



**Nkirote v Gatimu (Civil Appeal 2 of 2019) [2024] KEHC 5960 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5960 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CIVIL APPEAL 2 OF 2019**

**JN NJAGI, J**

**MAY 23, 2024**

**BETWEEN**

**MARGARET NKIROTE ..... APPELLANT**

**AND**

**SUSAN NDUTA GATIMU ..... RESPONDENT**

*(Being an appeal from judgement and decree of Hon. Njeri Thuku, PM, in Nanyuki CM's Court Civil Case No.105 of 2016 delivered on 20/12/2018)*

**JUDGMENT**

1. The respondent herein brought suit against the appellant at the lower court claiming general and special damages after sustaining injuries after purportedly being knocked down by the appellant's motor cycle registration No. KMDG 741E while she was walking off the Nanyuki/ Doldol road. The appellant filed a defence and denied ownership of the motor cycle. After a full hearing the trial court found for the respondent and awarded her Ksh.100,000/= in general damages. The appellant was aggrieved by the judgment of the trial court and lodged this appeal.
2. The grounds of appeal are that:
  1. Trial court erred holding that a case was established against the Appellant on balance of probability.
  2. Trial court erred determining the case on cause of action and issues that were not pleaded or canvassed in the evidence and submissions.
  3. Trial court decided the case on hypothesis not supported by pleadings or evidence.
  4. The Learned magistrate misapprehended the principle applicable in award of damages and analyzed evidence incorrectly thus arriving at a wrong finding.



5. Trial magistrate failed to direct her mind on glaring disparities in the Respondent's evidence and pleadings.
  6. The trial court erred in failing to appreciate the Appellant's evidence and submissions.
3. The appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

4. The appellant submitted that she had in her pleadings denied that she was the beneficial owner of the motor cycle. That the burden of proof was on the respondent to prove that she was the beneficial owner of the motor cycle as pleaded.
5. The appellant submitted that the respondent produced a copy of search from the Registrar of Motor Vehicles showing the registered owner of the motor cycle as Captain Motor Cycle Manufacturing Company. That the respondent did not call any witness from this company to ascertain whether she had any connection with the ownership of the motor cycle.
6. It was submitted that the respondent produced a police abstract which however did not show the appellant as the owner of the motor cycle. That the respondent told the court that she was told by a police officer that the appellant was the owner of the motor cycle but she did not call the officer who gave that information to testify in the case. Neither did she call Tiger Motor Cycle Company Limited who were alleged to be makers of a motorcycle sale agreement produced in court as Exh.3. Therefore, that the respondent did not adduce sufficient evidence from which a connection could be inferred that the appellant was the beneficial owner of the motor cycle.
7. The appellant submitted that the trial magistrate erred in taking into account a sale agreement that was attached into the proceedings in Nanyuki CMMCC No.91 of 2015.
8. On damages, the appellant submitted that the testimony of the respondent on the injuries that she sustained was inconsistent with the injuries pleaded in the plaint and in the medical report.
9. The appellant further submitted that the authorities cited by the trial court in reaching an award of Ksh.100,000/= were irrelevant to the matter that was before court. That the trial magistrate did not cite any comparative authorities. That the award was inordinately high and represented an erroneous estimate of damages. That the respondent suffered soft tissue injuries. The appellant urged the court to disturb the award and substitute it with an award of Ksh.40,000/=.

### **Respondent's submissions**

10. The respondent on the other hand submitted that the appellant in her witness statement recorded on 30/9/2016 admitted that she was the owner of the motor cycle in issue. That the trial court also took this fact into consideration in arriving at a conclusion on the ownership of the motor cycle. Therefore, that ownership was proved by the appellant on her own admission.
11. The respondent submitted that she adduced a delivery note from Captain Motor Cycle to Tiger Motor Cycle relating to the material motor cycle. Further that she adduced a sale agreement between Tiger Motor cycle and the appellant which proved ownership of the motor cycle by the appellant. That the respondent had established a casual link between the appellant's negligence and her injuries.
12. The respondent submitted that the court was invited to take judicial notice of the sale agreement which was not produced in the proceedings. That the law is that the court can take judicial notice of facts which are in the public domain.



13. On the injuries sustained by the respondent, the appellant submitted that the injuries as contained in the plaint and in Dr. Muthiora's medical report were tallying. That the award of Ksh.100,000/= made by the trial court was fair and was guided by existing principles in awarding damages.

**The respondent urged the court to dismiss the appeal.**

### **Analysis and Determination**

14. This being a first appeal, it is trite law that the court ought to examine and re-evaluate the evidence on record, assess it and make its own independent conclusion. This position was taken in *Selle & Another –vs- Associated Motor Boat Co. Ltd.& others* (1968) EA 123 where the court held that:

“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 demeanor of a witness is inconsistent with the evidence in the case generally.”

15. The appeal is on both liability and quantum of damages. I will consider the two issues separately.

### **Liability**

16. The respondent was the only witness in the case as far as liability was concerned. It was her evidence that on the 9/10/2014 she was walking on the side of the road off Doldol- Nanyuki road. That she was on the right side of the road as one faces Nanyuki from Doldol side. That she heard the noise of a motorcycle approaching from Doldol side. That it swerved off the road and knocked her down. The cyclist took off after it knocked her down but she took its registration number. She was injured on the right hand, on the shoulders and right side of the waist. She went to Nanyuki Teaching and Referral Hospital where she was treated and discharged. That on the following day she was experiencing pain and she went back to hospital and she was admitted for 3 days. She reported the accident at Nanyuki police station. She was issued with a police abstract.
17. It was further evidence of the respondent that her advocate conducted a search with the Registrar of Motor Vehicles and found that the same was registered under Captain Motor Cycle Manufacturing Co. That her advocate wrote a demand letter to the said company who responded that the motor cycle was bought by Margaret Nkirote, the appellant. The company gave them a sale agreement that was produced in court as P.exh. 3, despite objection by the appellant on the basis that it was a photocopy and was not certified. The respondent also identified a delivery note that was marked MFI.4 but was not produced in court as exhibit.
18. It was also the evidence of the respondent that a sister to the appellant called Judy Kagwiria was charged over ownership of the motor cycle after she (Judy) came forward and said that the motor cycle belonged to her. That the police then told her that the motor cycle belonged to the appellant.
19. The respondent further told the court that she had initially sued Captain Motor Cycle Manufacturing Company but that there was a sale agreement between them and the Appellant.



20. The appellant on her part testified in the case and further relied on her witness statement dated 30/12/2016. She told the court that she was not the owner of the motor cycle in issue and has never owned a motor cycle. She was referred to the sales agreement P.exh.3 and denied that she bought a motor cycle from Tigers Motor Cycle Co.Ltd. She stated in cross-examination that she never saw a delivery note.
21. I have considered the grounds of appeal, the record of the trial court and the submissions advanced by counsels for both parties. The issue for determination on liability is whether the respondent had proved that the appellant was the owner of the subject motor cycle.
22. The trial magistrate in her judgment held the appellant liable for the accident on the sole basis that she had admitted in her witness statement dated 30/12/2016 that she was the owner of the motor cycle. The magistrate held as follows:  
"I have considered the totality of the pleadings, the evidence and the submissions made in this case. I note from the pleadings that Margaret filed a statement which on December 30,2016 (sic). In the statement drawn and filed by her advocates, she states, "I am the owner of the motor cycle registration no.KMDG 741E." She goes on to state that she is not responsible for the accident. But in the eyes of the law, Margaret is to blame for the accident; indeed, she is 100%liable for the accident".
23. The appellant in her statement of defence denied ownership of the subject motor cycle and put the respondent to the proof of the same. Whereas the respondent in her witness statement stated as quoted by the trial court that she was the owner of the stated motor cycle, she continued to say in the subsequent paragraph, which the trial magistrate did not quote in full, that:  
"I am not to blame for the alleged accident as I was neither the driver or the owner of motor cycle. I pray that the suit be dismissed with costs."
24. It would then seem that the appellant was on one hand admitting that she was the owner of the motor vehicle and on the other denying that she was the owner. Should the trial court then have taken this to be a full admission of ownership of the motor cycle?
25. In *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others* [2021] eKLR Mativo J. (as he then was) considered what amounts to an admission and held as follows:  
.....Admission of a fact has to be clear from the facts and it should not be left to interpretative determination of court.....  
A decree can be passed only to the extent of admitted claims for which admissions are clear, unequivocal and unambiguous. There is no specific form of admission required for a court to pass a decree. It may be contained in pleadings or otherwise. It may be in writing or may even be oral. Even in cases where some dispute has arisen over any admission, judgment on such admission can be passed unless there is sufficient material on record to prove the admission is vague. Moreover, if an admission can be inferred from the facts and circumstances of the case without dispute, the court can pass a judgment on such admission.
26. It is clear to me that judgment on admission can only be entered where the facts are clear, unequivocal and unambiguous. In this case the appellant denied ownership of the motor vehicle in her statement of defence. She denied the same in her sworn testimony in court. The purported admission in her written statement cannot be taken as an admission of ownership as the same was not clear, unequivocal and unambiguous. The trial court erred in pulling out part of the written statement which tended to admit ownership without considering the contents of the entire statement in order to determine whether



- the statement amounted to an admission or not. It is my finding that the purported admission in the witness statement of the appellant was not unequivocal. In fact, from the context of the statement, the purported paragraph on admission appears to be a typing error. There was no admission of the claim.
27. The next question is whether the respondent adduced sufficient evidence to prove that the appellant was the owner of the motor cycle. The respondent produced a copy of records that showed that the registered owner of the motor cycle was Captain Motorcycle Manufacturers Company. She also produced a photocopy of a sales agreement from a company called Tigers Motorcycle Company Ltd between the said company and one Marget Nkirote.
28. A photocopy of a document styled as “Delivery Note” from Captain Motorcycle Manufacturing Co. Ltd to Tigers Motor Cycles was marked for identification but it was not produced as exhibit. Since the same was not produced it could not be used as evidence against the appellant.
29. The respondent was relying on the sales agreement in an attempt to show that the appellant had bought the subject motor cycle from Tigers Motorcycle Co. Counsel for the appellant objected to the production of the said document on the ground that it was a photocopy and was not certified. The trial court all the same admitted the document as evidence in the case. Since the document was a photocopy it fell under the description of secondary evidence.
30. Section 64 of the *Evidence Act* requires contents of documents to be proved by either primary or secondary evidence. Section 68(1) of the Act stipulates the conditions under which evidence on secondary evidence may be received in court. The section provides as follows:
68. Proof of documents by secondary evidence (1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases—
- (a) when the original is shown or appears to be in the possession or power of—
- (i) the person against whom the document is sought to be proved; or
- (ii) a person out of reach of, or not subject to, the process of the court; or
- (iii) any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;
31. In this case the court allowed production of a photocopy of the sale agreement when there was no compliance with the provisions of section 68 of the *Evidence Act*. The appellant is not the one who was in possession of the original document and neither had she admitted the contents of the document in writing. The sales agreement was unprocedurally produced in court. It was of no probative value and could not be used to prove that the appellant had bought the subject motor cycle from the Tigers Motorcycle Company.
32. The respondent was required to call the maker of the sales agreement to testify on whether or not they sold the subject motor cycle to the appellant. She failed to do so. The source of the document is unknown. It is therefore my finding that the trial magistrate erred in holding that the appellant was the owner of the motor cycle. There being no evidence that the appellant was the owner of the motor cycle, there was consequently no evidence that she was liable for the accident. The finding of the trial court on liability in the premises is set aside.



## **Quantum**

33. Even though I have dismissed the respondent's case on liability, the law requires me to assess the amount of damages I would have awarded the respondent if she had succeeded in the case.
34. The injuries pleaded in the plaint are: Bruises and swelling on the trapezium muscles Soft tissues injuries on the back.
35. The discharge summary indicated that the Respondent was admitted in hospital for three days with lower back pain.
36. The respondent called the doctor who prepared her Medical report, Dr. Muthiora, PW2 who testified that he saw the respondent about 9 months after the accident. That he relied on her medical history that indicated that she had sustained injuries to the lower back right side, right shoulder and right knee. That at the time of examination she had slight scarring on the shoulder right side, hip and right knee and tenderness on the right gluteal region. That there was persistent pain on the site of impact on palpation. She complained of pain and discomfort on walking for long distances.
37. I have noted that the P3 form indicated that the respondent had sustained bruises on the left trapezius muscle. The same however did not indicate any injuries on the right knee as indicated by Dr. Muthiora, and neither was the injury on the knee pleaded in the plaint. I do not find sufficient evidence that the respondent sustained an injury on the right knee. The injuries sustained were on the shoulders, hip and right gluteal region.
38. In *Hantex Garments (Epz) Ltd Vs Haron Mwasala Mwakawa (2017) eKLR*, the High Court upheld an award of Ksh.100,000/= where the respondent had sustained bruises, blunt trauma, swelling and tenderness on the right leg.
39. In *Mumias Sugar Company Limited v Julius Abuko Shibia [2015] eKLR Kakamega HCCA 112/2011*, an award of KShs.100,000 was made in favour of the plaintiff who suffered blunt injury to the neck, blunt injury to the occipital region of the head, blunt injury to the right shoulder, complaints of neck pain on and off with backache.
40. Considering the evidence of Dr. Muthiora that the respondent had pain on the site of impact 9 months after the accident, I would have confirmed the award of Ksh.100,000/= awarded by the trial court.
41. The above notwithstanding, the final end is that the appeal is allowed. The judgment of the trial court is set aside and the respondent's suit dismissed with costs to the appellant.

### **WRITTEN AND SIGNED BY:**

**J. N. NJAGI**

**JUDGE**

**DELIVERED, DATED AND SIGNED AT NANYUKI THIS 23<sup>RD</sup> DAY OF MAY 2024**

**By:**

**A K NDUNGU**

**JUDGE**

In the presence of:

.....for Applicant

.....for Respondent



Court Assistant - .....

30 days Right of Appeal.

