Njiinu v Kiarie & another (Civil Appeal E006 of 2021) [2024] KEHC 3732 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3732 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E006 OF 2021

SM MOHOCHI, J

APRIL 12, 2024

BETWEEN

CAROLINE NGOIRI NJIINU .... APPELLANT

AND

PAUL KARIUKI KIARIE .... 1ST RESPONDENT

PETER MUETI NGUGI .... 2ND RESPONDENT

(An Appeal from the Judgment and/or Decree of Honourable Magistrate, Honourable F. Munyi in Nakuru CMCC No. 1345 of 2015 delivered on 18th December, 2020)

JUDGMENT

Introduction

1. The matter was mentioned for directions on the 4th July 2023 and the Court issued directions for hearing and disposal of the Appeal the Appellant subsequently complied on the 4th December 2023 while the Respondents elected not to defend the Appeal, no response whereas filed or written submissions despite repeated directions to that fact so for all intents and purpose the merit review on Appeal does not have the enrichment by the Respondents.

2. The Appellant instituted a Civil Case at CMCC No. 1345 of 2015 vide a plaint dated 11th August, 2015 whereby she sued having been involved in a traffic accident that occurred on 4th August, 2015 involving motor vehicle registration number KAX 085B Station in which she was travelling in along Kabarak-Nakuru Road that was being driven by the 2nd Respondent as the 1st Respondents lawful agent, servant and/or authorized driver in which it was alleged that he negligently and/ carelessly drove, managed the said motor vehicle causing it to hit lorry registration number KCA 632E thereby inflicting upon her serious injuries. The Appellant, claimed for general damages for pain and suffering; special damages amounting to Kshs 10,000; cost of the suit and interest on all above at Court rates.

3. The Respondents filed a joint statement of defence dated 11th February 2016, in which they denied all the allegations of negligence on its part and particulars thereof as particularized by the Appellant and instead pleaded that the same was caused by the sole and/or contributory negligence of the Appellant whose particulars they itemized.

4. The Respondents also denied the particulars of injuries and damages and urged the Court to dismiss the suit with costs.

5. The Appellant set the matter for hearing on 1st August 2018 where PW1 testified, 4th, May 2019 where PW2 testified March 2021 where the Appellant closed her case and defence hearing was scheduled and rescheduled until 4th October 2020 when the defence closed its case having failed to turn-up, call witnesses or tender evidence.

6. By a judgment delivered on 18th December, 2020 the learned trial Magistrate Honorable F. Munyi dismissed the entire claim.

7. The Appellant being dissatisfied with the decree and judgment of the Honorable F. Munyi, appeals to the High Court of Kenya at Nakuru against the entire judgment and sets forth the following grounds of appeal: -

   i. That the learned magistrate erred in fact and law by finding that the appellant had failed to prove that she was injured in the accident, and as such dismissed the appellant's entire suit.

   ii. That the learned magistrate erred in fact and law by finding that the appellant had failed to prove liability against the respondents yet treatment documents, a P3 form and police abstract were produced by consent of parties.

   iii. That the learned magistrate erred in fact and law by not allowing the appellant an opportunity to prosecute her case without prejudicing her Case.

   iv. That the learned magistrate erred in fact and law by dismissing the appellant's entire suit and in so doing, deciding that the appellant did not prove her case on a balance of probability as required in civil matters, whilst the appellant produced all relevant documents and proved her.

8. The Appellant prays for judgment as follows; -

   a. That the finding of the Trial Magistrate be set aside, be reviewed and/or revised and/or be substituted with the judgment of this Honourable Court.

   b. That this Honorable Court do make such further orders as it may deem fit.

   c. That this Appeal be allowed with costs to the Appellant.

The Appellants Case

9. According to the Appellant, there was no dispute that an accident occurred on that day involving motor vehicles Registration Number KAX 085V and KCA 632E.

10. The Appellant rely on the Lower Court's submissions and the evidence tendered and that the trial magistrate dismissed the Appellant's case on grounds that her name was not indicated in the police abstract.

11. The Appellant argues that it was the investigating officer's mistake not to capture her name in the occurrence book. It is the Appellant's case that PW1 told the Court that the record in the abstract was made on the date of the accident and that it indicated that there were victims though not mentioned. The police officers simply maintained that the victims were as per the attached list. She maintained that a P3 and police abstract could not have been issued to her if she was not a victim in the accident. She stated that she had been rushed to Nakuru Provincial General Hospital immediately after the accident where she was treated. As a matter of fact, the records officer from the said hospital confirmed that when there is mass accident, the doctors may omit to record the injuries sustained.

12. Regarding liability, the Appellant argues that, the Trial Court did not adequately address the issue that the Respondents were to blame for the accident and there was evidence (copy of records) that the vehicle was owned by the 1st Respondent and was being driven by the 2nd Respondent (Police abstract) the vehicle was also being negligently driven. The police blamed motor vehicle registration number KAX 085V for careless driving and carrying excess passengers. We rely on the case of Stapley v Gypsum Mines Ltd (2) [1953] AC 663-Page 681 on how to determine what caused an accident. The Appellant therefore submits that she proved her case on a balance of probabilities.

13. The Appellant testified that on 4th August 2015, she was travelling board motor vehicle registration number KAX 085V which hit a truck before they joined Nakuru Kabarak Road. The truck was heading towards Nakuru while they were on their way to Nakuru from Rongai.

14. The Appellant relied on the doctrine of *res ipsa loquitor*. *The Black's Law Dictionary* (8th Ed) defines res ipsa loquitor as, "the thing speaks for itself". It goes on to explain that the doctrine providing that, in some circumstances, the mere fact of an accident occurrence raises an inference of negligence that establishes a *prima facie* case.

15. That, after the close of the Appellant's case, the Respondent did not call any witness to give the Court the version of their story on liability hence the testimony of the Appellant who was an eye witness to the accident remains uncontroverted.

16. Where a plaintiff (in the lower Court) gives evidence in support of his case but the defendant (in the lower Court) fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations.

17. In *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1 plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations... Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence"

18. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in *Miller v Minister of Pensions [1947] 2 All ER 372* discussing the burden of proof had this to say; -

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> The only evidence on record on that issue came from the Appellant. The Appellant relied on the police abstract report produced without any objection by the Respondent which clearly showed that it was reported to the police that the Appellant was involved in the said accident.

19. In the case of *Catherine Mbithe Ngina v Silker Agencies Limited* [2021| eKLR, the learned Judge had this to say,

> " I must point out however, that the contents of the police abstract as extracted from the records held by the police is merely evidence that a report of an accident was made. It is prima facie evidence of the occurrence of the accident and the particulars of those involved. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigating officer is not necessarily fatal in accident claims."

20. It was held further in *Peter Kanithi Kimunya v Aden Guyo Haro* [2014| eKLR:

> " A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was reported' at a particular police station."

21. That in dismissing the Appellant's claim, the Honorable Trial Court based her judgment on the fact that the name of the plaintiff did not appear in the police abstract. That was all the reasoning given. That, apart from what has been stated hereinabove, no other basis was given whatsoever leading to the dismissal of the suit.

22. That Order 20 Rule 4 of the *Civil Procedure Rules* requires that judgments in defended suits do contain a concise statement of the case, the points for determination, the decision thereto and the reasons for such decision. In the above case, it is obvious that the magistrate relied on wrong principles as she failed to summarize the case for both the plaintiff and defendant and thus did not analyze the evidence before making her determination and the reasoning thereof and make judgment.

23. In respect of assessment of damages, the Appellant faults the trial magistrate for finding that, injuries had not been proved. In as much as the treatment card was blank, the Appellant submit that that was no fault of the plaintiff. As a matter of fact, the records officer who testified as PW2 confirmed that the plaintiff was treated at the facility and explained that it is a normal occurrence that when there is mass accident/ many casualties, the doctors may omit to record the injuries sustained.

24. In the Appellant's Lower Court submissions, she quantified an award of Kshs. 350,000/= as general damages for pain and suffering and we maintain the same. That, in this light, it is very clear that the submissions by the Appellant were never considered since the magistrate never analyzed what we submitted in view of liability.

25. In the circumstances, the Appellant pray that her appeal be allowed and the judgment of the trial magistrate be set aside and substituted with judgment of this Honourable Court.

Analysis and Determination

26. I have considered the documents on record; the testimony of the witnesses in the Subordinate Court and the Appellant's submission and the Court finds that the following issues are for determination is whether the Appellant proven her case and can the orders sought issue?

27. On a balance of probability, the Appellants evident of having been in the ill-fated motor vehicle having been injured following the road traffic accident, and having been rushed to the PGH hospital for treatment was never controverted and her secondary evidence corroborated her assertion.

28. This Court finds that the Appellant's evidence could not have been displaced by the defendant's joint statement of defence alone as the Respondent never called any evidence in support of their case.

29. The Court therefore finds that, the Hon F. Munyi was in err, to disregard the Appellant's evidence even where the defence had offered non, owing only to the reason that the Appellant's name was not appearing on the Police Abstract form.

30. The Appeal Accordingly succeeds and the Judgment and/or Decree of Hon. Magistrate, F. Munyi in Nakuru CMCC No. 1345 of 2015 delivered on 18th December, 2020 is hereby set-aside and substituted therewith as follows

    i. General damages for pain and suffering Kshs 200,000/-

    ii. Special Damages as proven Kshs 6,500/-

    iii. Costs of the Suit and interest at Court rates

    It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 12TH DAY OF APRIL, 2024

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MOHOCHI S.M.

JUDGE