Gitau & another v Dame (Civil Appeal E483 of 2021)
[2024] KEHC 7084 (KLR) (Appeals) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7084 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

APPEALS

CIVIL APPEAL E483 OF 2021

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

SAMUEL NJOROGE GITAU .... 1ST APPELLANT

EASTLEIGH ROUTE SACCO LIMITED .... 2ND APPELLANT

AND

ZEINAB KILTA DAME .... RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon. P. Muholi - PM in Milimani CMCC No. 8914 of 2017, delivered on 4th August, 2021)

JUDGMENT

1. This is an appeal from the judgment and decree given on 4/8/2021 in Nairobi CMCC 8914 of 2017. The Appellant filed a Memorandum of Appeal the following day, but dated 4/8/2021. They set out 4 grounds of appeal:

    a. That the learned trial magistrate's judgment was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

    b. The learned trial magistrate erred in law and in fact in awarding under the head "general damages" Kshs.550,000/= the same based on the wrong principles of law as the same was excessively high and unjust in view of conventional awards in relation to similar claims.

    c. The trial magistrate erred in fact and in law in finding the entire defence unconvincing and failing to consider the Appellant's submissions and their cited authorities therein.

d. The learned Judge erred in awarding an excessive sum for the nature of the matter in the face of the evidence adduced.

2. The appeal goes against the old adage by wise men that actions should never be taken on the heat of the moment.

3. The Respondent filed suit on 15/12/2017 stating that the Respondent suffered fracture and dislocation of the 1st metatarsal bone of the left leg with 5% permanent disability. They sought Kshs.4,150/= as special damages made up of:

   i. Copy of records - Kshs.550/=

   ii. Medical report - Kshs.2,000/=

   iii. Medical and transport costs – Kshs.1,500/=

Submissions

4. The Appellant filed submissions dated 21/11/2022. They prayed that the Appeal be allowed. They sought that the court awards Kshs.60,000/=. This was on basis of some bruises suffered in the case of *Eva Karemi & 5 others –vs- Koskei Kieng & Anor* [2020]. They also reasserted that the court considered *Ndungu Dennis –vs- Ann Wangari Ndirangu & Anor* [2018]. They had blunt injuries to both hands. They stated that the initial x-ray did not indicate a fracture.

5. On the other hand the Respondent stated in their submissions dated 15/11/2023 that the appeal is baseless. They relied on the case of *Simon Muchemi Atako & Anor –vs- Gordon Osore* (2013) eKLR. They stated the record is incomplete. The x-ray at page 13 is not the Respondent's and the one on page 14 was not an exhibit.

6. They stated that it is so because the defence downgraded their injuries. They asked that I rely on *Agnes Kamene Mulyali –vs- Harvest Ltd* (2017) eKLR.

Decision

7. The court considered and held the driver 100% liable. There is no appeal on this aspect. The second aspect was quantum. The court considered decisions by both parties and awarded Kshs.500,000/=, and special damages of Kshs.4,150/=. There is no appeal on special damages.

8. The question before the court is not truly the quantum but the injuries suffered. This is because both parties are basing their case on different injuries.

Analysis

9. 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.

10. This was aptly stated in the case of *Peters vs Sunday Post Limited* [1958] EA 424 where, the court of Appeal 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…"

11. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

> " …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 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…"
>
> appellate court might have come to a different conclusion…"

12. The Appellant closed their case without calling witnesses. The Respondent adopted a list of documents dated 13/9/2017. They are at pages 6-19 of the lower court record. The defence closed its case without calling any evidence. A copy of the record by Dr. Imalingat was not produced by both parties though it has been filed in the record. I have also seen the list of defendant's list of authorities.

13. Documents from pages 14-19 are missing in the record of appeal. In lieu thereof they were replaced with page 13-15. I find no difficulty in striking out those documents as they are meant to embarrass a fair trial. The record of appeal is a creation of practice and not means to introduce new evidence. For introduction of new evidence the Appellant must apply and be granted leave to adduce new or additional evidence.

14. The question of an appellant (and by like reasoning a Respondent who has filed a cross-appeal) being heard on a new point which was not raised in the trial court has been dealt with by a long list of decisions of the Court of Appeal for East Africa and the Kenya Court of Appeal and the position that the court has a discretion in permitting a new point to be taken on appeal is now established. There is however no decision that the court can entertain new evidence sneaked into the record of Appeal for the first time at Appeal level.

15. In the case of *Twaher Abdulkarim Mohamed v Independent Electoral & Boundaries Commission (IEBC) & 2 others* [2014] eKLR, the court stated as follows:

> " The general principle that a new point not raised in the pleadings may not be allowed or used as a basis of judgment is set out decisions of the courts cited by the appellant and also in *Girdhari Lal Vidyarthi v. Ram Rakha* (1957) EA 527 CA, where the Court of Appeal, held that the appellant could not be heard to allege an express trust when he had only pleaded a resulting trust before the trial court.
>
> How about a situation where although a matter is raised before the trial court, it is not raised initially in the grounds of appeal and it is subsequently sought to be raised by the appellant or indeed by the Respondent? Does the want of an appeal by way of a memorandum of appeal under rule 34 in this case prevent the court from entertaining the point proposed to be raised by the Respondents? I think the matter may be resolved by reference to the analogy of the principles for raising a new point on appeal which was not dealt with at the trial court. Although the point had been raised in the trial court, having not been raised a memorandum of appeal by the Respondent, it amounts to a new point taken in the course of the appeal,

and the considerations of the ability to give the appellant a fair trial are paramount in the same way as with the new point not previously raised in the trial court."

16. It was held by the Court of Appeal in *Securicor (Kenya) Ltd v. EA Drappers Ltd and Anor.* (1987) KLR 338, that the Court of Appeal has a discretion to admit a new point at appeal but that the discretion must be exercise sparingly, the evidence must all be on record, the new point must not raise disputes of fact and it must not be at variance with the facts or case decided by the court below.

17. In *Attorney General v. Revolving Tower Restaurant*, (1988) KLR 462, the Court of Appeal reiterated the principle that an appellate court has discretion to allow an appellant to take an new point before it if full justice can be done to the parties but found that in the case the facts bearing upon the new point had not been fully explored to show the relevance of the new point of law and the court would therefore not allow that new point.

18. In *Kenya Commercial Bank Ltd v. Osebe* (1982) KLR 296 and *Nyangau v. Nyakwara* (1986) KLR 712 the Court of Appeal held that it would allow a point to be raised for the first time on appeal where it was an issue going to jurisdiction.

19. The law on the matter was also condensed by Platt JA in *Wachira v. Ndanjeru* (1987) KLR 252, as follows:

> "The principles can be summarised as follows: the discretion to allow a point of law to be taken for the first time on appeal will not be exercise unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case. (See *Tanganyika Farmers Association Ltd. v Unyamwenzi Development Corporation* [1960] EA 620, *Overseas Finance Corporation Ltd v. Administrator General* (1942) 9 EACA 1). But the court will allow a new question concerning the construction of a document or the legal effect of admitted facts, since no question of evidence arises, and it will usually be regarded as expedient in the interests of justice to do so."

20. In the case Civil Appeal No. 13 of 2018 *Ainu Shamsi Hauliers Limited versus Anastacia Ndinda Mwanzia (suing as Administrator of the Estate of Harrison Mwendwa Karili* [2018] eKLR where C. Kariuki – J., held that:

> "No Court of Law should be deprived of information which will assist it reach a fair and first determination of a case. Counsel also relied on CA 93 of 2016 (Court of Appeal at Mombasa between *Tana and Athi River Development Authority versus County Government of Tana River* [2018] eKLR where the Court set out the threshold for allowing additional evidence and stated *inter alia* that in allowing additional evidence, the Court should not allow a fresh case but for the Court to arrive at a proper determination."

21. In the case of the *Administrator of His Highness the Aga Khan Platinum Jubilee Hospital Versus Munyambu* CA No.18 of 1983 where the Court of Appeal elucidated two prior parameters for the court to allow additional evidence: -

> " That the evidence sought to be adduced could not be obtained with reasonable diligence during the cause of the trial and that it will have an important influence and is credible enough."

22. However, whichever he position, evidence must be introduced formally and not by sneaking, so to speak into the court record. Such evidence is otiose and has no place in a civilized litigation. That gives a chance, on the basis of Audi Alterum Paterm to comment or rebut the same. It is not even trial by ambush but by subterfuge.

23. The medical report and the P3 show grievous harm, walking with difficulty in crutches, fracture, dislocation of the metatarsal bone. The plaster of Paris was applied. A report by Mr. Wokabi showed that the Appellant suffered a major injury, a fracture at the base of the 1st metatarsal bone.

24. The evidence is consistent with other evidence on record. I find and hold that the Respondent suffered a fracture dislocation of the 1st metatarsal bone. The court had awarded a sum of Kshs.500,000/=.

25. In *Samuel Ndungu Mbugua –vs- Jane Wambui Gitau* [2022], on 17/2/2022 Hon. Justice Kariuki awarded damages Kshs.400,000/= for fracture of the 3rd metatarsal, pharyngeal, dislocation of left ankle joint and pain on the second finger of the right hand.

26. In the case of *China Wu Yi Co. Ltd –vs- Stephen Muniu Kingangi* the court, E.K. Ogola confirmed an award of Kshs.800,000/= for fracture dislocation of the tarsal-metatarsal joint of the right foot and degloving injury medial aspect of the right foot.

27. In this matter the court awarded Kshs.500,000/=. The sum is within the region awarded by other courts. In the circumstances I find no merit in the appeal. The next question is on costs.

28. 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."

29. Section 27 of the *Civil procedure Act* Provides as follows: -

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

30. Costs follow the event. In this case it is dismissal of a hopeless Appeal. The Respondent is entitled to costs. In the end, I find that the Appeal lacks merit and is accordingly dismissed with costs of Ksh. 115,000/= to the Respondent.

Determination

31. In the circumstances I make the following orders:

a. The appeal herein lacks merit and is consequently dismissed with costs of Kshs.115,000/= to the Respondent payable within 30 days, in default execution do issue.

b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE 2024.

KIZITO MAGARE

....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

No Appearance for the Appellant

No Appearance for the Respondent

Court Assistant - Jedidah