry registration number KAU 560T belonging to the 2nd appellant which was reversing into the road, resulting in injuries loss and damage to her. She further testified that the 2nd defendant was charged, found guilty and fined Kshs, 4000/= in a criminal case. She blamed him for the said accident
4. The injuries sustained by the respondent as pleaded were as follows:
 - i. Blunt injury and concussion on the head.
 - ii. Crushed whole left hand.
 - iii. Lacerations.

- iv. Several fractures.
- v. Head injury with Glasgow Coma Scale (GCS) of 11/15
- vi. Difficulties in breathing due to bilateral lung contusion.
- vii. Severely anaemic due to blood loss through her open wounds.
- viii. Open wounds over her left arm with underlying fractures namely:-
 - a. Compound comminuted and segmental left humeral fracture.
 - b. Compound comminuted left distal ulna fracture with bone loss.
 - c. Disruption of distal radio-ulna and open wrist joint injury with soft tissue loss.

5. The trial court awarded Kshs 3,850,000/= made up as follows:

General damages	3,000,000/=
Special damages	600,000/=
Costs of future expenditure	250,000/=

6. PW2, PC Fredrick Gitari testified that Gilgil Police Station received a road traffic accident report involving the two vehicles and he issued the Plaintiff with an abstract. The abstract indicated that the driver of the lorry/trailer was to blame; that he had been charged; found guilty and fined Kshs 4,000/= or two months imprisonment. The witness also said that he had not investigated the case, nor did he visit the scene.

7. The medical reports by Dr James Mogire and Dr Bodo were admitted by consent the medical reports produced herein prepared by Dr. James K. Mogire and Dr. Joab Bodo that the Plaintiff sustained the following injuries:-

- 1. Head injury with Glasgow Coma Scale (GCS) of 11/15.
- 2. Bilateral lung contusion.
- 3. Anaemia due to blood loss.
- 4. Open wounds over her left arm with underlying fractures namely:-
 - i. Compound comminuted and segmental left humeral fracture.
 - ii. Compound comminuted left distal ulna fracture with bone loss.
 - iii. Disruption of distal radio-ulna and open wrist joint injury with soft tissue loss.

The injuries were confirmed through X-ray pictures that were taken. Dr. Mogire awarded her 20% permanent disability while Dr. Bodo awarded her 15% permanent disability.

8. No witnesses were called for the defence, but each party filed written submissions.

9. The following issues arise for determination

- 1. *Whether a person found guilty in a criminal case automatically liable in a civil case?*
- 2. *Was there a withdrawal of the suit against the 1st defendant?*
- 3. *Whether the amount of Kshs. 3,000,000/= was commensurate with the injuries sustained?*

Whether a person found guilty in a criminal case automatically liable in a civil case?

10. The appellants allege that the Respondent did not prove negligence. That the mere fact that the 2nd defendant was found guilty in the criminal court doesn't make him liable in this case. He points out that although the trial court stated there was a withdrawal of the suit against the 1st defendant this fact was not placed on record and the court therefore misdirected itself. He insists that the 1st defendant was liable because he saw the lorry's reverse lights and did not brake to avoid the accident.

11. Section 47 of the Evidence Act, Cap 80 Laws of Kenya, provides as follows;

“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”

12. In *Joshua Muriungi Ng’anatha v Benson Kataka Lemureiyani* [2016] eKLR Kamau J, faced with a similar situation expressed herself as follows;

“This does not, however, follow that such a convicted person will be found wholly liable in civil proceedings that a complainant institutes arising out of such criminal or traffic proceedings because the civil case will be determined on a balance of probability. This is notwithstanding that the witnesses who testified in the criminal proceedings are the same ones who testified in the civil proceedings.

13. In *Philip Keipto Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende* [1982-88] 1 KAR 1036 at 1039-1040

“... it is further submitted that the standard of proof in a traffic case is beyond reasonable doubt despite conviction and that conviction is not conclusive proof that the defendant is fully to blame. ..”

14. In *Asif Sadiq v Mumbi Holdings Ltd & Another*[2012]eKLR the court had the following to say

*“In my view what the foregoing provisions mean is that once a conviction becomes conclusive by virtue of the aforesaid provision, the issue whether or not the convict was guilty of the offence cannot be subject of a subsequent inquiry. It does not necessarily mean that that person is 100% liable in negligence. The decision to charge one and not the other person is usually at the discretion of the police and the mere fact that one of two drivers is charged does not necessarily mean that the other driver is not liable at all. Whereas the person convicted of a criminal offence cannot, where the circumstances under section 47A aforesaid prevail, question that conviction, the issue of contributory negligence is always open to the party despite the conviction. In *Robinson v. Oluoch* [1971] EA 376, it was held that:-*

“Careless driving necessarily connotes some degree of negligence and in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent; but that is a very different matter from saying that a conviction for an offence involving negligence driving is conclusive evidence that the convicted person was the only person whose negligent caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in the subsequent civil proceedings.

That is not what section 47A states. It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident. Accordingly, the judge was right in not striking out the defence as a whole.”

15. It is trite that he who alleges must prove. Here, the 2nd and 3rd defendants closed their case without calling any witness. The respondent called witnesses who testified in support of her case and her testimony and the testimony of her witnesses on how the accident occurred and the injuries sustained was never controverted nor shaken during cross examination. Strong submissions by defence counsel cannot stand in place of evidence for the defence in support of the allegations of contributory negligence on the part of 1st defendant.

16. Accordingly, I agree with the position of Odunga J in *Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu* [2012] eKLR on the consequences of a party failing to call evidence where he stated:

*“... in the case of *Motex Knitwear Mills Limited Milimani HCC 834/2002 Honourable Lessit J citing Autar Singh Bahra & Another Vs Raju Govindji HCC 548 of 1998* stated:*

“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 1st plaintiff’s case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail.....” 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.....”

17. On this point, I am satisfied that the respondent did in fact satisfactorily prove her case on balance of probabilities.

Whether there was a withdrawal of the suit against the 1st defendant.

18. From the court record, there is no mention of the 1st defendant. The trial magistrate at the close of the plaintiff’s hearing recorded that *“the 2nd and 3rd defendants are closing their case without calling any witnesses”*, and thereupon directed the filing of submissions. This was done in the presence of counsel for the parties, and no issues were raised. Parties filed their submissions and again no issue was raised.

Accordingly, the parties must be deemed to have had notice that the 1st defendant had ceased to participate.

19. In any event, in the first paragraph of the submissions of the plaintiff at the trial is the statement:

“The suit against the 1st Defendant was withdrawn with no orders as to costs and the case proceeded only against the 2nd and 3rd defendants”

This was not contradicted by the 2nd and 3rd defendants in their submissions at the trial and there is no mention of the 1st defendant in the 2nd and 3rd defendants' submissions. Accordingly, the point is moot as nothing turns on the answer the court may give on this issue.

Whether persons involved in the same accident but in different suits are supposed to get similar judgment on liability if the suits have not been consolidated?

20. Upon a close perusal of the file and the documentation availed, it is noted that there are two judgments applying to the same case that the appellant is relying on relating to Nakuru CMCC No. 1097 of 2010 that apparently arose from the same accident. The first is by SPM Korir on 16/8/2011 in which liability was apportioned at 50:50 between the matatu driver and the lorry driver. The 2nd judgment is by CM Mungai on 25/5/13 wherein the case against 1st defendant was dismissed and 2nd defendant held 100% liable. The 3rd defendant was found vicariously liable for the actions of 2nd defendant.

21. A matter of concern however is that in the 2nd judgment in the record of appeal, the details of the motor vehicles involved in the accident are missing. Further, the date of the accident on the 2nd judgment is indicated as 22/2/2010 while the date on the 1st judgment is stated to be 25/2/2010. It is therefore impossible to tell which judgment the appellant is relying on and thus which is valid as both apply to the same case file. Further scrutiny and clear submissions would have been requisite from the applicant to achieve clarity on their point of appeal. Accordingly, I make no finding on this issue which therefore fails.

Whether the award given to the plaintiff was commensurate with the injuries

22. It was argued that the amount awarded to the respondent was not commensurate with the nature of injuries sustained and that the court did not explain how it came up with the figure of Kshs. 3,000,000/= as general damages. The appellants also state that future medical expenses were not pleaded and medical report never indicated the figure for future medical expenses. The appellants state that future medical expenses were not pleaded as special damages and medical report never indicated the figure for future medical expenses.

23. The position in law on future medical expenses was stated in the case of **Tracom Limited & Another v Hassan Mohamed Adan [2009] eKLR** the Court of Appeal held:-

“We readily agree that the claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved before a court of law can award it.”

24. I have perused the medical reports and the one from Dr. Mogire clearly indicates that the plaintiff will need a further surgery to remove metal implants and that the cost was estimated at around 250,000/= to 300,000/=. Looking at the amended plaint dated 20th May 2013, the plaintiff has prayed for general damages and damages for future operation under prayer (i). Therefore the award of future medical expenses was rightfully awarded.

25. With regard to the complaint that the award of Kshs. 3,000,000/= as general damages given to the respondent was not commensurate with the nature of injuries sustained and court did not explain how it came up with the figure of, it is prudent to note as follows: that this being a first appeal, it is the duty of this court to analyse and assess the evidence afresh and draw its own conclusion bearing in mind of course that it neither saw nor heard the witnesses testify and give due allowance for that. It is also trite that an appellate court will not interfere with a finding of fact by the trial court unless: it is based on no evidence, or is based on a misapprehension of the evidence; or the Judge is demonstrably shown to have acted on wrong principles in reaching the findings he did.

26. The Appellant has not attached any authorities with similar injuries or almost similar injuries that he would wish to rely on to prove that the amount awarded was not commensurate with the injuries sustained. The respondent however relied on the case of **Duncan Kimathi Kariga v Ngugi David and 3 others [2016] eKLR** which is close to the issue at hand and the injuries sustained, where the plaintiff was awarded Kshs,4,000,000/= as general damages on appeal. I consider that the respondent's injuries in this suit/appeal are more severe than those in the **Duncan Kimathi case**, above.

27. Accordingly I find that the amount of Kshs, 3,000,000/= is neither too low nor too high to warrant interference of the trial court's decision.

Disposition

28. In light of all the foregoing the appeal is dismissed, and lower court's judgment upheld.

29. The appellant shall bear the costs of the appeal.

Orders accordingly.

Dated and Delivered at Naivasha this 29th Day of November, 2018

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Wairegi holding brief for Muchemi for the Appellant
2. Omenta holding brief for Betty Rashid for the Respondent
3. Court Clerk Quinter