Odongo & another v Okello (Civil Appeal E014 of 2023)
[2024] KEHC 6828 (KLR) (3 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6828 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E014 OF 2023

RE ABURILI, J

JUNE 3, 2024

BETWEEN

ELIJAH ODONGO ..... 1ST APPELLANT

SAMSON ADERA ODONGO ..... 2ND APPELLANT

AND

HUMPHREY ODHIAMBO OKELLO ..... RESPONDENT

(An appeal arising out of the Judgment of the Honourable M.I. Shimenga in the Chief Magistrate's Court at Kisumu delivered on the 10th November 2022 in Kisumu CMCC No. 602 of 2018)

JUDGMENT

Introduction

1. The appellants herein were sued by the respondent *vide* a plaint dated 7th November 2019 for general damages following injuries that he sustained after an accident that occurred on the 27th August 2019 when, as a pedestrian, he was knocked down by motor vehicle registration number KCM 994W owned by the appellants that he alleged was negligently driven resulting in the aforementioned accident.

2. The appellants entered appearance and filed a statement of defence dated 4th February 2020 denying any negligence on their part and attributing negligence on the respondent and put him to strict proof thereof.

3. After the hearing, the trial court found the appellant 100% liable for causing the accident and after considering the authorities relied on by the parties, she proceeded to award the respondent Kshs. 150,000 as general damages for pain and suffering for the injuries sustained and Kshs. 17,327 for special damages.

4. Aggrieved by the said judgment and decree, the appellants filed a memorandum of appeal dated 19th April 2023 raising the following grounds of appeal:

    1. That the learned trial magistrate erred in law and misdirected herself to the extent and value of the respondent's injuries and thereby erred in law in his assessment of damages as no initial treatment notes were produced as exhibits.

    2. That the learned trial magistrate erred in fact and in law in awarding quantum basing on a P3 form only which is dated 11 days after the accident.

    3. That the learned trial magistrate erred in fact and in law in failing to consider the appellant's submissions on quantum by completely disregarding the submissions and authorities of the appellant and as a result arrived in unjustified decision on quantum.

    4. That the learned trial magistrate erred in fact and in law in failing to dismiss the suit for non-injury.

5. The parties filed written submissions to canvass the appeal.

The Appellants' Submissions

6. The appellants' counsel submitted that although the accident occurred, the respondent was never involved in the same and that there was enough evidence adduced that the injuries which the respondent claimed to have sustained were not sustained in the said accident.

7. It was further submitted that in the absence of initial treatment notes from Avenue Hospital and Kisumu Specialist Hospital, the P3 form did not stand and that the respondent was intent on insisting that he suffered injuries from the accident without any proof whatsoever. Reliance was placed on the case of Eldoret Civil Appeal No.126 of 2013 *Fadna Issa Omar v Malne Sirengo Chipo & 3 Others* where the appellate court upheld the trial court's decision dismissing the suit for lack of treatment notes showing injury even with a P3 form and medical report indicating injuries as the same was not proof that the plaintiff was injured during the accident.

8. The appellant further relied on the case of *Peter Migiro v Valley Bakery Limited* [2015] eKLR where the High Court overturned the lower court decision and dismissed the suit for the plaintiff's failure to produce initial treatment notes and held that a medical report which is based on treatment notes which were never produced would never stand.

The Respondent's Submissions

9. On behalf of the respondent, it was submitted that he pleaded and proved all the injuries that he sustained following the accident which evidence was corroborated by PW2 and that no contrary evidence was adduced by the appellants to dislodged the respondent's claims.

10. It was submitted that the only way to challenge medical evidence was to subject the injured person to a second medical examination by a doctor of one's choice and produce the resultant medical report which the appellants failed to do. Reliance was placed on the Court of Appeal decision in the case of *Bagwasi Maranga (minor suing through his next friend and father Charles Maranga Bagwasi) v Samuel Kamonjo Muchiri & Another* [2000] eKLR where it was held *inter alia* that even though the medical report and treatment notes were not produced, the appellant gave credible and unchallenged evidence hence he ought to have been awarded some general damages for pain and suffering.

11. The respondent further relied on the case of *Erick Juma & 3 Others v Fredrick Gacheru & Another* [2016] eKLR where it was held *inter alia* that although treatment notes are part of the evidence of involvement in an accident or injury, it is not true that without treatment notes, one cannot prove involvement in an accident or injury.

12. The respondent thus submitted that the trial court did not err in awarding quantum of damages basing on P3 form as the same confirmed the injuries sustained.

Analysis and Determination

13. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of *Selle & Anor. v Associated Motor Boat Co. Ltd [1968] EA 123).* This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in the case of *Mwanasokoni v Kenya Bus Service Ltd. [1982-88] 1 KAR 278* and *Kiruga v Kiruga & Another* [1988] KLR 348).

14. From the grounds of appeal and both parties' submissions, submissions, the issue that arise for determination is whether the learned magistrate was wrong in awarding the respondent herein damages in the absence of initial treatment notes.

15. The common thread in the Appellants' grounds of appeal and submissions is that the non-production of initial treatment documents was fatal to the Respondent's case. It is their contention that the treatment notes were the only nexus between the accident and the injuries. They argued that in the absence of initial treatment notes, there could be no causal link between the accident and the injuries.

16. It was further contended that the P3 form itself would not suffice as it was filled 11 days after occurrence of the accident. According to them, the P3 form can only be filled with reference to the initial treatment documents.

17. I have extensively perused the record of appeal. The Respondent adopted the witness statement dated 7th November 2019 as his testimony. He testified that on the material date of 27th August 2019, he was a pedestrian within Kisumu Bus stage area when the appellants 'motor vehicle registration No. KCM 994W was carelessly, negligently and recklessly driven that it lost control and knocked the respondent upon which he sustained bodily injuries. The respondent testified that after the accident, he was rushed to Avenue Hospital where he was treated and discharged and later he went to Kisumu Specialist Hospital for further treatment. He further testified that he sustained injuries on his face (cheeks), forehead, a laceration on the left side of the chest, knee joints and right foot.

18. The respondent called PW2 George Mwita, a Clinical Officer at Ahero Sub county Hospital who testified and produced a P3 form for the respondent, which he had filled 11 days after the accident, listing and assessing the injuries that the respondent sustained in the accident of 27/8/2019 to be soft tissue injuries. On cross-examination, he stated that the respondent reported about the accident to him but he did not have any personal knowledge about it. He also noted that the respondent had fully healed.

19. PW3 PC Kithongo Kiilu then attached to Kisumu Central Police Station Traffic Section testified that the material accident which occurred at 10.00 am on the material date and place pleaded was reported at Kisumu Central Police Station. He stated that the police were yet to prefer any charges against the owner or driver of the motor vehicle involved in the accident. he stated that two motor vehicles were involved KCM 994W and KAX 270E. He stated that the police file went to the ODPP and was yet to

be returned but that the motor vehicle KCM 994W was to blame according to the report. He produced the police abstract as PEX 2.

20. I have examined the authority relied on by the Appellants. In my opinion, the circumstances in that case are very different from those in this suit. First and foremost, is that in the cited case, the initial treatment documents were not produced and the doctor who filled the P3 form was not called to give evidence. In this the instant case, the Clinical Officer who filled the P3 form was called and he gave evidence on the injuries and no questions were put to him regarding the said injuries. In addition, the Police officer, PW3 testified and produced the Police Abstract confirming that indeed, an accident did take place on the material day and that it involved the respondent. that accident was reported to central Police Station who booked the report and even recorded the name of the respondent as the person who was injured in the material accident. Police Stations do not just issue P3 forms and Police Abstracts. They must be satisfied that an accident has taken place and that the person being issued with the P3 form and the Police Abstract was involved in that accident and unless the contrary is proved, I have no reason to doubt the testimony of PW3 and PW2, who, nonetheless, were not eye witnesses to the accident and they need not be such eye witnesses.

21. In my view, the Respondent proved that he was involved in the material accident which was reported to Kisumu Central Police Station and that he suffered the injuries contained in the P3 form classified as soft tissue injuries.

22. PW1 and PW2's evidence on the injuries remain uncontroverted and unshaken in cross-examination. Furthermore, the respondent produced as exhibits receipts from Avenue Hospital showing that on 27/, he paid Kshs 950 being consultation fees, Kshs 8000 for a CT Scan of the brain together with a CT scan report signed by Dr. P. Umara Consultant Radiologist and Kshs 3366 to cover suturing, bandage, injections and other medicines given.

23. In my humble view, albeit the respondent did not produce treatment notes from Avenue Hospital, from the receipts produced and the CT Scan request and report together with medication which he paid for on the material day of the accident, Iam satisfied that the respondent was treated at Avenue Hospital and that that evidence satisfies the standard of proof in civil cases which is not beyond reasonable doubt but on a balance of probabilities.

24. In addition, I reiterate that the P3 form was issued by the Police Traffic Office at Kisumu and it would not have been difficult for the appellants to call evidence from the traffic police officers at Kisumu Traffic Office, who also issued the respondent with a police abstract, on 13/9/2019 to controvert the evidence that the respondent was involved in the material accident.

25. Further, albeit the appellants have argued that absence of initial treatment notes means that no accident occurred in which the respondent was injured, in their list of witnesses, they enlisted the Base Commander Kisumu Police Station who, in my view, would have attended court and confirmed whether the respondent was one of those people reportedly injured in the material accident. They however did not call this witness. Further, the appellants did not challenge the testimony of PW3 who was a police officer from Kisumu Central Police Traffic Base, where the material accident was reported,

26. Additionally, in the list of documents, the appellants listed a police file and an internal medical report among the documents to be produced. None of those documents were produced to controvert the evidence adduced by the respondent. It follows that the appellants had no basis to now claim on appeal that the plaintiff/ respondent herein was not involved in the material accident or that he was not injured following the material accident.

27. It is trite law that an appellate court will only interfere with a finding of fact by the trial court if it is based on no evidence, or on a misapprehension of the evidence, or where the trial court is shown demonstrably to have relied on wrong principles in reaching the findings he did. (see the Court of Appeal case of *Ephantus Mwangi and Another v Duncan Mwangi Wambug*u [1982 – 88] IKAR).

28. The Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* [1987]KLR 30 held that:

> " The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, 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 the damages." see also *Butt v Khan* [1981]KLR 349 and *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* [1979] EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu Civil Appeal No. 284 of 2001; [2004]eKLR.

29. Nothing in the learned Magistrate's judgment points to having arrived at her decision through misapprehension of evidence, reliance on wrong principles or that it was based on no evidence.

30. In the end, I find and hold that the trial court did not err in any way in holding that the respondent had proved on a balance of probabilities that he was involved in the material pleaded accident and that he sustained the injuries pleaded and proved. I further find no issue with the quantum awarded based for the soft tissue injuries suffered and the authorities relied on.

31. On whether the trial Court erred in ignoring submissions filed by the appellants' counsel I find that the ground of appeal not merited as the trial magistrate considered the submissions and stated in her judgment that the plaintiff's case on liability was not controverted. She also considered submissions on quantum and reached her decision based on the material placed before her. Furthermore, submission are not evidence controverting the respondent's evidence. The fact that PW3 was not an investigating officer and that he testified that two motor vehicles were involved in the accident does not in any way shift the liability to the respondent or to any other person. PW3 was clear that the investigating officer went on transfer and that the file was transmitted to Office of Director of Public Prosecutions fro advise but that from the preliminary report, the appellant's motor vehicle was responsible for the accident although no one was charged in court. No third party notice was issued to the owner of the other motor vehicle. The respondent having testified on what he saw happen in broad daylight at 10.am, I have no doubt that he proved his case against the appellants on a balance of probabilities.

32. This appeal is therefore found to be without merit. it is hereby dismissed with costs of Kshs 30,000 to the Respondent payable within 21 days of today by the appellants and in default, the respondent shall be at liberty to execute for recovery.

33. This file is closed

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF JUNE, 2024

R.E. ABURILI

JUDGE