



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 302 OF 2007

ISAAC MUNGAI KAMAU.....APPELLANT/ORIGINAL PLAINTIFF

VERSUS

DANIEL MUGURO NJOROGE.....1ST RESPONDENT

EDWARD IRUNGU NGANGA.....2ND RESPONDENT/ORIGINAL DEFENDANTS

(Being an appeal from the Judgment and order of Hon. S.B.N. Atambo Esq, Resident Magistrate Muranga Law Courts

in PMCC No. 26 of 2006 delivered on 3rd April 2007)

J U D G M E N T

I. INTRODUCTION

1. This is a running down cause whereby the appellant/original plaintiff, a male adult aged 41 years old in the year 2005 was run down by a motor vehicle registration number KAN 469X Toyota Hiace that was registered in the name of the second respondent/original defendant No. two, Edward Irungu Nganga and driven by the first respondent original defendant number one, David Muguro Njoroge.

2. The appellant sued the respondent in negligence and prayed for damages as a result of injuries sustained due to the said accident. The injuries sustained being:

i) *Bruises on the right side of the scalp.*

ii) *Injury to the mouth.*

iii) *Bruises to both hands.*

3. After trial, the Hon. Magistrate dismissed the case on grounds that the appellant was not able to establish his case against the defendant/respondent herein. A possible award for injuries sustained was asked by the appellant of Ksh. 220,000/=. The trial magistrate stated if per chance the case was successful, she would have awarded Ksh. 40,000/=.

4. Being dissatisfied with the dismissal of the suit, the appellant/original plaintiff filed appeal to this court.

II APPEAL

5. The memorandum of appeal stated that:

5.1 *The learned Resident Magistrate erred in law in her finding that the appellant's evidence that he was standing off the road when the accident happened was a fatal departure from the pleading in the plaint which stated that he was standing off the road and that it required an amendment of the plaint.*

5.2 *The learned magistrate erred in law in finding that the appellant's evidence needed corroboration to support by other witnesses who were with him, whereas there is no such legal requirement.*

5.3 *The learned Resident magistrate erred in law in dismissing the appellant's case whereas the respondent admitted that the accident occurred about in the centre of the road near a busy market where there were speed bumps. Had the learned Resident magistrate addressed this fact, the court would have found the respondents liable to some condition.*

5.4 *The learned Resident Magistrate erred in law in not making an adverse inference over the failure by the respondent to plead and call independent evidence of the appellant's alleged drunkenness on which their defence critically hinged.*

5.5 *The learned Resident Magistrate erred in law on dismissing the appellant's case for alleged defect in the verifying affidavit to the plant for the reason that the year indicated was wrong. The learned resident magistrate ought to have found that the respondents were stopped from raising the issue in their submissions after failing to raise the same either as a preliminary objection or during the hearing of the case at which stage the appellant would have responded appropriately by seeking for leave to file a fresh replying affidavit.*

5.6 *the Learned Resident Magistrate assessment of general damages would have been awarded to the appellant was so manifestly low, even lower than what the respondent had submitted for, as to show a wrong exercise of discretion.*

6. The appellant prayed the appeal be allowed, the judgment of the lower court be set aside and in its place, this court be pleased to allow the suit in the lower court, apportion liability as necessary and reassess general damages upwards. The appellant prayed for the costs of the appeal and costs in the subordinate court be awarded to him.

7. The arguments put forward by the appellant is that the trial magistrate erred in not finding for his clients on grounds that the respondent admitted to the full liability. Indeed, one of the witnesses stated in the proceedings:

Defendant's Witness No. 1

“I suddenly saw someone on [the] road about 5 metres. I tried to avoid hitting him. [I] swerved and stopped on [the] opposite direction that, to the left. He was hit slightly ...”

8. The injuries sustained but not considered by court included being unconscious.

9. In reply, the respondent stated that the pleadings before court was wanting. It could not sustain and support the evidence to court. This was seen in the verifying affidavit being dated in the year 2005 and the suit filed in the year 2006. The evidence before the trial magistrate was contradicting and unreliable.

10. Indeed, this court on perusal of the evidence saw the trial magistrate finding contradictory evidence not only on the part of the appellant’s case but also the respondent’s case.

11. The trial magistrate dismissed the suit.

III OPINION

12. It is without a doubt the pleadings filed by the appellant in the subordinate court was wanting. They were filed in a hurry and had some mistakes that may have been rectified by way of amendment. The plaintiff did not take advantage of this.

13. In the authorities placed before me which the Court of Appeal found there to be differences between the pleadings and evidence, they ordered to be a retrial and the case began De Novo:

Pushpa d/o Raojibhai M Patel

– Vs –

The Fleet Transport Company Ltd

(1960) E.A. 1025

“It is a statutory and necessary rule that a party is bound by his pleadings, but if particulars are given in undue details and what is passed varies from then inwhich are immaterial. It remains the duty of the court to see that justice is done and leave to award will be given at any stage; if on the other hand, the particulars given have misled the defendant or led him to shape his case in a certain way that would be a different matter.

...appeal allowed. Order for retrial denovo. The appellant given leave to amend her pleadings so as to include.....”

14. The case law of

Associated Electrical Industries Ltd – Vs – William Otieno

HCCA 421/1998

Visram J

Where the Hon. Judge agreed that parties are bound by their pleadings. That the respondent pleaded one thing and sought to prove another. In such a situation, the defendant/appellant was highly prejudiced.

The magistrate, the Hon. Judge found/noted the disparity between what was pleaded, then went ahead to write judgment. The appeal was allowed and the judgment was set aside.

15. In the current appeal before court, the trial magistrate found discrepancy that could not convince him/her to allow the prayers on a balance of probability.

16. On perusal of the evidence and pleadings before court, I noted that the appellant's name alone is known as Isaac Mungai Kamau. An application to amend this name to read Isaac Mungai Kimani should have been made with leave of the court after pleadings are closed. The plaint should have been amended by striking out with a red underlining of the correct amended name.

17. The police abstract, the P3 forms, the documentary evidence such as the medical report have the name of Isaac Mungai Kimani.

18. Written submission in the subordinate courts, the memorandum of appeal the skeletal arguments presented to court in writing have the name of one Isaac Mungai Kamau.

19. This appeal is not curable. The discrepancy is enormous.

20. The **Pushpa d/o Raojibha M Patel** (supra) case above, would not be of much assistance herein.

21. I would find that, the trial magistrate conclusion that the appellant failed to prove their case on the balance of probability failed, to rectifying the verifying affidavit as per the case law of **Delphis Bank Ltd – Vs – Aside (K) Ltd & Another CMCC 83/03**. (I believe this to mean withdrawing the verifying affidavit and filing a new one.) The trial magistrate dismissed, the case is the current position.

22. This appeal therefore is dismissed. The decision of the trial magistrate is upheld.

23. There will be costs of the appeal and costs in the subordinate court awarded to the respondent original defendant.

DATED THIS 18TH DAY OF OCTOBER 2011 AT NAIROBI

M.A. ANG'AWA
JUDGE

Advocates :

i) *J N Mbutia instructed by J N Mbutia & Co Advocates for the Appellant/original plaintiff*

ii) *A. Okongo instructed by Kinyanjui & Njuguna & Co Advocates for the Respondents/original defendants*