Kaara v Ong'udi (Civil Appeal E040 of 2023)
[2024] KEHC 5735 (KLR) (Civ) (15 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5735 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E040 OF 2023

WM MUSYOKA, J

MAY 15, 2024

BETWEEN

SAMUEL KAMAU KAARA .... APPELLANT

AND

VICTOR OKINYI ONG'UDI .... RESPONDENT

(An appeal arising from the decision of Hon. JP Omollo, Adjudicator, delivered on 22nd December 2022, in Milimani SCCC No. E943 of 2022)

JUDGMENT

1. The respondent had sued the appellant, at the primary court, for a sum of Kshs. 160,164.00, being for repair costs, and assessment and investigations fees. The claim allegedly arose from material damage that had been caused to a vehicle belonging to the respondent, by that belonging to the appellant, following a traffic accident on July 7, 2020, along Waiyaki Way, Nairobi. It was alleged that the appellant had failed to exercise control over his vehicle, hence the accident. The appellant filed a reply, denying the allegations against him, but conceding the accident, and arguing that the mishap was caused by negligence on the part of the respondent, and submitting that the claim was false and fraudulent.
2. A trial was conducted. 4 witnesses testified for the respondent, and 1 for the appellant. Judgement was delivered on December 22, 2022. The claim was allowed as prayed, on grounds that the respondent had proved his case on a balance of probabilities.
3. The appellant was aggrieved, hence the instant appeal. The appellant faults the trial court on several grounds: failing to consider all the evidence that he had tendered at the trial; allowing the claim despite the serious issues that he had raised in his evidence; failing to consider his submissions and authorities on the issues raised; failing to consider his evidence on liability; and weighing his case in isolation of that presented by the respondent. He asks that the award by the trial court be set aside.

4. On September 28, 2023, directions were given, for canvassing of the appeal by way of written submissions. Both sides filed their respective written submissions.

5. The appellant has condensed his appeal to 1 ground: whether the trial court failed to consider his evidence. He submits about the veracity of the evidence tendered by the respondent; parties being bound by their pleadings, and not introducing fresh issues at the trial without amendment; and burden of proof. He cites *Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others* [2014] eKLR (GBM Kariuki, Kiage & M'Inoti, JJA), *Malawi Railways Ltd vs. Nyasulu* [1998] MWSC 3 (Unyolo, Kalaile & Tambala, JJA), *Total Kenya Ltd formerly Caltex Oil (K) Ltd vs. Janevams Ltd* [2019] eKLR (Warsame, M'Inoti & Murgor, JJA), Great Lakes Transport Co. (U) Ltd vs. Kenya Revenue Authority [2000] eKLR (Waki, Onyango Otieno & Visram, JJA) and *Mbuthia Macharia vs. Annah Mutua Ndwiga & another* [2017] eKLR (Visram, Karanja & Koome, JJA). In his submissions, the respondent wholly supports the decision of the trial court, and cites no authorities.

6. There is really only one issue for determination, burden of proof. Did the respondent establish his case against the appellant to the required standard? Did the appellant marshal evidence, in defence, which overwhelmed the case presented by the respondent?

7. The respondent testified, and relied on his witness statement. He was driving his motor vehicle, registration mark and number KCN 312L, along the said road, when motor vehicle registration mark and number KYD 333, driven by the appellant rammed into his car, forcing it to smash into a roadside barrier, causing it to suffer material damage, for which he sued. The motor vehicle was repaired, and what he claimed was the cost of the repairs. He produced a copy of registration of the motor vehicle, a copy of the motor accident claim form, a copy of a satisfaction note, and a demand letter.

8. He called No. 5666 Police Constable David Gitonga, to produce the police abstract of the accident report, relating to the said accident. He stated that the accident was reported at the Kabete Police Station, and was entered in the occurrence book as OB18/5/18. It was noted in the report that the vehicle belonging to the respondent suffered damage. The driver of the other vehicle, the appellant, was blamed for the accident, for his vehicle rammed the rear of the vehicle that the respondent was driving. He produced an abstract from the police report on the accident. According to him, after the respondent's vehicle was hit, the respondent lost control of the vehicle, and crashed into a construction pillar, damaging its front wheel and bonnet. He said that he did not investigate the case.

9. Patrick Githinji was a motor assessor, from Autostar Assessors and Valuers, who assessed the respondent's motor vehicle after the accident. He produced an assessment report, an invoice for Kshs. 6,270.00, and a payment voucher request for the same amount. Lawrence Momanyi was a Legal Officer from the insurer of the respondent's vehicle. He stated that the claim was for subrogation. He produced a renewal advice, an invoice for Kshs. 122,094.00 from St Austins Service Centre Limited, an ETR receipt for that amount issued by St Austins Service Centre Limited, a payment voucher request for Kshs. 122, 094.00 from St Austin Service Centre, an investigation report from Factual Facts Loss Assessors, a motor private insurance policy schedule in respect of KYD 333, and a payment voucher request issued in favour of Factual Facts Loss and Factual Facts Loss Assessors.

10. The appellant stated that his vehicle softly bumped into the rear of the car of the respondent, adding that there was no damage, and there was no barrier. He said that his own vehicle was not damaged. He and the respondent shook hands, and went home. He said that he was not involved in any police investigations, and that a motor vehicle assessor called him a year later.

11. In its judgement, the trial court allowed the claim. On liability, the court noted that the appellant had admitted the collision. Significantly, the court noted that the car of the appellant bumped on the

vehicle ahead of him. The appellant had, therefore, admitted that accident, although he disputed the date when it happened. He, however, did not provide proof that the accident occurred on a date other than that adduced by the respondent. Secondly, the police records indicated that an accident did occur, on the date proved by the respondent, involving vehicles driven or controlled by the 2 parties, and that blame was heaped on the appellant. On damage, the appellant claimed that the collision, which he described as a soft bump, did not occasion any damage on the respondent's vehicle, but the court found and held that the appellant provided no proof that no damage was caused, contrasted with the documented proof of damage presented by the respondent.

12. Burden of proof lies on the party alleging a certain fact. See sections 107 and 108 of the *Evidence Act*, Cap 80, Laws of Kenya, *Muriungi Kanoru Jeremiah vs. Stephen Ungu M'Mwarabua* [2015] eKLR (Gikonyo, J), *Alice Wanjiru Ruhiu vs. Messiac Assembly of Yahweh* [2021] eKLR (Ong'udi, J) and *Stanley Maira Kaguongo vs. Isaac Kibiru Kahuthia* [2022] eKLR (C. Kariuki, J). The standard of proof, in civil cases, is on a balance of probability. See *Samuel Ndegwa Waithaka v Agnes Wangui Mathenge & 2 others* [2017] eKLR (GBM Kariuki, Sichale & Kantai, JJA), *Ahmed Mohammed Noor vs. Abdi Aziz Osman* [2019] eKLR (Mrima, J), *James Muniu Mucheru vs. National Bank of Kenya Ltd* [2019] eKLR (Musinga, Makhandia & Ouko, JJA). It is also referred to as proof on a preponderance of the evidence. See *BM vs. RM & another* [1989] eKLR (Bosire, J), *Bernard Kibor Kitur vs. Alfred Kiptoo Keter & another* [2018] eKLR (Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) and *Hydro Water Well (K) Limited vs. Sechere & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society)* [2021] KEHC 22 (KLR) (Mativo, J). It is about which of the rival versions, presented by the parties, should be considered more believable, or more probable.

13. The accident was not denied. The only small issue was on the dates when it happened. The respondent produced police records, and availed a police officer to bespeak the contents of those records. The allegation by the respondent was that his car was hit from behind. The appellant admitted as much. So, on liability, the respondent discharged his burden, there was an accident for which the appellant was responsible. The appellant did plead contribution. However, the issue of contribution could not arise, for the respondent's vehicle was hit from behind, meaning that there was no proper lookout. In any event, the appellant led no evidence on the alleged negligence or contribution of the respondent to the causation. The trial court cannot be faulted for finding and holding that the appellant was liable 100%.

14. The real issue was on quantum. The appellant, although admitting the accident, alleged that no damage was caused on either vehicle. The finding and holding of the court was that he did not provide any proof that the respondent's vehicle was not damaged. On his part, the respondent provided documents to support his claim of material damage to his vehicle. There was a police abstract, which pointed to a non-injury accident, for which the driver of the vehicle belonging to the appellant was blamed. Then there was an accident assessment report, complete with photographs indicating the damage, which was produced by the assessor. There repair was done at St Austins Service Centre, and there was an invoice, a receipt and a satisfaction note from that service centre. So, from that material, there was preponderance of evidence that the respondent's vehicle suffered damage. Upon that evidence being mounted, the burden shifted to the appellant to present counter-evidence, that the said vehicle did not suffer any damage, or that the evidence led on the alleged damage was false. He led no counter-evidence. His stance was more of a denial. Without counter-evidence, the trial court had no basis upon which it could conclude that the said vehicle did not suffer damage.

15. The appellant pleaded that, as there was no damage to the vehicle, the claim by the respondent was fraudulent and a misrepresentation. The burden of proving fraud and misrepresentation is always on the person who sets up such a claim, and the alleged fraud or misrepresentation must not only be pleaded, it must also be strictly proved. Fraud has elements of criminality, and the standard of

proof required for the same, in civil cases, is higher than balance of probability, or on preponderance of evidence, and it is closer to proof beyond reasonable doubt. See section 109 of the *Evidence Act*, *Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another* [2000] eKLR (Tunoi, Keiwua & Lakha, JJA), *Kinyanjui Kamau vs. George Kamau* [2015] eKLR (Karanja, Warsame & Gatembu, JJA) and *Demutila Nanyama Purumu vs. Salim Mohamed Salim* [2021] eKLR (Ouko (P), Nambuye & Karanja, JJA). In the instant case, the appellant strictly pleaded fraud and misrepresentation, in his pleadings, inclusive of particularising the same. However, at the oral hearing, he led no evidence to strictly prove that there was fraud and misrepresentation.

16. The next consideration relates to the repair allegedly done on that vehicle, for the claim was for recovery of what the respondent's insurer spent on that repair, and, of course, the other expenses concomitant to that. The pleading was that the repairs cost Kshs. 122,094.00, while assessment fees were Kshs. 6,270.00, and investigation fees were charged at Kshs. 31,800.00. The claim was in respect of special damages, for the special or particular damage caused. That damage was specifically pleaded, at Kshs. 160,164.00.

17. Was that special damage proved? Did the respondent, through his insurer, suffer the loss of Kshs. 160,164.00? The amount would only be recoverable, upon proof that that money was in fact spent. The amount claimed was allegedly spent on repair costs, assessment and investigations. Did the respondent, through his insurer, spent any money on repairs, assessment and investigations? Whether any money was spent on the 3 items was subject to proof, by production of accounting documents, demonstrating that money moved from one party to the other, in this case, from the insurer to the repairer, the assessor and the investigator. From the trial record, the only proof of payment came from the repairer of the accident vehicle, St Austin Service Centre Limited. The amount paid was Kshs. 122,034.00, on August 3, 2020. For the fees for assessment and investigation, no evidence of payment was produced. No receipts were produced, from the recipients of those monies. What were presented were payment voucher requests. No evidence was presented as proof that payments were in fact made on the basis of those 2 requests. The 2 payment voucher requests presented did not bear the purported signatures of the persons in whose favour the 2 documents were created. The 2 merely proved that money was requisitioned for, for settlement of the fees for assessment and investigations, but fell short of proving that the requisitioned funds were actually availed, and paid to whoever was entitled to the payment requisitioned. So, whereas there was proof that the repair costs were paid for, there was no evidence that the fees for assessment and investigations were ever settled.

18. The principal argument by the appellant, in this appeal, is that his evidence, submissions and authorities were not considered by the trial court. I do not think that there is much to that argument. The trial court recited the cases presented by both parties, in paragraphs 1 and 2 of the judgement. In paragraph 3, it was stated that the submissions were considered, on liability and quantum. It was not specified which of them were considered, and it would be safe to presume that both were considered. It would be up to the appellant, in the face of what was stated in paragraph 3, to demonstrate that, contrary to that statement by the court, that his submissions were not among the submissions said to have been considered. Paragraphs 4 and 5 contained the analysis of the evidence tendered. At paragraph 4, the court considered what was tendered by both the appellant and the respondent, on the aspect of liability. Paragraph 5 analysed the material presented to prove quantum. The appellant did not present any material evidence on that aspect. Paragraph 6 draws the final conclusion, a finding and holding that the respondent had established the case against the appellant; while paragraph 7 carried the final orders.

19. Based on the above, it is my finding and holding that the trial court came to the right conclusions on liability and the cost of repair. However, I find and hold that the trial court did not have any evidence before it that the fees for assessment and investigations were settled, and should not have awarded the

moneys claimed for those 2 items. Consequently, I shall dismiss the appeal, as I hereby do, on the aspect of liability and the repair costs, but I shall allow the same on the fees for assessment and investigations. The consequence shall be that the award of Kshs. 160,164.00 is hereby set aside, and substituted with judgement for Kshs. 122,094.00. Each party shall bear their own costs of the appeal. It is so ordered.

DELIVERED BY EMAIL, AND DATED AND SIGNED, AT BUSIA, THIS 15TH DAY OF MAY 2024.

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Gitau, instructed by Mundui Murai, Advocates for the appellant.

Ms. Njoroge, instructed by Eboso & Company, Advocates for the respondent.