Kinogerama FCS Ltd v Mungai & another (Civil Appeal 311 of 2023) [2024] KEHC 7092 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7092 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 311 OF 2023

FN MUCHEMI, J

JUNE 14, 2024

BETWEEN

KINOGERAMA FCS LTD ..... APPELLANT

AND

TERESIA NJERI MUNGAI ..... 1ST RESPONDENT

CHARLES KAMAU NDUATI ..... 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. V. A. Ogutu (Adjudicator/SRM) delivered on 15th June 2022 in Thika Small Claims Court Civil Claim No. E070 of 2020)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Adjudicator/Senior Resident Magistrate Small Claims Court Civil Claim No. E070 of 2022 a claim arising from a motor vehicle accident that damaged the appellant's premises. The Small Claims Court found that the appellant failed to discharge the required burden of proof and dismissed the suit.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 3 grounds of appeal summarized as follows:-

    a. The learned trial magistrate erred in fact and law in finding that the appellant did not discharge the burden of proof.

3. Both parties filed submissions in disposal of this appeal .

Appellant's Submissions

4. The appellant submits that it filed a suit against the respondents being Thika Small Claims Court Civil Claim No. E070 of 2022 claiming special damages for an accident involving the appellant's property and motor vehicle registration number KXA 514 which the 1st respondent beneficially owned and the 2nd respondent was the driver. The appellant submits that the trial court erred by finding that there was no evidence tendered in court on how the accident occurred despite all the evidence pointing to the fact that he accident was self-involving.

5. The appellant states that during the hearing, it pleaded that the 1st respondent's driver drove motor vehicle registration number KXA 514 in a careless and negligent manner causing it to hit the appellant's gate and eventually ramming into the appellant's chemical store.

6. The appellant submits that it adduced evidence in the form of an assessment report produced by PW3 to show the amount of loss it had incurred. The appellant further called a witness PW4who arrived at the scene ten minutes after the accident happened and gave her testimony that she found the lorry had crushed into the appellant's building. The appellant further submits that the evidence remained uncontroverted as the respondents did not call any witnesses to testify or give a contrary account of what happened. The evidence is further supported by the police abstract issued and produced by PW2 which expressly blamed the driver of motor vehicle registration KXA 514 for the accident.

7. The appellant further submits that he called PW2 who produced an investigation report which contained a concise statement from the driver explaining how he lost control of the vehicle and rammed into the property of the appellant. Further, the investigation report contained photographs of the accident scene which showed that the lorry crashed into the appellant's building.

8. The appellant states that the accident was self-involving and therefore there would be no eye witness to the accident as only one driver was involved. Furthermore, the appellant argues that the ten minutes it took PW2 to arrive at the scene of the accident does not negate the presence of the 1st respondent's action of ramming into the said building. As such, the appellant relies on the cases of *Osiche & Another vs Nyongesa (Suing as the legal administrator & representative of the Estate of Dickson Maina Kuloba Sirengo)* (Civil Appeal 18 of 2016) [2023] KEHC 24227 (KLR) (27 October 2023); *Sally Kibii & Another vs Francis Ogaro* [2012] eKLR and *Margaret Waithera Maina vs Michael K. Kimaru* [2017] eKLR and submits that the doctrine of *res ipsa loquitor* applies.

9. The appellant argues that the respondents did not call any witnesses to rebut the evidence tendered by themselves which means that it proved its case on a balance of probabilities.

10. Relying on the case of *Alice Wanjiru Ruhiu vs Messiac Assembly of Yahweh* [2021] eKLR, the appellant submits that the learned trial magistrate erred in finding no liability on the part of the respondents despite producing evidence in court to prove the contrary.

The Respondents' Submissions

11. The respondents rely on Sections 107 and 109 of the *Evidence Act* and the cases of *Ahmed Mohammed Noor vs Abdi Aziz Osman* [2019] eKLR; *East Produce Kenya Limited vs Christopher Astiado Osiro* in Civil Appeal No. 43 of 2001 and *David Musafiri Kulova vs Chhabhadiya Enterprises Ltd* [2020] eKLR and submit that the appellant did not discharge the required burden of proof as the witnesses called to ventilate its case were not eye witnesses to the alleged accident. The respondents submits that PW1 gave hearsay evidence on the occurrence of the accident, PW2 was instructed by the appellant's

insurance and only gave evidence to the assessment of losses whereas PW3 testified that she was not at the scene of the accident and was informed of the accident after the accident occurred.

12. The respondents submit that the only evidence adduced by the appellant on the occurrence and manner of the accident was the police abstract produced as exhibit 8 in the lower court which indicated that the case was pending under investigation. As such, the respondents contend that the appellant's case falls short in establishing the element of negligence upon themselves. Furthermore, the appellant did not substantiate the particulars of negligence it particularised in its statement of claim.

13. The respondents argue that although the appellant has relied on the doctrine of *res ipsa loquitor*, it has not met the burden of proof required to invoke the doctrine. Furthermore, the respondents maintain that the trial court appropriately evaluated the evidence presented before it and reached a conclusion.

14. The respondents rely on the case of *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others* [2014] eKLR and submit that costs follow the event and thus urge the court to award them costs of the appeal.

Issue for determination

15. The main issue for Determination is whether the appellant proved its case on a balance of probabilities.

The Law

16. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

> " .....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 into account of particular circumstances or probabilities materially to estimate the evidence."

17. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated 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.

18. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

    a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

    c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the Appellant Proved His Case on a balance of Probabilities.

19. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In *Khambi & Another vs Mahithi & Another* [1968] EA 70 it was held that:-

> It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

20. The appellant called three witnesses including PW1, a Legal Officer with CIC Insurance testifying that they brought the suit under the doctrine of subrogation following compensation to their insured, the appellant. According to PW1, motor vehicle registration number KCA 514 lost control and damaged the appellant's building leading to them engaging with loss adjustors who adjusted the loss to the tune of Kshs. 444,162/-.

21. PW2, a loss adjustor by Fidelity loss adjustor and assessors testified that he was instructed by the appellant to assess loss between 2019. The witness further testified that he assessed the loss at Kshs. 444,162.41/-.

22. PW3, a Manager of the appellant adopted her witness statement as her testimony. He testified that on 5/4/2019 at around 12pm, she was informed that a motor vehicle was driven into the appellant's gate and as a result of the accident, there was extensive damage on the property. The witness further testified that the matter was reported at Gatanga police station and the police officers visited the scene. On cross examination, the witness testified that she was in head office when the accident happened and she visited the scene immediately but was not present when the accident happened.

23. The respondents did not call any witnesses nor did they testify.

24. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-

> 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.

25. In *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:-

> As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the *Act*.

26. From the evidence on record, it is not disputed that an accident occurred on 5/4/2019 as testified by PW3 and the police abstract produced as an exhibit dated 10/4/2019.

27. According to PW3, she was not at the scene of the accident when it happened but she stated that it took her ten minutes to reach the scene of the accident. The police abstract produced indicates that the driver of motor vehicle registration number KXA 514 was blamed for the accident. Furthermore, the appellant produced the tracing report from Sunrays General Insurance Investigators dated 5/1/2022

which contained a statement by one Charles Kamau Nduati, the driver was to the effect that of motor vehicle registration KXA 514. The evidence the driver was to the effect that on the material day he was driving the said vehicle when the steering developed a mechanical problem and as a result he could not control the vehicle which ended up ramming into the appellant's premises. The said investigators report was produced into evidence by PW1.

28. The respondents did not call any evidence during the hearing of the case. At this point, the appellant shifted the evidential burden of proof when it pointed out through the investigators report that the respondents caused the accident. From the record, it is evident that the driver of the said motor vehicle on the fateful day was Charles Kamau Nduati. The documents relied upon by both the appellant and the respondents refer to the said Charles Kamau. The respondents only denied the claim but did not produce any evidence to rebut the claim by the appellant that indeed Charles Kamau was driving on the material day and he caused the accident.

29. The appellant testified that the respondent's driver was to blame for the accident in that he lost control of his vehicle, hit the gate of the appellant thereby damaging it. Due to the heavy impact, the respondent's vehicle pushed open the gate and damaged structures inside the home compound of the appellant as shown by the loss adjustor's report. The said structures consisting of two stores, an office, pulper house, two pump houses were damaged. The damage on the appellant's property was assessed at Kshs.602,084/=. The property was insured by CIC Insurance Company who after assessing the loss paid the appellant Kshs.444,162/=.

30. The issue herein was whether the appellant proved negligence of part of the respondent. The appellant was not at the scene when the accident occurred. She was called from her place of work and went to the scene within ten (10) minutes. The accident was reported to the police a Kirwara Police Station. A police abstract was issued dated 10th April 2019 on whose left hand corner was engraved the words "The driver of M/V Reg. No. KXA 514 is to blame for the accident." It is indicated that the abstract which bore the official stamp of Kirwara Police Traffic Base was picked by one Chairman Stephen Mbugua. The document was one of the plaintiffs documents.

31. The appellant produced the CIC Insurance loss assessment which had several attachments including photographs of the damaged property. The photos show damage on the mental gate and of the structures inside the appellants compound where walls and roofs suffered. These documents were produced by a claim department personnel CIC extensive damage. The statement of the claim sets out particulars of negligence which include losing control of the motor vehicle losing control of the motor vehicle registration number KXA 514, causing the said accident, driving without due care and attention as well as failing to slow down so as to avoid the accident.

32. The appellant testified as PW2 as to what she found at the scene at her home because she did not witness the accident. She blamed the driver of the respondent for the accident. Having not been at the scene, the appellant could not be expected to testify on how the accident occurred.

33. The appellant did not adduce any evidence despite being given the opportunity to do so. As such, the appellant's evidence remained uncontroverted. The Magistrate/Adjudicator dismissed the case on grounds that negligence was not proved on part of the respondent.

34. The question herein is whether the doctrine of *res ipsa loquitor* applies. The Court of Appeal in *Margaret Waithera Maina vs Michael K. Kimaru* [2017] eKLR invoked the doctrine of *res ipsa loquitor* as follows:-

> This is a case where the doctrine of *res ipsa loquitor* applies. In *Mukusa vs Singa & Others* (1969) EA 442 it was held that for the doctrine to apply there must be reasonable evidence

of negligence but where the thing is shown to be under the management of defendant or his servants and the accident in the ordinary course of things does not happen if those who have the management use proper care, t affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care.

In situations where explanation exists on how the accident occurred even if there are two different versions, the doctrine of *res ipsa loquitor* does not apply. The doctrine applies only in situations where an accident occurs and no other explanation can be attributed to it other than inference of negligence on the part of the defendant. This was not the situation in the above accident and the same was not pleaded. The doctrine is normally used to establish a tort of negligence in the absence of a proper explanation on how the accident occurred. The doctrine applies in situations where surrounding circumstances may permit an inference or a presumption of negligence on the part of the defendant if such defendant cannot offer an explanation in rebuttal.

35. I have considered the evidence on record. The police abstract was sufficient evidence to prove that an accident occurred on 5th April 2019 and was duly reported at Kirwara Police Station. The abstract indicated that the driver of the repondent's vehicle was to blame for the accident. The act of losing control on the public road, hitting the metal gate and going through it to hit and damage the appellant's stores was negligence on part of the respondent's driver. The driver gave no evidence to controvert that of the plaintiff which was corroborated by the loss assessor from CIC insurance and the loss adjustor who was engaged by the appellant. It is not a legal requirement, that there be an eye witness to testify but the scene at the Plaintiff's home which was documented by other witnesses was in my view sufficient to prove that the respondent's driver was negligent and drive at a high speed which accelerated the impact. Had the driver been at a moderate speed, the metal gate would have stopped the vehicle from entering the compound and damaging the stores.

36. In my considered view, the Magistrate/Adjudicator failed to consider the evidence of the plaintiff which was not controverted. The respondent made no attempt to exonerate himself on how he lost control and entered the appellant's compound and caused damage to property.

37. I come to a conclusion that the evidence adduced was sufficient to prove on the balance of probabilities, negligence on part of the respondent. It is not in dispute that the respondent was the employer of the driver and was therefore, vicariously liable for his acts. The judgment of the Magistrate on liability in my considered view, was erroneous both in fact and in law. I find the respondent fully liable for the accident and enter judgment against him in favour of the appellant. The judgment of the magistrate delivered on 15th June 2022 is hereby set aside.

38. The evidence of PW3 the loss adjustor as well as that of the insurance company corroborated that of the plaintiff and sufficiently prove the material damage claim.

39. It is my finding that the evidence adduced by the appellant proved the claim of Kshs.538,072. Judgment on the said sum is hereby entered in appellant's favour.

40. The appellant shall have the costs of the suit and of this appeal Interests on the special damages are hereby awarded at court rates with effect from the date of filing the suit.

41. The appeal is hereby allowed.

42. It is hereby so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 14TH DAY OF JUNE 2024.

F. MUCHEMI

JUDGE