



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 149 OF 2012

KIGUMO MICHAEL.....1ST APPELLANT

PATRICK GITONGA.....2ND APPELLANT

VERSUS

JOSEPH WAMBUA.....RESPONDENT

(An appeal arising out of the judgment of Hon. I. Kahuya RM delivered on 7th September 2012 in Kangundo Senior Principal Magistrate's Court Civil Case No. 65 of 2010)

JUDGMENT

Introduction

The Respondent herein, by a Plaint dated 12th November, 2009 and filed on 12th March, 2011 in the trial Court alleged that on or about 6th February 2009, along the Kangundo road at Kipawa trading centre, he was a lawful passenger travelling aboard motor vehicle registration number KBD 767W when the 2nd Appellant, who was the 1st Appellant's driver or authorized agent drove the said motor vehicle registration negligently, carelessly and/or recklessly, causing it lose control and collide with motor vehicle registration number KBA 176C, as a result of which the Respondent sustained serious injuries. The Respondent was the Plaintiff in the trial Court, while the 1st and 2nd Appellants were the 1st and 2nd Defendants therein.

The Appellants thereupon filed a joint Defence in the trial Court dated 20th May 2010, denying the allegations in the Plaint. The suit proceeded to full hearing, and on 7th September, 2012 a judgment was delivered in favour of the Respondent, in which the trial court awarded him Kshs 200,000/= as general damages upon finding the Appellants 100% liable for the accident that occurred on 6th February 2009.

The Appellants subsequently moved this Court through a Memorandum of Appeal dated 17th September 2012, wherein they raised the following grounds:

1. The judgment of the Learned Trial Magistrate does not meet the mandatory requirements of Order 21 Rules 4 & 5 of the Civil Procedure Rules 2010 and is therefore a nullity.
2. The Trial Magistrate erred in law and in fact in failing to address and to make a finding on the issue of ownership of motor vehicle registration number KBD 767 W, when the defendant had specifically denied ownership.

3. The Trial Magistrate erred in law and in fact in failing to address and to make a finding on the issue of primary evidence of injuries which was not presented.
4. The Trial Magistrate erred in law and in fact in failing to find and determine the issue of whether the alleged injuries suffered by the Plaintiff were as a result of the road traffic accident dated 6th February, 2009.
5. The Trial Magistrate erred in law and in fact in failing to address the issue that the plaintiff had no corroborating witnesses and no primary medical evidence of injury .
6. The Trial Magistrate erred in law and in fact in considering the evidence tendered by the Plaintiff and more particularly that the Plaintiff allegedly sustained injuries as a result of the road traffic accident of 06th February , 2009 attended at Kangundo District Hospital on 06th February , 2009 and was given a pain reliever, antibiotics and balm, and examined by PW2.
7. The Trial Magistrate erred in law and in fact in allowing the Plaintiff to produce the treatment notes in the face of the Defendants objection as the maker of the document is the one who produces the same as envisage under section 35 of the Evidence Act.
8. The Trial Magistrate erred in law and in fact in basing her findings on irrelevant issues not supported by evidence adduced or the applicable law, as clearly captured in her judgment.
9. The Trial Magistrate's decision is against the weight of evidence.
10. The Trial Magistrate erred in law and in fact in denying the Appellants their constitutional right to a fair hearing by unreasonably , unfairly and injudiciously allowing and considering evidence tendered by the Plaintiff with no objective consideration of the Defendants'/ Appellants ' case.

The Appellants are praying for orders that the appeal be allowed with costs, the judgment of the trial Magistrate be set aside and a proper finding be made, and that the Respondent's suit be dismissed with costs to the Appellants.

The Arguments

The Appellants and Respondent canvassed the present appeal by way of written submissions. Fredrick K. Kariuki of Kairu and McCourt Advocates for the Appellants filed submissions dated 22nd February 2017, while the Respondent's Advocates, Were & Oonge Advocates filed submissions dated 6th March 2017.

The Appellants in their submissions collapsed all their grounds to one ground and issue, which is whether the Respondent's claim is fraudulent. They submitted that the trial magistrate failed to analyze the issue of fraud at all despite police findings and recommendation thereof, and failed to carefully and critically interrogate and analyze the evidence of both DW1 and DW2 and this led him to a wrong conclusion of both fact and law.

The trial Magistrate's analysis of the evidence by DW1 and DW2 was faulted on the grounds that the Occurrence Book entry was irregular as it was never known who entered the Respondents name in the Occurrence Book, thus it was not possible to investigate an officer who was not known. Further, that there was no error on the part of the police officer making the entry in the O.B as stated by the trial magistrate and the inclusion of the Plaintiffs name was an afterthought and the trial magistrate ought to have disregarded the same.

It was also submitted that the Respondent did not call the makers of the discharge summary which was allegedly issued to him, neither did he call the doctor who filled the P3 form that was issued to him to identify the same and to testify on the injuries he sustained and also the Police abstract report was not produced. It was contended that these documents remained unidentified and unproduced. Reliance was

placed on the Court of Appeal case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR** where the question whether a document marked for identification should be considered as part of evidence and what weight should be placed on a document marked for identification was considered.

Lastly, it was urged that it was PW3's testimony that it is the P3 form which is issued prior to the issuance of the police abstract, and this procedure is a matter of public notoriety, but that in this case, the date on the police abstract, was 6th February 2009 while that on the P3 was 13th of May 2009, therefore raising doubt as to the validity of the documents. The Appellants accordingly urged this Court to re-examine, re-evaluate and review the award on quantum based on actual and current trends and court awards and to allow the Appellants appeal in its entirety and set aside the judgment by the trial magistrate.

The Respondent on his part submitted that the trial magistrate duly followed Order 21 Rules 4 & 5 of the Civil Procedure Rules 2010, by framing and analyzing the issues in the judgment and also gave reasons for delivering the Judgment in favour of the Respondent herein. Further, that the motor vehicle search and the police abstract were duly produced and marked as P Exhibit 2 to prove the Appellants' ownership of the accident vehicle, and during the trial the plaintiff confirmed to court the motor vehicle he was travelling in.

In addition that the trial magistrate correctly in determining the nature of injuries suffered by the Respondent considered the two medical reports filed by parties, and it was not mandatory to call makers of the discharge summary and the doctor who filled the P3 to testify on the injuries sustained by the Respondent.

It was further contended that the errors in relation to the variation on the dates in the Police abstract and P3 form was adequately explained by PW3. Lastly, it was submitted that the Appellants' submissions on fraud should be struck out because it is not a ground of appeal in the Appellants' Memorandum of Appeal and is an afterthought.

The Determination

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661**, **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**. The duty of this Court is therefore to examine and re-evaluate the evidence in, and findings of the trial Court, and to reach its own independent conclusion as to whether or not the findings of the trial Court as to liability and quantum of damages should stand.

I have considered the evidence given in the trial Court and the arguments made by the parties. From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellants are contesting the findings of the trial Court on liability and quantum of damages.

The Appellant in his grounds of appeal did question the involvement of the Respondent in the accident that is the subject of this appeal and injuries alleged to have been incurred. This is what he said he collapsed to one issue of a fraudulent claim. As the occurrence of the accident is not disputed, the issue in my view is whether the Respondent suffered any injuries from the said accident, and if so, whether he should be awarded any damages.

At the outset I must observe that in analyzing the evidence brought by the Respondent as regards his involvement in the subject accident and the injuries he suffered, I do agree and am guided by the decision of the Court of Appeal in **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR** that a document marked for identification is not part of the evidence that a trial court can use in making its decision, and such a document must be formally produced as an exhibit for it to have evidential weight.

The exhibits produced by the Respondent were the motor vehicle search and receipt and police abstract

which were produced by PW.3 (Police Constable John Kachoki N0.55615) from Kayole Police Station, and which showed that motor vehicle registration number KBD 767W is owned by the 1st Appellant and that an accident was reported on 7th February 2006 involving the said motor vehicle whose driver was the 2nd Appellant, who is indicated as having been charged with the offence of careless driving, and the Respondent is listed as having been one of the passengers in the vehicle in the police abstract.

PW 2, (Dr. Ciprianus Okoth Okere,) who was the doctor who examined the Respondent also relied on the contents of his medical report which was produced as Exhibit 5. His testimony as to the injuries the Respondent is also on the record of the trial Court. PW2 stated in this respect that stated that that he found the plaintiff to have sustained fractures of both the tibia and fibula on both legs and that he had referred to the P3 and the discharge summary from Kangundo District Hospital.

The evidence by PW2 was corroborated by the Appellant's own witness, DW 2 (Dr. Isaak Theuri), who stated that on physical examination he found the Respondent with scars on the left chin and right foot. He also did some x-rays on the Respondent and found healing fractures on both tibia of the left and right legs. He produced his medical report as D exhibit 2. His only area of dispute was that there was no fracture on the fibula. Upon re-examination he stated that he examined the Respondent 10 months after the accident.

The Appellants have questioned the authenticity of the Police Abstract and DW1 who was Corporal Henry Omboga produced a letter of revocation of the same as the D Exhibit 1, on account that the Respondent's name was not in the Occurrence Book in which the accident was reported.. However, the copy of the extract of the Occurrence Book attached to the said letter of revocation shows that the Respondent's name as indicated on the side, and legal basis was shown for the arguments that the procedure used in the Occurrence Book was erroneous. Similarly, no legal basis was laid for the argument that a police abstract is to be issued after the P3 form has been issued.

I therefore find that the Respondent did prove on a balance of probabilities that he was involved in the accident that occurred on 6th February 2009, while aboard motor vehicle registration number KBD 767W, and that he sustained injuries as a result.

On the quantum of damages awarded by the trial Court, it is an established principle of law that that the appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR and Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5).

In the present appeal, the trial magistrate awarded general damages of Kshs 200,000/= after considering a relevant judicial authority, and the Appellant has not brought any legal authorities to show a contrary position.

I therefore dismiss the Appellants' appeal for the foregoing reasons with costs to the Respondent.

It is so ordered.

DATED AT MACHAKOS THIS 4TH DAY OF AUGUST 2017.

P. NYAMWEYA

JUDGE