Guardian Coach Limited v Matunda (Fruits) Bus Services Limited (Civil Appeal 242 of 2020) [2024] KEHC 5793 (KLR) (Civ) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5793 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 242 OF 2020

HI ONG'UDI, J

MAY 17, 2024

BETWEEN

THE GUARDIAN COACH LIMITED ..... APPELLANT

AND

MATUNDA (FRUITS) BUS SERVICES LIMITED ..... RESPONDENT

(Being an appeal from the Judgment of Honourable D. W Mburu Senior Principal Magistrate in Nairobi CMCC No. 1317 of 2017, delivered on 29th May, 2020)

JUDGMENT

1. This appeal arises from a judgment and decree entered in Nairobi Chief Magistrate's Civil Suit No. 1317 of 2017. In the said suit, the respondent sued the appellant for payment of Kshs. 847,550/= as costs of repairs of his motor vehicle and loss of income for 14 days. Additionally, the respondent prayed for interests at court's rate from March 2017, costs of the suit and any other relief the court deemed fit.

2. The respondent is the registered owner of motor vehicle registration number KCG 653H while the appellant is the owner of motor vehicle registration number KBX 605J. It is pleaded in the plaint that on or about 1st April, 2016 at about 06.30 pm, the respondent's vehicle was lawfully parked when the appellant's authorized driver negligently drove the said vehicle colliding with that of the respondent.

3. The respondent stated that as a result of the accident and acts of negligence by the appellant's driver, the respondent has suffered loss and damage.

4. The matter was fully heard and the trial Magistrate delivered Judgment on 29th May,2020 in favour of the respondent as prayed.

5. Being aggrieved with the judgment the appellant lodged the appeal dated 18th June, 2020 on the following grounds:

i. The Learned Magistrate erred in law and fact in making a finding that the Plaintiff had proved the pleaded particulars of loss specifically to the standard required by law.

ii. The Learned Magistrate erred in Law and fact in failing to find that the evidence tendered by the Plaintiff in the Lower Court was at variance with the Pleadings, inadequate and incapable of sustaining the Plaintiff's claim against the Appellant herein.

iii. The Learned Magistrate failed to appreciate that the Plaintiff had merely thrown figures at the court and failed to establish cogent evidence in support of the same to warrant the award/ judgment of Court.

iv. The finding of the Learned Magistrate on liability was erroneous and incompatible with the evidence on record.

v. The Learned Honorable Magistrate failed to appreciate that the Plaintiff/Respondent herein had not established liability to warrant the finding of 100% liability on the part of the Appellant herein.

vi. The Learned Honourable Magistrate relied on inadequate; scanty and generalized testimony of the Plaintiff's witnesses to award damages contrary to the standard contemplated in the Law of pleading specifically and proving specifically.

6. The appellant urged the court to set aside the judgment delivered on 29th May, 2020 and allow the appeal with costs.

7. The Appeal was canvassed through written submissions.

Appellant's submissions

8. These were filed by Mose Nyambega & Company Advocates and are dated 25th February, 2024. Counsel submitted that the trial magistrates decision was not informed by the oral and documentary evidence presented in court. She added that the evidence was inadequate and incapable of holding the appellant fully liable for the said accident. She relied on the opinion by Rajah J A in Britestone Pte Ltd V Smith & Associates Far East Ltd [2007] SLR 855 and submitted that the question on liability was the respondent's obligation.

9. She submitted that the trial magistrate erred in law and fact in failing to find the respondent liable for the occurrence of the accident. She added that the same was not demonstrated by tangible or plausible evidence, thus the respondent did not establish liability to warrant the finding of 100% liability on the appellant. She relied on the case of Miller V Minister of Pension (1947) ALL ER 373 in support.

10. Counsel submitted that in a claim for damages, one must prove negligence on the part of the tortfeasor. She argued that there must be proof that there is existence of duty of care and a breach of that duty resulting in material damage so as to attract damages. She submitted that the trial magistrate erred in law and fact in failing to find the respondent partly liable since the occurrence of the accident was not demonstrated by plausible evidence. She placed reliance on the case of Stratpack Industries V James Mbithi Munyao; Nairobi HCCA No. 152 of 2013. Counsel argued that evidence from DW2 confirmed that the respondent's motor vehicle had been parked at a sharp corner within the country bus station without any warning or prior sign.

11. It was counsel's submission that evidence by DW1 and DW2 confirmed that there was no material damage but a small scratch on the vehicle. She further submitted that the particulars of the claim do not resonate with the factuality of the damage. She relied on the case of Gicheru V Morton and Another

(2005) 2 KLR 333 and submitted that the material damage to the motor vehicle does not relate to the particulars, to the claim.

12. She submitted that the award given is not commensurate to the alleged damages in the plaint. Counsel relied on the Court of Appeal case in Alfarus Muli V Lucy M. Lavuta & Another Civil Appeal No. 47 of 1997 where the court held that:

> " The appellate court interferes only if it is shown that there was absolutely no evidence or that the evidence that was there could not possible support such a finding...even if a judge does not give his reasons for his finding the appellate court can find the same in evidence"

13. She argued that the respondent was awarded damages that are high and an erroneous estimate. She added that the trial magistrate relied on the respondents witnesses but failed to consider DW2's witness statement showing that the damage was a mere scratch. It was further submitted that PW3 prepared an exaggerated report on the losses suffered by the respondent's motor vehicle when it was not in operation. She added that the alleged loss of Kshs. 455,000 was plucked from thin air. She placed reliance on the Court of Appeal case of Dhalay V Republic (1997) KLR.

14. Finally, she submitted that the respondent's case is tainted with discrepancies in both oral and documentary evidence adduced and urged the court to allow the appeal.

Respondents' submissions

15. These were filed by Mugo Githinji & Company Advocates and are dated 19th January, 2024. Counsel submitted that it was not in dispute that an accident occurred involving motor vehicle number KCG 653H with a stationary motor vehicle.

16. He added that the foreseeability that there would be a stationery motor vehicle was recognized by the trial court in apportioning liability of 100% to the appellant. He submitted that the appellant did not dispute the occurrence of the accident but rather challenged the liability of the case and particulars of loss but failed to provide any technical evidence to counter.

17. He submitted that the challenges made during cross- examination were insufficient to undermine the consistent evidence presented by the respondent. He found the main issue for determination to be whether the respondent had proved her case on a balance of probabilities on liability for the material accident and particulars of special damages.

18. He relied on Section 107 of the *Evidence Act* and the Court of Appeal case of Mbuthia Macharia V Annah Mutua & Another [2017] eKLR. Counsel submitted that the respondent discharged its burden of proof when it called witnesses who produced documents in support of every allegation and particular of loss pleaded.

19. Counsel submitted that DW1 did not deny occurrence of the accident when the respondent's vehicle was stationery. He added that DW1 claimed that the damages were not as excessive as pleaded in the suit. He further submitted that DW2 was of the same position.

20. He relied on the case of Nicholas King'oo Kithuka V Jap Quality Motors & Another [2021] eKLR. It was his contention that there was no doubt that the respondent's claim for repair costs and other incidental costs was a special damage. He placed reliance on the case of Swaleh C. Kariuki & Another V Violet Owiso Okuyu [2021] eKLR where the court held that special damages must not only be specifically pleaded but also strictly proved.

21. He submitted that the respondent presented the assessment reports, invoices and actual receipts of payment to substantiate the pleaded loss. He added that it was not in dispute that the respondent's motor vehicle was being used for public transport and no evidence was tendered to rebut the evidence by PW1 and PW4 on the loss of business income.

22. Counsel added that the assessment report produced as PEx4 was enough to substantiate the loss with reasonable certainty. He relied on the case of David Bagine V Martin Bundi Civ App No. 283 of 1996 where the court observed that:

> " a motor vehicle assessor's report would provide acceptable evidence to prove the value of material damage to a motor vehicle"

23. He submitted that from the pleadings and trial court's record, it was clear that the appellant did not provide any evidence to challenge the respondent's evidence.

24. He concluded by stating that the respondent proved its case on a balance of probabilities and that the challenge mounted during cross examination was insufficient to controvert the respondent's evidence which was consistent.

Analysis and Determination

25. This being a first appeal, this court has a duty to re-consider and re-evaluate the evidence that was tendered before the trial court, and make its own conclusions in the circumstances. It must bear in mind that it did not see nor hear the witnesses testify, and must give an allowance for that.

26. In the classicus case of in Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123 the Court of Appeal stated as follows on the power of the first appellate court:

> "I accept counsel for the Respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).[emphasis added]

27. Having considered the record of appeal, grounds of appeal the parties submissions and the authorities relied on by the respective parties, I opine that the issues for determination are:

    i. Whether the respondent proved its case on a balance of probabilities.

    ii. Whether the respondent proved its claim for Kshs. 847,550/= as special damages.

28. On the first issue, it is not in dispute that the accident occurred and that the respondent's vehicle KBX 605J was damaged. The appellant argued that the trial magistrate erred in finding that it was 100% liable for the accident since there was no tangible evidence. During examination in chief, DW1 testified that the respondent's motor vehicle had been parked by the road. He further testified that he was driving into the country bus station when the side mirror of his motor vehicle came into contact with that of

the respondent. He also testified that they tried to reach a consensus but it failed. On cross examination, DW1 confirmed that the respondent's driver was never charged with obstruction. DW2, the manager of the appellant's company on the other hand testified that the respondent's vehicle had been parked at a U-turn.

29. In civil cases, the onus is on the plaintiff or any other claimant to prove the position he or she postulates on a balance of probabilities. This position is anchored under section 107 of the *Evidence Act* which provides guidance in this area, it states as follows: -

> Section 107 of the *Evidence Act* states that;
>
> i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Also see Karugi & Another V. Kabiya & 3 Others (1987) KLR 347

30. From the above, the onus was on the appellant to show that it was not liable for the said accident. The fact that the respondent's vehicle was parked, meant that the said vehicle KBX 605J was stationery and that the appellant's vehicle was in motion causing the accident. The issue of whether it was parked on the road was never proved by the appellant. In addition, the allegation by DW2 that the respondent's vehicle had been parked at a U-turn was never substantiated. In my view, the appellant ought to have gone further to even produce photographic evidence clearly showing the same but it failed to do so. It is therefore this court's finding that the trial magistrate was right in finding the appellant 100% liable for the accident, and the same is upheld.

31. Last is the issue as to whether the respondent proved its claim for Kshs. 847,550/= as damages. In as much as the appellant argued that the said figures were exaggerated, there was no objection to the production of the assessor's report and receipts. Further the appellant did not controvert the said report by availing its own expert hence the trial court had to go by what had been availed by the respondent. In Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657 the Court of Appeal expressed itself as follows:

> " The onus was on the appellant to prove the special damages strictly. The payments made by the appellant for the various purchases are certainly consistent with the damage noted by the police in the certificate of inspection issued to the appellant and produced as an exhibit without objection. The purchases were supported by proper documents and there was no reason why the appellant could not produce them in court as he sought to do. The documents were admissible and ought to have been admitted and considered by the trial court. The omission to do so invites the court's intervention and the appeal is allowed. The appellant pleaded the cost of repairs at Kshs. 700,000/= although he stated the amount was more than that. That, however, was not specific pleading and there was no leave sought to amend the pleading to insert the correct figure. In the result, although the appellant proved a higher figure for repair charges, he can only be awarded the amount pleaded at Kshs 700,000/=."

32. During the hearing the respondent called PW3, an automotive engineer with Regent Automobile Valuers and Assessors who produced assessment charges receipts of Kshs. 6,000/=. He added that the

damages on the respondent's motor vehicle were on the rear side. He also added that the figures in the report are estimates and rounded off to the nearest Kshs. 1,000/=.

33. On the other hand, PW4 a partner in an audit firm produced a report dated 28th July, 2016 on loss of use of the motor vehicle. He testified that the loss was for 13 days at Kshs. 35,000/= daily totalling to Kshs. 455,000/=. He also stated that the report was based on historic data and admitted that he did not have anything to show as the basis for the above figures. On this claim the respondent had a duty to show how these figures were arrived at. His report (PEXB 6a) just showed figures for March – April. No year is indicated. From this report the total expenses for one month were Kshs 425,142/= while the net profit was Ksh 568,588/=. How would the loss for half a month be Ksh 455,000/=?

34. There is no break down on how the figure of Ksh 35,000/= per day was arrived at. Secondly besides the report there is no evidence of the actual figures the respondent used to make on a daily basis though its not denied that there was an income whenever a trip was made. Thirdly, the respondent in the plaint and witness statement simply claims for loss of use for 14 days amounting to Ksh 455,000/=.

35. The accident occurred on 1st April, 2016 at 7.00pm. When was the motor vehicle taken to the garage and when was it released? The respondent is silent on that. His witness Richard Masonye Shabaya (PW5) who repaired the vehicle stated in his witness statement that the vehicle was brought to their garage. That the motor vehicle was damaged on its rear and had a crack on its front windscreen.

36. He further stated that they had to await for an assessor's report before carrying out any repairs. The assessment was later done on 22nd April, 2016. It was not until 7th July, 2016 that there was an agreement for the repair of the vehicle. The repair work was completed on 22nd July, 2016 and the vehicle released. It is therefore not clear where the 14 days loss of use fall? Does it mean the motor vehicle was in use from the date of accident upto 7th July, 2016 when there was an agreement to commence repairs? How then does the respondent explain the serious damage allegedly caused if the motor vehicle continued in use for over three (3) months? I find that there was supposed to be an explanation by the respondent on the loss of use of the motor vehicle which was not satisfactorily done. I therefore find the claim not proved as a special damage.

37. I however find the claims for motor vehicle search, Ksh 550/= Assessors fees (Ksh 6,000/=) and Accountancy fees (Ksh 10,000/=) proved.

38. In view of the foregoing, I find merit in the Appeal which partially succeeds. I hereby set aside the Judgment by the trial court on quantum and substitute it with a Judgment in the following terms:

    i. The finding on liability is upheld

    ii. Repair charges Kshs 376,000/=

    iii. Search Fees Kshs 550/=

    iv. Assessors Fees Kshs 6,000/=

    v. Accountancy Fee Kshs 10,000/=

    Total = 392,550/=

    vi. Costs to the respondent, both in the Lower court and High court

    vii. Interest at court rates from date of Judgment

    viii. Loss of use of motor vehicle – Disallowed.

39. Orders accordingly

DELIVERED VIRTUALLY, THIS 17TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE