Odhiambo v Ali t/a Mbarak Pit Contractors (Civil Appeal 147 of 2018) [2024] KEHC 3788 (KLR) (5 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3788 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 147 OF 2018

DAS MAJANJA, J

APRIL 5, 2024

BETWEEN

EUNICE AWUOR ODHIAMBO ..... APPELLANT

AND

ALI MBARAK ALI T/A MBARAK PIT CONTRACTORS ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J.A. Kasam, SRM dated 20th July 2018 at the Magistrates Court at Mombasa in Civil Case No. 1623 of 2017)

JUDGMENT

Introduction and Background

1. The Subordinate Court dismissed the Appellant's suit in which she had sought general and special damages in respect of an accident that occurred on 25.08.2017 at around 4.00pm along Magongo Mwisho Road off Nairobi-Mombasa Road. The Appellant claimed that she was carrying on her business of making and selling samosas with her daughter helping her when motor vehicle registration number KBR xxZ was driven by the Respondent's driver negligently so as to cause its tyre to burst and pressure from the said blast throwing the Appellant, her daughter and her kiosk about 100 meters away and the hot cooking oil she was using poured on her skin as a result occasioning her severe physical injuries including 4% superficial burns on both feet and ankles.

2. By a letter dated 17.10.2017, the Appellant requested for judgment against the Respondent stating that he had failed to enter appearance within the time allowed. On 27.10.2017, the Subordinate Court entered interlocutory judgment in default when the Respondent failed to enter appearance within the stipulated time. The matter proceeded by way of formal proof and thereafter, and upon considering the Appellant's submissions on the issue of quantum as directed by the court, the Subordinate Court rendered a judgment on 12.07.2018. It found that the Appellant had not proved the occurrence of the accident that took place as she did not file a police abstract, "which is a critical document that

would prove that the occurrence of the accident was reported to the police, although it does not prove the occurrence of an accident itself". While acknowledging that the Respondent did not file any reply or defence to counter allegations of contributory negligence against him, the trial court held that the Appellant still did not prove the said allegations against the Respondent that the accident occurred due to his negligence.

Analysis and Determination

3. The Appellant, through her memorandum of appeal dated 13.08.2018 is aggrieved by the judgment more so that there was an interlocutory judgment which meant that the Respondent was 100% liable and that the said interlocutory judgment was final in respect to the aspect of liability. I agree. Indeed, the Court of Appeal has since held and settled that once an interlocutory judgment is issued, the question of liability becomes a foregone conclusion and that the role of the court after entering the interlocutory judgment was only to assess damages since the interlocutory judgment, having been regularly obtained, there can never be any doubt that judgment was final with regard to liability and was unassailable (see *Felix Mathenge v Kenya Power & Lighting Company Ltd* NRB CA Civil Appeal No. 215 of 2002 [2008] eKLR). From the proceedings and as I have stated above, the Subordinate Court understood this and that it is why it directed the Respondent to file written submissions on quantum alone. How it then changed to revisit the issue of liability in its judgment was clearly an error as its only duty was to determine and assess the damages payable to the Appellant.

4. In any case, assuming that there was no interlocutory judgment, I still fault the Subordinate Court's position that the Appellant's failure to produce the police abstract was fatal to her claim of proving the occurrence of the accident was reported to the police. There is no legal requirement that an accident must be reported to the police for liability to be proved. A police abstract is merely evidence that a report of an accident has been made to the police. Unless it contains information regarding the investigations and their outcome, such evidence cannot without more be evidence of negligence and cannot therefore be the basis of determining liability on the part of the Respondent (see *Florence Mutheu Musembi & Geoffrey Mutunga Kimiti v Francis Karenge* [2021] eKLR). The Appellant gave direct evidence as to how the accident happened and in the absence of contrary testimony and evidence it was sufficient to determine liability against the Respondent.

5. It is for the above reasons that I find that the subordinate court erred in revisiting the issue of liability when the same was already settled with the entry of the regular interlocutory judgment. The Subordinate Court ought to have entered liability at 100% against the Respondent, which is what I have proceeded to do.

6. I will now move to assess the damages payable based on the Appellant's submissions before the Subordinate Court. I proceed to do so on the basis that under section 78 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), which empowers this court to determine the case with finality and to exercise such conferred jurisdiction on the court exercising original jurisdiction.

7. The Appellant sought general damages for her injuries. General damages are damages at large as the Court is guided by decided cases to ensure that similar injuries attract, so far as is possible, similar amounts (see *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR). She sought Kshs. 200,000.00 for her injuries which according to her pleadings and evidence of the medical report was 4% superficial bruises on both feet and ankles which the examining doctor classified as soft tissue injuries. Going through the case cited by the Appellant and compared to her injuries and other awards made in the past, I find that the claimed sum of Kshs. 200,000.00 is reasonable and appropriate as an award for general damages in the circumstances. On special damages, she sought Kshs. 2,000.00 for preparation of the medical report which receipt was produced and therefore, this claimed was sufficiently proved.

Disposition

8. For the above reasons, I allow the appeal and order as follows:

    a. The Judgment dated 12.07.2018 is set aside and the interlocutory judgment of the Subordinate Court is reinstated and Judgment is entered for the Appellant against the Respondent for Kshs. 200,000.00 as general damages for pain and suffering together with interest from the date of the judgment until payment in full and Kshs. 2,000.00 for special damages together with interest from the date of filing suit until payment in full.

    b. The Appellant shall have costs of the suit and costs of this appeal which are assessed at Kshs. 25,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT MOMBASA THIS 5TH DAY OF APRIL 2024.

OLGA SEWE

JUDGE