



IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO.250 OF 2005

(An Appeal arising from Judgment by Christine Meoli (Mrs.) –

SENIOR PRINCIPAL MAGISTRATE – NAIROBI CM. Civil Case No.636 of 2003

Delivered on 23rd March 2005)

LUCY KIMATHI WAMBUI.....APPELLANT

VERSUS

SAMUEL MUIRURI IRUNGU.....RESPONDENT

JUDGMENT

FACTS

On 2nd December 1999, the Plaintiff, Lucy Kimathi Wambui was travelling in motor vehicle, Reg. KJM 127 which was involved in an accident with the defendant’s motor vehicle Reg. KWP 540 and as a result she sustained serious injuries.

PLEADINGS ORAL EVIDENCE SUBMISSIONS

PLEADINGS

The Plaintiff filed Plaintiff on 9th February, 2001 and attributed negligence on the part of the defendant as particularized in paragraph 4 of the Plaintiff. The Plaintiff relied on the doctrine of *Res Ipsa Loquitur* and the provisions of Traffic Act & Highway Code. The Plaintiff relied on the principle of vicarious liability. The plaintiff sought general and special damages; costs and interest of the suit.

The Defendant filed defence on 14th July, 2001, he denied ownership of motor vehicle Reg.KWP 540. He attributed negligence to the Plaintiff and/or her driver as the cause of the accident with motor vehicle KJM 127.

ORAL EVIDENCE

Dr P. M. Wambugu examined the Plaintiff on 14th February, 2003 and observed;

1. Compound committted fracture of left radius/ulna bones
2. Fracture of wrist joint

3. Small cut on right occipital region

The X-rays confirmed the fracture muted but forearm mal united leading to deformity and stiffness. She was disposed to osteoarthritis of 2 joints.

PW2, the Investigation officer, Ag IP Mary Kiarie confirmed issuing Police Abstract (*P.Exhibit 3*) to the Plaintiff. She left the station while the matter was forwarded to State Counsel for action.

PW 3, Lucy Wambui Kimathi, the Plaintiff travelled in motor vehicle Reg. KJM 127 belonging to Kaguni Mwangi on Nyeri – Nairobi road. As they approached Thika, near Blue Post hotel, their vehicle came down the slope and ahead was a lorry, the driver could not swerve as there were other vehicles, and on the other side the wall, they rammed into the rear of the lorry from the driver's side. The driver died. PW'3's hands were broken, she sustained cut on the right eye and was unconscious. She produced medical documents on treatment; X-ray, drugs and physiotherapy and proved special damages. She conducted search at the KRA- Motor vehicle department and obtained a copy of record (*P.Exhibit 3*) confirming the defendant as the owner of motor vehicle Reg.KWP 540.

PW4, Elizabeth Muthoni Mwangi travelled with the Plaintiff on the said day in the same vehicle. As they approached Blue Post on Thika highway, they found a stationary lorry which had nothing to indicate it was stationary, their vehicle rammed into the lorry as there was nowhere to swerve to.

PW5, Cecilia Wangui Waigwa a car hire operator confirmed she was hired by the Plaintiff to avail a vehicle and driver who took her from home to clinic at

Kenyatta hospital and back. She produced the receipts (*P.Exhibit 16 &17*)

DW1, Charles Muiruri Mwati drove motor vehicle KWP 540 from Murang'a headed to Thika. On nearing Blue Post, he heard screeching brakes behind his vehicle and hooting. He found motor vehicle Reg. KJM 127. He denied his vehicle was stationary and said he drove slowly.

SUBMISSIONS

The Plaintiff submission on liability was to hold the lorry driver liable for the accident, as he was stationary and did not indicate, thus the driver of KJM 127 rammed into his lorry.

On quantum relying on relevant authorities, the Plaintiff sought Ksh. 1,000,000/-

JUDGMENT

The learned magistrate found the Plaintiff did not prove her claim under the tort of negligence pleaded in paragraph 4 of the Plaint. Of importance, the particulars of negligence pleaded were direct opposite of the commission or omission the driver was deemed liable of. The plaintiff did not plead the lorry was stationary at the time, or that it did not show any light , hazard to indicate it was stationary or moving slowly.

APPEAL

The memorandum of appeal and record of appeal were lodged on 20/4/2005.

The matter was among those advertised and hearing dates served through the Deputy Registrar during the High court Civil service week. The Hearing of the appeal proceeded under **Order 42 Rule 5** of the **Civil Procedure Rules 2010**.

Ms Ndungu for the appellant argued the grounds of appeal in court.

The grounds of appeal combined were as follows;

Grounds 1, 3, 5 & 8

The Trial Court erred in law and fact by finding the defendant not negligent, ignoring evidence of PW3 & 4 who were eye witnesses, that lorry Reg KWP 540 was stationary and had no hazard indication or any other form of light to indicate its presence in the path of motor –vehicle KJM 127. The lorry was on a public road without due care and attention to other road users.

Counsel submitted that PW3 & 4 were credible witnesses; eye-witnesses to the accident and their testimony were not rebutted.

Ground 4

The Trial Court preferred uncorroborated evidence of DW1 and introduced new evidence;

“we cannot in the absence of credible evidence conclude that driver of KJM 127 was unable to see the defendant’s lorry due to some failure on the part of its driver.”

Ground 6

The Trial failed to consider the fact that the lorry blocked the road, the driver of KJM 127 would not have moved forward if the defendant’s driver provided light, indicator that the lorry was moving slowly or had a problem.

Ground 7

The Trial Court failed to consider the defendant’s own admission of contributory negligence in paragraph 4 of the defence filed on 14th June, 2001.

Ground 9

The Trial Court applied the wrong burden of proof, used the strict one of proof beyond reasonable doubt contrary to the principle of negligence.

The Court did not consider evidence in totality; testimony of the Police Officer and PW 2 & 3.

The Trial Court ignored this evidence and upheld that of DW1 which was not corroborated by the turn boy who was not called to give evidence.

The Trial ignored the Highway Code, the defendant’s driver did not put on hazards or indicators, to alert other road users.

LAW

As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue.

That is the purport of Section 107 (1) of the Evidence Act Cap 80, which provides:

“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.”

There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act, thus:

“109. 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”.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

The two sections carry forward the often repeated evidential adage: “he who asserts must prove”.

Cumulatively, he who alleges must prove. A party is bound by its pleadings, what is pleaded is proved on a balance of probability through evidence.

Selle & Another vs. Associated Motor Co. Ltd & Others (1968) E.A. 123.

This being a first appeal, it is the duty of this court to consider and re-evaluate the evidence presented before the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses testify.

The appellant filed grounds of appeal 1, 3, 5 & 8 that the evidence adduced was not properly evaluated, it was corroborated and consistent yet the Court relied on the evidence of DWI which was not corroborated. On evaluation I find the evidence adduced cogent on the motor vehicle KWP 540 moving slowly or stationary and not alerting other road users by light or hazard and obstructing use of the road. Unfortunately this not what was pleaded; instead it is the careless and reckless manner of driving that was attributed as negligence but not proved by evidence on record.

In considering whether the trial court properly arrived at a finding on liability, it must be borne in mind that an appeal court;

“will not normally interfere with a finding of a fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles” - EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA -VS- DUNCAN MWANGI WAMBUGU (1982-1988) 1 KLR, 278.

The tort of negligence one must prove duty of care, the breach of duty being act in commission or omission that is the direct cause of injury, damage or loss to the Plaintiff.

In the instant case, the Court considered the pleadings. In the Plaint at paragraph 4, the particulars of negligence of the defendant or his authorised driver, servant or agent were outlined as follows;

‘Driving at a speed that was too fast in the circumstances

Driving without due care and attention to other road users and to the passengers of motor vehicle reg. KJM 127

Failing to exercise or maintain proper or effective control of motor vehicle Reg. KWP 540

Failing to exercise due diligence while driving the said motor vehicle.

Failing to stop or slow down, to swerve or in any way so to manage or control the said motor vehicle Reg. KWP 540 as to avoid the said accident.

Failing to adhere to the Highway Code.’

The Plaintiff set out in her evidence to prove these particulars of negligence with regard to the manner of driving and not in form of obstructing other road users.

The testimony of PW 2, said the lorry was moving slowly down the slope and the saloon car rammed into

the lorry rear. PW 3 testified the lorry Reg. KWP was ahead of them, it was stationary inside the road. PW 4 said they found a stationary lorry which had nothing to indicate it was stationary and the lorry driver did not indicate, nor put hazard lights or move the lorry off the road. DW 1 testified he drove lorry Reg. KWP 540 on Thika Highway from Muranga and on nearing Blue Post he had screeching sound and brakes at the rear of the lorry.

The Scene – visiting Officer PW2, testified and claimed to send the file to State Counsel for advice. The police abstract indicated the case was under investigation, it is not clear whether sketch plan was drawn, statements of witnesses obtained on investigation report prepared. Therefore, PW2 evidence was inconclusive as to who was to blame for the accident.

The evidence reveals facts in relation to obstruction and not the mode or manner of driving that was negligent so as to cause the accident.

The evidence on record confirms negligence in form of the lorry moving slowly or being stationary on the road, with no indication, hazard lights and not the form or manner of driving. From the facts and circumstances of the case on record I find no fault with the findings of facts by the Trial Court. The evidence on record is at variance with the pleadings on particulars of negligence which depict negligence on the part of the defendant based on the manner of driving; lack of control, due diligence and failing to stop, slow down, swerve and instead driving at a speed that was too fast in the circumstances.

The evidence on record seems to suggest the defendant's authorised driver was driving slowly or was stationary. At 7 pm it was dusk to dark and visibility must have been poor. Yet the defendant's driver did not indicate, put on hazard lights or put up any other sign to road users. Despite the evidence, the court finds that it does not prove the particulars of negligence outlined and therefore under the Evidence Act, the Plaintiff did not discharge the Burden of proof of the pleadings on a balance of probability.

In the case of **Francis K. Righa vs Mary Njeri (Suing as representative of the estate of James Kariuki Nganga) 2014 eKLR** Wendoh J observed;

“Negligence is a question of fact whereby the plaintiff has to adduce evidence to prove that the defendant was negligent, that he failed to that degree of care which was reasonable in all the circumstances of the case or that he failed to act as a reasonable man would have acted. Then if the defendant did ‘owe a duty of care’ we can call his negligence a breach of that duty (see Accident Compensation and the Law P.S. Atiyah 2nd Ed).

Contending that negligence as pleaded by the respondent does not automatically impute liability on him, the appellant has submitted that the respondent did not discharge the burden placed on her of proving the allegations levelled against the appellant. Maintaining that none of the particulars of negligence levelled against the appellant were proved, cited the decision in **Jane Mwikali vs. Akamba Public Service HCC NO.79 of 1991** (unreported) in support of his argument that the respondent was legally obligated to prove all allegations of negligence levelled against him. In the **Mwikali's** case(*supra*) Mwera J., (as he then was) dismissed a suit because particulars of negligence were not proved.

The Court is sympathetic to damage, loss and injury the accident caused the parties but in the absence of evidence to prove on a balance of probability the particulars of negligence pleaded, the Court will not visit liability on the defendant.

On the issue of liability by the defendant through the principle of vicarious liability, and DW1 was the authorised driver of the defendant who is the registered owner of motor- vehicle Reg. KWP 540. There was therefore sufficient relationship of employer and employer or principal and agent or master and servant. If then the driver, DW1 was liable, liability would attach to the defendant.

Grounds 4, 6, 7 & 9 are directly related to the substance of the manner of driving. The Evidence of DW1 was uncorroborated but the evidence was not relevant to the holding of the Court; the evidence and pleadings do not tally.

Ground 6 that the Court failed to consider the lorry blocked the road, the evidence is cogent but particulars of negligence pleaded were of the manner of driving not obstructing.

Ground 7 the Court did not consider admitted contributory negligence. The Court finds the issue of contributory negligence would arise where the particulars of negligence as pleaded are proved.

The Burden of proof used was not proof beyond reasonable doubt but a balance of probability but the evidence proved what was not pleaded.

The Court finds on evaluation of evidence on record and the pleadings, the evidence is at variance and the burden of proof on the Plaintiff as envisaged in the Evidence Act is not discharged and liability for the accident cannot be on the defendant due to action of driving by the authorised person DW1

The Court upholds the reasoning and judgment of the learned Magistrate and dismisses the appeal with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2014

MARGARET MUIGAI

JUDGE

In the presence of:

Counsel for the Appellant.....

Counsel for the Respondent.....