Wepukhulu t/a Gati Cleaning Agency Limited v Oduor (Civil Appeal 82 of 2019) [2024] KEHC 5737 (KLR) (14 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5737 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 82 OF 2019

DKN MAGARE, J

MAY 14, 2024

BETWEEN

JONATHAN WEPUKHULU T/A GATI CLEANING AGENCY LIMITED ..... APPELLANT

AND

JULIUS ODHIAMBO ODUOR ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the judgment and decree of the Hon. Kassam SRM in Mombasa CMCC 112 of 2015 given on 22/3/2019. The Appellant was a defendant in the case.

2. This Appeal is rather strange. It reminds me of the dispute between Shylock and Antonio in William Shakespeare's, "The Merchant of Venice" with the words of Portia as 'Judge', as follows:

> ...Tarry a little; there is something else. This bond doth give thee here no jot of blood; The words expressly are 'a pound of flesh:' Take then thy bond, take thou thy pound of flesh; But, in the cutting it, if thou dost shed One drop of Christian blood, thy lands and goods Are, by the laws of Venice, confiscate Unto the state of Venice...

3. The 1st Respondent demanded for justice in the Trial Court and got justice for himself but there are much more matters to abound the justice that he sought and obtained; with the consequence of justifiably taking it away. The hon attorney general sought and was granted leave to b joined as a respondent herein at Appeal level. He was also granted leave to adduce further evidence. This was because the Appellant has been injured and lost same teeth in several other cases and actually got judgment in All of them.

4. The matters in this Appeal turned out to be matters that were largely not brought to the attention of the Trial Court. It is not a typical appeal. New evidence rammed the Appeal and metamorphosized it into an originating suit within the appeal. The issues in the Memorandum of Appeal dwindled and

the main issue appear to be even whether the Judgement of the Trial Court, prima facie, stands the test of legality.

5. The Memorandum of Appeal dated 18th April 2019 raised the following grounds as doth:

   a. The Trial Magistrate erred in law and fact in finding liability against the Appellant.

   b. The Trial Magistrate erred in law and fact in awarding special damages not proved.

   c. The Trial Magistrate erred in law and fact in awarding excessive general damages.

   d. The Trial Magistrate erred in law and fact in failing to consider the evidence and submissions by the Appellant.

6. The court will not deal with ground 3 as it is not a stand alone ground.

Pleadings

7. Vide an Amended Plaint dated 13th November 2015, the 1st respondent claimed damages for an accident that occurred on 2/1/2015 in which it was alleged that while cycling from Mikindani slaughterhouse carrying 90 Kg of assorted meat, liver and stripe (matumbo), the 1st Respondent fell into a 4-feet deep pit dug by the Appellant under instruction of the 2nd Respondent and negligently left by the road side as to cause danger to the 1st Respondent and other members of the public. The 1st Respondent set forth particulars of negligence. He pleaded injuries as follows:

   i. Loss of lower front teeth No. 31 and No. 34

   ii. Blunt object injury to the forehead.

   iii. Blunt object injury to both cheeks

   iv. Blunt object injury to the right ankle.

8. The Appellant filed Defence, denied liability for the accident.

9. The Trial Court considered the case and delivered its Judgment on 22/3/2019. The Judgment was as follows:

   a. Liability 100% against and the Defendants.

   b. General Damages 455,000/=

   c. Special Damages 46,400/=

   d. Costs and interest

10. The Court did not indicate the total award. It is important when delivering judgments, the court comes up with the full, spectrum of the judgment. It should not let lawyers do the calculations on their own. It is also a strange award on special damages as they are almost precise instead of being at large.

Duty of the first Appellate court

11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

12. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

13. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

14. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

15. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

16. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR, Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

17. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

18. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph *8*.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

19. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

20. The Court of Appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

21. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages: -

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

22. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

23. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

24. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

25. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite

apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

The Appellant's case

26. During the hearing of this Appeal, the 1st Respondent was cross examined. It turned out that he had been injured and lost the same teeth in several other previous cases. In 2004 he had a sued a defendant in CMCC No. 4944 of 2004 which was still pending in court. That he lost two lower teeth. He was awarded damages for the loss of those teeth.

27. Hitherto he had filed CMCC No. 1750 of 2003 in which he lost lower incisors to the right and so the total teeth lost by 2004 was 4.

28. Further, that on 2014, he filed CMCC 1989 of 2014 involving an accident while he was working when he fell into a sewer. He lost 2 teeth on the left jaw. In 2015, he also filed CMCC No. 112 of 2015 and lost two teeth. There were other cases. The only common denominator was that the teeth lost in respect of the accident in this Appeal was already lost before the alleged accident.

29. That in this case, he was supplying meet on a motorcycle. He fell in an open pit and two teeth came out. According to him lost two teeth each of the cases and therefore 8 teeth in all the four cases. On cross examination, it was his case that he had lost 8 teeth but they regrew back for him to lose them again.

30. The doctor indicated that teeth cannot regrow after milk teeth. I was wondering why the 2 that he lost have not grown again. I take judicial notice under section 60(1) l that teeth cannot grow once removed. It is not the common way nature behaves. That upon loss of teeth, teeth could not regrow at his age.

Analysis

31. I have perused the record of appeal, the proceedings and the Affidavits filed by the respective parties.

32. I have also considered the submissions and authorities filed in court and it is not for the lack for their value that I do not reproduce them here. They relate to the fact whether or not this particular accident occurred.

33. As observed at the beginning, this is a peculiar appeal that turns on new evidence. This court as the power to scrutinize new evidence. In addressing the question when additional evidence may be taken on appeal, the Supreme Court gave the general principles in the case of Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 Others [2018] e KLR as doth;

> " We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:(a)The additional evidence must be relevant to the matter before the court and be in the interest of justice;(b)It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;(c)it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;(d)Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;(e)The evidence must be credible in the sense that it is capable of belief; (f)The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;(g)Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;(h)Where the additional evidence discloses a strong prima

facie case of wilful deception of the Court;(i)The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.(j)A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.(k)The court will consider the proportionality and prejudice of allowing the additional evidence.

This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other."

34. Stemming from the Investigation reports against the 1st Respondent, I note that the 1st Respondent alleged the loss of tooth numbers 31 and 41 in the four different cases filed in court.

35. There cannot be any other conclusion than the 1st Respondent, in pursuit for justice involved injustices to others through his fraud. The Trial Court could not have noticed the fraudulent misrepresentation just as the other Defendants in earlier matters could not. Howver, a judgment that was obtained fraudeulnets cannot be left to stand.

36. Black's Law Dictionary (11th Edition) the term fraudulent misrepresentation as stated to mean:-

> " A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and is intended to induce a party to detrimentally rely on it".

37. Fraud is proven when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false (Derry -vs- Peek (1889) 14 App Cas 337).

38. In my analysis, the 1st Respondent filed a multiplicity of suits while concealing the prior suits. In each he pleaded similar injuries. He managed to get away with this illegality and in fact obtained the Judgement that is subject to this Appeal. It is not in the ability of this court to aid a party in wrong doing. Courts frown at parties who conceal facts. In any event, a party cannot benefit from an illegality.

39. As was held in *Kenya Wildlife Service v Awuor (Civil Appeal E013 of 2022)* [2023] KEHC 3721 (KLR) (26 April 2023) (Judgment):

> " Under common law there cannot be a wrong without a remedy - or in other words,' Equity will not suffer a wrong to be without a remedy (ubi jus ibi remedium).

40. This was a fraudulent claim. Even from the evidence there was o material upon which the court could hold the Appellant liable. The accident never happened. The loss never happened. This was a scheme by the 1st respondent together with professionals to have fraudulent claims perpetuated against the insuring public.

41. The innocent party in this case was the Appellant who could not have established the misrepresentation during the pendency of the suit and as such suffered an adverse Judgement.

42. Therefore, to this court, the Judgement in was tinted with illegality due to nondisclosure of facts and fraudulent misrepresentation. The Judgement is as such a nullity and non existent. As was re-stated by the Supreme Court in Petition No. 5 of 2015 - Republic vrs Karisa Chengo and 2 Others, where

the court quoted Lord Denning M.R in Benjamin Leonard Mcfoy United African Company Limited (UK) [1962] AC 152 in the Privy Council as opining:

> " If an act is void, then it is in law a nullity. It is not only bad ...and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

43. The judgment by the court, being based on a fraudulent claim perpetrated against the Appellant must as a corollary be set aside. Having set aside the judgment and noting that the award was for non-existent claim, I set aside the award of both special and general damages.

44. To start with what was claimed as special damages was not awardable. The damages were too remote. Further, the same had been compensated in other suits, also filed fraudulently. Claim for lost meat, bicycle are too remote and not proved. Only the award for medical report of 2000 could have sufficed. Had the 1st Respondent intended to claim for a bicycle, it is not enough to produce a receipt for purchase, it must be valued and damages assessed. I set aside the entire award of special damages.

45. On general damages the court has to defer to the lower court. However, in this case, there were no damages proved. The award thus must be set aside in toto.

46. The 2nd Respondent and the Appellant will have costs. This is informed by the supreme court decision in The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

47. Before I depart, I note that I have made a positive finding of fraud in all cases filed by the 1st respondent. The judgment debtors in those cases are entitled to a refund of all amounts paid including auctioneers charges in all the cases that were filed by 1st respondent.

48. Further all the claims filed were without basis. The hon Attorney general had to move in to save the situation. The 1st respondent does not appear to be keen to stop filing vexatious proceeding. Given that the attorney general is the one who moved the court on the various cases, this court has no option than declare the 1st respondent a vexatious litigant. Consequently, he cannot file suit without written permission under the hand of the hon attorney general, given prior to filing of such suit. He shall also declare such a fact of having been found to be a vexatious litigant in every pleading, petition, Appeal or other processes he may file. The declaration shall be on the title and body. The title shall indicate "Julius Odhiambo Oduor –A vexatious litigant."

Determination

49. In the upshot, I make the following orders: -

a. The appeal is allowed. I set aside the entire judgment and decree in Mombasa CMCC Suit No. 112 of 2015 given on 22nd March 2019, in lieu thereof I dismiss the case in the lower court with costs.

b. The Appellant to have costs of Ksh. 175,000/=/

c. The 2nd respondent to have costs of 180,000/=

d. The costs shall be paid within 30 days in default execution do issue.

e. By dint of this judgment, the 1st Respondent is to refund all monies paid under the decrees in the cases he fraudulently filed together with costs and auctioneers charges within 30 days in default the judgment debtors in those cases be at liberty to execute.

f. I find that the 1st Respondent is a vexatious litigant by dint of *vexatious proceedings Act*. He shall not file any proceedings in the Republic of Kenya against any person or entity without prior written consent under the hand of the attorney general and where such leave is granted, without disclosing that very fact in pleadings. He shall also declare such a fact of having been found to be a vexatious litigant in every pleading, petition, Appeal or other processes he may file. The declaration shall be on the title and body. The title shall indicate "Julius Odhiambo Oduor –A vexatious litigant."

g. The 1st Respondent the Appellant's costs in the lower court

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 14TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of: -

Ms. Attorney General

Ms. Opwapo and Company Advocates

Ms. Lawrence Obonyo legal Advocates

Court Assistant- Brian