Gitiche v Wanjui & another (Civil Appeal E559 of 2022)
[2024] KEHC 1118 (KLR) (Civ) (12 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1118 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E559 OF 2022

DAS MAJANJA, J

FEBRUARY 12, 2024

BETWEEN

RICHARD WACHIRA GITICHE ..... APPELLANT

AND

HARON WANJOHI WANJUI ..... 1ST RESPONDENT

IAN GONJI M'MBOGA ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. G. Sogomo, PM dated 22nd July 2022 at the Nairobi Magistrates Court, Milimani in Civil Case No.2860 of 2019)

JUDGMENT

1. This is an appeal against the judgment of the Subordinate Court dismissing the Appellant's suit against Respondents.

2. According to the Plaint dated 29. 04.2019, the Appellant was a fare paying passenger in motor vehicle registration number KBY 671F owned by the 2nd Respondent when the 1st Respondent drove it negligently causing it to lose control and injure the Appellant on 27.09.2018. As a result of the injuries, the Appellant made a claim for general and special damages. The Respondents, in their defence, denied that they were to blame for the accident.

3. At the hearing, the Appellant (PW 1) testified and called Corporal Julius Kimathi (PW 2). The Defendant called PC Richard Ndirangu (DW 1). After considering the testimony of the witnesses and other material on record, the trial magistrate concluded that the Appellant had failed to prove that the Respondents were liable for the accident which resulted in his injuries. It is this finding that has precipitated this appeal.

4. In his Memorandum of Appeal dated 22.07.2022, the Appellant complains that the trial magistrate erred in holding that the Appellant had not rebutted the Respondent's expert testimony and that the trial court failed to appreciate the testimony of the Appellant's expert witness. That the trial magistrate failed to appreciate that the Appellant had proved his case against the Respondents and that the trial magistrate failed to consider the Appellant's evidence, submissions and authorities.

5. Whether the Appellant proved his case or not is a question of fact hence this court, as the first appellate court, has the duty to examine all the evidence presented before the Subordinate Court and come to an independent determination whether the trial court's judgment should be upheld always making an allowance for the fact that it neither saw nor heard the witnesses testify (Selle v Associated Motor Boat Co. Ltd (1968) EA 123).

6. The Appellant testified that he was a lawful passenger in the subject motor vehicle. On the material day, he had just entered the motor vehicle and was yet to settle on his seat when it suddenly drove off causing him to fall off whereupon the vehicle trample on his left foot and left arm on the shoulder. PW 2 produced the police abstract and told the court that the investigating officer had been transferred. He confirmed that he did not visit the scene of the accident and told the court that the Occurrence Book did not attribute any blame to anyone. DW 1 told the court that the Appellant was blamed for the accident by the driver who reported the accident and stated that a pedestrian was running towards a moving vehicle whose door had closed and that he slipped and fell off injuring himself. According to DW 1, the pedestrian was hanging from the moving vehicle before falling off.

7. All the witnesses confirm that the accident took place involving the Appellant. What is in issue is whether the Respondents were to blame for the accident. Based on the available testimony, the trial magistrate accepted the testimony of DW 1 as an expert and held that the Appellant had failed to call evidence to rebut this expert testimony.

8. I do not think there is any dispute that the Appellant bore the burden of proving that the Respondents were liable on the balance of probabilities. The fact that an accident took place is also not disputed. The only direct evidence of what took place is that of the Appellant. His testimony was not controverted by any other direct evidence. The testimony of DW 1 was hearsay as he was not present at the scene of the accident when it took place. Further, his testimony based on the statement of a third party who purportedly blamed the accident on the Appellant was inadmissible and contrary to section 62 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provides that all facts, except the contents of documents, may be proved by oral evidence. Section 62 goes on to provide that oral evidence must be direct evidence which means:

    a. with reference to a fact which could be seen, the evidence of a witness who says he saw it;

    b. with reference to a fact which could be heard, the evidence of a witness of a witness who say he heard it;

    c. with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

    d. with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case may be, hold it on those grounds:

9. It is therefore clear that the trial magistrate erred in disregarding the oral and direct testimony in favour of the hearsay testimony of DW 1. Moreover, the trial magistrate wrongly characterised the testimony of DW 1 as that of an expert. Section 48 of the *Evidence Act* permits the court to receive the opinion of experts. It provides as follows:

48. Opinions of experts

(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

(2) Such persons are called experts.

10. The Court of Appeal in Mutonyi v Republic [1982] KLR 203, 21, Potter JA elucidated the nature and application of expert evidence as follows:

> Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.
>
> Section 48 of the *Evidence Act* (Cap 80) provides that where, inter alia, the court has to form an opinion upon a point "of science, art, or as to identity or genuineness of handwriting or finger or other impressions", opinions on that point are admissible if made by persons "specialist skilled" in such matters.
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> In Cross on Evidence 5th edition at page 446, the following passage from the judgement of President Cooper in Davie versus Edinburgh magistrates (1933) SC 34,40, as scenting the functions of expert witnesses:
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> > "Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts put in evidence."
>
> So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:
>
> 1. Establish by evidence that he is specially skilled in his science or art.
> 2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
> 3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.

11. In this case, DW 1 did not meet threshold of being an expert within the meaning of section 48 aforesaid. His credentials and special skills in the science of road traffic accidents was not established. In fact, he did not present himself as an expert. As I have stated elsewhere, his testimony on the facts and circumstances was inadmissible hearsay and without laying any foundation as to his expertise, his opinion on the cause of the accident was irrelevant.

12. In the final analysis, the Appellant's testimony as to the circumstance of the accident was uncontested. By driving off the motor vehicle suddenly, without care and attention to the fact that the Appellant as a fare paying passenger had not downed on his seat, the Respondents' driver was negligent. I find and hold the Respondents were fully liable for the accident that resulted in the Appellant's injuries.

13. I allow the appeal on the following terms:

    a. The judgment of the Subordinate Court dated 22.07.2022 is set aside to the extent that the finding on liability is substituted with a finding that the Respondents are jointly and severally liable for the accident resulting in the injuries sustained by the Appellant.

    b. For avoidance of doubt and subject to (a) above, the judgment of award of damages shall remain.

    c. The Respondents shall pay costs of the suit in the Subordinate Court and of this appeal.

    d. The costs of this appeal are assessed at Kshs. 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2024.

D. S. MAJANJA

JUDGE

Mirara and Associates Advocates LLP for the Appellant

Kimondo Gachoka and Company Advocates for the Respondents.