Mabwete v West Kenya Sugar Company & another (Civil Appeal 22 of 2022) [2025] KEHC 3453 (KLR) (20 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3453 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 22 OF 2022

PJO OTIENO, J

MARCH 20, 2025

BETWEEN

JACOB LUNANI MABWETE ..... APPELLANT

AND

WEST KENYA SUGAR COMPANY ..... 1ST RESPONDENT

JOSEPH MWANGI ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Willian Lopokoiyit (RM) in Kakamega CMCC No. 484 OF 2015 delivered on 28th May, 2021)

JUDGMENT

Background of the Appeal

1. By way of a plaint dated 21st December, 2015, the appellant moved the trial court for special and general damages, costs and interests of the suit.

2. The appellant's case was that on or about the 13th day of February, 2015 he was aboard the 2nd respondent's Motor Vehicle Registration Number KAP 552J, Toyota matatu, along the Kakamega Webuye road when on reaching Kakamega Forest, the 2nd respondent's motor vehicle and that of the 1st respondent registration number KAV 223X/ KTCB 762H were so negligently driven and controlled leading to a collision, a result of which he sustained serious personal injuries. The particulars of negligence by both were pleaded just as particulars of injuries and damages.

3. The 1st respondent in a statement of defence dated 9th February 2016 denied the appellant's claim and averred that if at all the accident occurred, then it was occasioned by the respective and contributory negligence of the Appellant and the 2nd respondent. The statement of defence pleaded the particulars of such negligence and denied the particulars assigned to it.

4. The 2nd respondent in a statement of defence dated 10th January 2016 equally denied the appellant's claim and averred that if at all the accident occurred, it was occasioned by the negligence of the appellant and the 1st respondent. The 2nd Respondent equally attributed the causation of the accident, if at all, to the respective and contributory negligence of the Appellant and the 1st Respondent.

5. In a judgment of the trial court delivered on 28th May, 2021 and the court found and held that the appellant had failed to prove how the respondents were involved in the accident. it was also held that the ownership of the involved motor vehicles was not proven and his case was thus dismissed.

6. Aggrieved with the decision of the trial court, the appellant lodged an appeal vide memorandum of appeal dated 30th March, 2022 seeking orders to have the decision by the trial court set aside. The Appellant urges this court make a finding on both liability and quantum and to equally award to the Appellant costs of the appeal and those of the lower court. The appeal is premised on the following grounds;

    a. That the learned trial magistrate erred in law and fact in holding that the appellant had not proved his case on a balance of probability.

    b. That the learned trial magistrate erred in law and fact in holding that the appellant had not proven ownership of the motor vehicle despite the production of the police abstract which clearly indicates the owners.

    c. That the learned trial magistrate erred in law and fact in holding that Peter Maina Mahinda was the owner of KAP 552T while he was the driver of motor vehicle KAP 762H.

    d. That the learned trial magistrate erred in law and fact in holding that the appellant had not proved contribution of the 2nd respondent to the accident when there was clear evidence that it was pulled a string across the road.

    e. That the learned trial magistrate erred in law and fact and failed to appreciate the evidence before him and arrived at a wrong decision.

7. Even though the court directed that the appeal be canvassed by way of written submissions only the appellant's submissions are on record. The failure by a party to file submissions by itself relieves the court of its duty as first appellate court in the matter. The court must proceed by way of re-hearing.

Appellant's Submissions

8. Contrary to the finding of the trial court that the owner of motor vehicle registration number KAP 552T was Peter Maina who was not a party to the suit, the Appellant submits that the police abstract captured the said Peter Maina as the driver and not the owner indicating that ownership of the suit motor vehicles was never contested. He argue that according to the police abstract, the owner of motor tractor registration number KAP 552T is indicated as Joseph Mwangi T/A North ways while the owner of motor vehicle registration number KAV 223 X is indicated as West Kenya Sugar Company Limited. It is the Appellant's contention that since the respondents did not contest the ownership status as captured in the abstract, they cannot deny ownership. In that regard, he cites the case of Benard Muia Kiloroo v Kenya Fresh Produce Experte (2020) eKLR, Mega Industry Ltd v Jane Jerotich (2020) eKLR and Lake Flowers v Cila Frankly Nganga (suing as the personal respresentative of the estate of Florence Agwingi Ogam (deceased) Nakuru Civil Appeal No. 210 of 2006. For the proposition that where a document produced is a police abstractor certificate of official search without challenge from the Respondent, the proof on balance of probability is met.

9. On the issue of liability, the appellant contends that the respondents are equally to blame. It is submitted that both the evidence of PW1 and PW3 that the 2nd respondent's motor vehicle rammed into the wire pulling the tractor across the road. That according to PW1, there was no sign that there was an accident ahead and which position was confirmed by PW2 on reexamination.

10. On quantum, the appellant submits that he suffered a cut wound to the forehead, blunt injury to the chest and cut wound to the right chin which Dr. Andai described as moderate soft tissue injuries. For the injuries, the appellant proposes general damages in the sum of Kshs. 300,000/ and special damages of Kshs. 7,000/. To support his claim on the general damages the Appellant cites the case of Michael Okello v Priscilla Atieno (2021) eKLR where the claimant was awarded a sum of Kshs.225,000 for soft tissue injuries.

Issue for Determination

11. This court has considered the grounds of appeal, the proceedings of the lower court and the submissions by the appellant and discerns the issue for determination to be whether the appellant proved his case on a balance of probabilities, and if yes, what ought to be the apportionment of liability between the parties and quantum of damages payable.

Analysis

12. The court has looked at the judgment by the trial which dismissed the appellant's suit mainly on the ground that he had failed to prove that both the 1st and 2nd respondents were owners of Motor Vehicles Registration Number KAV 22X/KTCB 762H and KAP 552J respectively.

13. In this appeal, the appellant contends that the police abstract produced at trial confirmed the ownership status of the two motor vehicles and the court has read the record including the abstract and confirm that that is the position.

14. The court of Appeal in Joel Muga Opinja vs East African Sea Food Limited (2013) eKLR reiterated its position in the case of Ignatius Makau Mutisya vs Reuben Musyoki Muli where it was stated that;

> " We agree that the best way to proof ownership would be to produce to the court a document from the registrar of motor-vehicle to show who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, the contents cannot be later denied." (emphasis provided)

15. Even though both respondents did not admit ownership of the motor vehicles both failed to testify at all and thus whatever they alleged in the statements of defence remained but allegations with no evidentiary value. The court thus finds the holding by the trial magistrate that ownership of the said motor vehicle was not proved to be contrary to the information in the police abstract. That finding by the trial court affronts the evidence on record and cannot be upheld but must be upset. When the respondents failed to lead evidence, the pleadings filed by them remained mere allegations without any probative value while the evidence by the appellant remained uncontroverted.

16. On liability, the burden of proof that the accident was caused by the negligence on the part of the Respondents rested squarely with the Appellant. It was incumbent upon the appellant to prove existence of facts on occurrence of the accident and that it was as a result of negligence on the part of the respondents. In the instant, it was never disputed that the accident occurred and that it involved three vehicles; registration No KAV 223X and motor tractor KTCB 762H, which was hauling a trailer

ZC 3206, both belonging to the 1st respondent, and motor vehicle KAP 552J, belonging to the 2nd respondent, in which the appellant was aboard as a passenger.

17. The entire case was founded on the Appellant's testimony supported by that of the clinical officer and PW3 who stood in for the investigation officer. The only evidence on how the accident occurred was only for the Appellant. Having proved the ownership of the vehicles on preponderance, the Appellant gave uncontroverted evidence that the motor vehicle he boarded was at a speed and rammed into a wire raised across the road between the two motor vehicles owned by the 2nd Respondent. He added that there was no sign that the road was being obstructed.

18. There was, thus, prima facie evidence on proof of negligence on part of the 2nd Respondent because it is an offence and lack of care for anybody to obstruct a public road without a warning sign to other road users. As for the 1st Respondent, it was negligent of him to drive the said motor-vehicle in a manner that it rams onto an obstruction negligently placed on the road.

19. The trial court in dismissing the claim held that the Appellant had failed to prove how the respondents were involved in the accident that occasioned him harm. While the onus was always upon the Appellant to prove its case, the court takes cognizance of the provision of Section 109 of the *Evidence Act* that provides;

> " The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case."

20. The above provision when applied to the facts and circumstances of this case, the court finds that it is the law that a prudent and discerning driver of any motor vehicle is never expected to obstruct a public road without warning to other road users. Further, a prudent and observant driver never rams onto an obstruction on the road merely because it is unlawfully there.

21. The court thus finds and holds that both the drivers/operators of motor vehicle registration No. KAV 223X and motor tractor KTCB 762H had a duty to guard against the possibility of any danger which was reasonably expected in the circumstances of their winch obstructing the road by mounting warning signs. They failed in that duty.

22. On the one hand, the driver of the aboard motor vehicle KAP 552J, having been in control of the same being a mobile machine capable of causing damage if negligently managed, was obliged to maintain some level of responsibilities in his conduct as to the safety of passengers on board. He was expected to be on the watch-out and be observant on any obstruction coming on his path and taking the necessary evasive moves. He never did so.

23. By failing to give any response to the direct evidence offered by the appellant on the proximate cause of the accident, the respondents left the court with no other interpretation but that the evidence given by the appellant was true. See Mount Elgon Hardware Ltd vs United Millers CA No. 19 of (1996) eKLR.

24. The court holds that the driver of the vehicle in which the Appellant boarded, having been in control of the motor vehicle failed to keep a proper look out hence colliding into the wire which was equally negligently being pulled across the road. The court finds both Respondents to have been equally to blame and apportions liability between them at the ratio 50:50.

25. The court in the case of Republic vs PS in Charge of Internal Security ex parte Joshua Paul [2013] eKLR on apportioning liability on contributory negligence held that;

> " Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.

26. Taking guidance from the above decision the court finds that the respondents are jointly and severally liable to the appellant.

27. The court further finds that even after dismissing the suit, the trial court was duty bound to assess damages that would have been due. The trial court by failing to assess the damages made an error in principle which this court as a first appellate court must correct by pronouncing so then making an award.

28. In determining the general damages payable, the court notes that the medical report prepared by Dr. Charles M. Andai revealed the appellant to have suffered a cut wound on the forehead, a blunt injury to the chest and a cut wound on the right chin. He identified the injuries as moderate soft tissue injuries. The appellant proposes damages in the sum of Kshs. 300,000/ for his injuries citing the case of Michael Okello v Priscilla Atieno (2021) eKLR where an award of Kshs.225,000 was made for comparable injuries.

29. The court takes guidance from the above cited case, on comparable awards, and the appreciates the disclosed injuries suffered by the appellant; being blunt injury to the head, a blunt injury to the forehead, a blunt injury to the neck, a blunt injury to the chest with fracture of the 1st anterior rib, bruises and blunt injury to the left shoulder, upper limbs and a cut wound and blunt injury to the right lower limb, as the yard stick in assessing general damages.

30. Assessment of quantum of damages is known to be a difficult task. In P. J. Dave Flowers Ltd v David Simiyu Wamalwa Civil Appeal No. 6 of 2017 [2018] eKLR where the court held as below;

> " ... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter."

31. In assessing the damages payable to the appellant, the court is guided by the past decisions where the plaintiffs suffered comparable injuries. This court chooses the decision in Maimuna Kilungwa vs Motrex Transporters Ltd [2019] eKLR Makueni Civil Appeal No. 11 of 2017 where the court awarded Kshs.125,000/= for soft tissue injuries to the neck, left ear and left shoulder.

32. The court is further persuaded by the decision in Elizabeth Wamboi Gichoni v Benard Ouma Owuor [2019] eKLR where the Plaintiff sustained suffered deep cut wound leaving keloids, two deep lateral

cuts on the neck leaving keloids, multiple bruises on the chest and chest injuries and cut wound on the buttocks. He also had deep bruises on the left hand. The trial court assessed general damages for pain and suffering in the sum of Kshs.120,000/- and this was reduced to Kshs. 175,000/- on appeal.

33. Taking into account the passage of time from the date of judgements and awards cited above as well as the incidence of inflation and its effect on money value, the court assesses the general damages to the Appellant in the sum of Kshs.200,000/=.

34. On special damages, the law requires that special damages must be specifically pleaded and proved. The court appreciates that the Appellant pleaded a sum of Kshs.7,000 but the only receipt produced by the appellant was one for the preparation of the medical report whose cost was Kshs. 5,000/. That is the only damage the court finds proved. The Appellant is awarded that sum.

Rendition and Final Orders

35. Accordingly, for the reasons set out above, this appeal succeeds in that liability is apportioned between the respondents in the ratio 50:50. The respondents are adjudged jointly and severally liable to the appellant.

36. The Appellant is awarded general damages of Kshs.200,000/ and special damages of Kshs 5,000/. The appellant is equally awarded the costs at trial and in this appeal.

37. In addition, the appellant gets interests on damages and costs. The interest on special damages shall be computed from the date of the suit while those on general damages and costs shall be computed from the date of the judgement of the lower court till payment in full.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF MARCH, 2025.

Patrick J O Otieno

Judge