



**David Ngare t/a Prestige Buses v Okumu (Civil Appeal
27 of 2022) [2024] KEHC 8815 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8815 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL 27 OF 2022**

JN KAMAU, J

JULY 24, 2024

BETWEEN

DAVID NGARE T/A PRESTIGE BUSES APPELLANT

AND

BENSON OMOLLO OKUMU RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon M. M. Gituma (RM) delivered at
Vihiga in the Principal Magistrate's Court Civil Case No 235 of 2019 on 12th October 2022)*

JUDGMENT

Introduction

1. In her decision of 12th October 2022, the Learned Trial Magistrate, Hon M. M. Gituma, Senior Resident Magistrate, entered Judgment in favour of the Respondent as against the Appellant herein on a hundred (100%) per cent basis in the following terms:-
General damages Kshs 140,000/=
Costs of the suit
Interest of (b) and (c) at court rates
2. Being aggrieved by the said decision, on 28th October 2022, the Appellant herein filed a Memorandum of Appeal dated 25th October 2022. He relied on four (4) grounds of appeal.
3. His Written Submissions were dated 27th February 2024 and filed on 7th March 2024 while those of the Respondent were dated 14th March 2024 and filed on 21st March 2024. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.



Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for consideration were:
 - a. Whether or not the Learned Trial Magistrate erred in having found the Appellant wholly liable for the accident herein;
 - b. Whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court.
7. This court therefore dealt with the said issues under the following distinct and separate heads.

I. Liability

8. Grounds of Appeal Nos (1), (2) and (4) of the Memorandum of Appeal were dealt under this head.
9. The Appellant placed reliance on the case of *Ndungu Dennis v Ann Wangari Ndirangu & Another* [2018] eKLR where it was held that the duty of a first appellate court was to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.
10. He submitted that the Respondent failed to prove on a balance of probability that he was a passenger in his Motor Vehicle Registration Number KCP 083 V (hereinafter referred to as the "subject motor vehicle"). It was his case that although the Respondent alleged that he was a passenger in the subject Motor Vehicle, he did not call an independent witness to support the same.
11. He further contended that the Respondent's testimony was contradictory as he stated that he reported the accident at Vihiga Police Station yet the police officers from Kaimosi found him at the scene of the accident and that he recorded his name at Kaimosi and those of other victims.
12. He added that No 104937 PC Damaris Mutunga (hereinafter referred to as "PW 3") confirmed that his name was not among those that were listed in the Occurrence Book (OB), that there was no follow up report and that the Police Abstract was issued on 17th July 2019, a month after the accident. He pointed out that No 59708 PC John Koech (hereinafter referred to as "DW 1") also testified that the Respondent was not among those involved in the accident as his name was not indicated in the OB hence the P3 Form and the Police Abstract Report that the Respondent produced were obtained illegally which led DW 1 to revoke the same.
13. On his part, the Respondent submitted that from the evidence of PW 3 and DW1, it appeared that the Appellant geared towards proving fraud against him but that the Trial Court having understood the principles revolving around the proof of fraud, declined to uphold the fraudulent claim and found the Appellant wholly liable for the accident herein.



14. He contended that one of the tenets expected in proof of fraud was that it had to be specifically pleaded on the face of the pleadings and then specifically proved but that a cursory look at the Appellant's defence showed that there was no mention of anything like fraud or even any insinuation of it.
15. In this regard, he placed reliance on the case of *Kinyanjui Kamau vs George Kamau Njoroge* [2015] eKLR where it was held that fraudulent conduct must be distinctly alleged and proved and it was not allowable to leave fraud to be inferred from the facts. It was his case therefore, that there was no room for the Appellant to allege fraud in his submissions nor purport to lead evidence on it during hearing.
16. He asserted that the Trial Court correctly observed that the Appellant only attached a revocation letter to his list of documents but failed to mention it in his statement of defence. He pointed out that it had been echoed in various authorities that the standard of proof of fraud was higher than the nominal one placed for normal civil matters which is always on a balance of probabilities.
17. In that regard, he cited the case of *Sammy Ngugi Mugo vs Mombasa Salt Lakes Ltd & Another* [2014]eKLR wherein the court echoed the finding of the Court of Appeal in *Ratilal Govedhabhai Patel vs Lalji Makanyi* (1975) EA 314 where it was held that an allegation of fraud had to be strictly proved and that although the standard of proof was not so heavy as to require proof beyond reasonable doubt, it was something more than a mere balance of probabilities.
18. He reproduced the evidence on record and argued that the only point of departure was the absence of the Respondent's name in the OB. He submitted that most times, police did not witness accidents but that they confirmed their occurrences and shed more light based on the investigations they carried out after such accidents.
19. He pointed out that both police officers who testified clarified that they did not go to the scene of the accident and that the victims whose names appeared in the OB were the ones who went to Vihiga Police Station to record their individual statements. He asserted that the Trial Court was not told whether DW 1 or any other police from Vihiga police station summoned him to Vihiga Police Station to clarify the issue of suspected fraud on his part by possessing a Police Abstract Report illegally and/or fraudulently. He asserted that he was not the one who made the entries in the OB or authored the said Police Abstract Report.
20. He added that the Appellant failed to avail his driver to verify whether he was a passenger in the subject Motor Vehicle at the material time.
21. He argued that the omission of his name in the OB and production of a revocation letter was significantly inefficient to prove fraud against him and that the Trial Court was right to find that he was a passenger in the subject Motor Vehicle at the material time and that the Appellant had failed to prove fraud against him.
22. He therefore submitted that having found that the Respondent was a passenger in the subject Motor Vehicle at the material time and that the accident was self-involving, the Trial Court proceeded to find the Appellant wholly to blame for the accident.
23. The Respondent herein testified that on 13th June 2019, he was travelling together with his wife from Nairobi in the subject Motor Vehicle when he was involved in the aforesaid accident. He stated that he reported the accident the following day as he could not do that on the same day as he had injuries. He told the court that he was present at the scene when the police from Kaimosi came to assist them and his wife was taken to Vihiga County Referral Hospital. He pointed out that he recorded his name at Kaimosi Police Station.



24. Philip Kilimo (hereinafter referred to as “PW 2”) was a Clinical Officer. He filled the P3 Form in respect of the Respondent herein on 17th July 2019 and tendered the same as evidence. He testified that the Respondent was involved in a road traffic accident along Chavakali-Kapsabet Road on 13th June 2019 and sustained injuries on the head and upper limbs. He pointed out that the head was swollen with a cut wound, upper limbs were swollen with bruises on the nostrils with tenderness and tenderness on the neck and chest. He stated that the approximate age of the injuries was thirty five (35) days.
25. He classified the degree of the Respondent’s injuries as “harm.” He explained that the Respondent had fully recovered as at the time of the examination. He pointed out that he used the Respondent’s Treatment Notes from Jumuia Hospital to complete the P3 Form.
26. PW 3 testified that she was attached to Vihiga Police Station and performed traffic duties. She produced a Police Abstract Report dated 17th July 2019 that was issued to the Respondent. She stated that his name was not among the thirty-five (35) people who were listed on the OB but that the he may have reported later. She stated that the said Police Abstract Report was authored by PC Koech.
27. On being cross-examined, she stated that OB in her Abstract was OB No 1/13/6/2019 but that the information on the said Police Abstract Report was extracted from OB No 7/13/6/2019 which was about loss of a document.
28. Turning to the Defense case, DW 1 testified that he was attached to Vihiga Police Station and also performed traffic duties. He produced a letter dated 10th March 2020 concerning a self-involving accident involving the subject Motor Vehicle which occurred on 13th June 2019 at around 0530 hours at Shamakhokho area along Kisumu-Kapsabet road. He stated that in OB No 13/13/6/2019, the persons listed to have been involved in the accident were Dorcas Amollo, Lillian Owino, Millicent Ogada, Geoffrey Barasa, Kipchumba, Jane Kerubo, Maxwell Dalo, Annette Mula, Agnes Mila, Hellena Kanini, Lilian Ochili, Sarah Okocha, Muhando Brenda Likunene, Ernest Wawire, Jocelyne Winas Anane, Collonelius, Caroline Wesonga, Mildred, David Makokha, Stephen Kasavuli, Priscah Omelet, Joseph Nyongesa, Nahashon Onanda Nambuire, Godfrey Ouma, Johana Amwayi, Omondi, Hillary Temba, Geoffrey Barasa, Fransisca and Natasha Wafula.
29. He said that he was the author of the said letter having written it when he was approached by an agent of Directline Insurance who came to inquire about the Respondent herein.
30. When he was shown the Respondent’s Abstract which had OB No 7/13/6/2019, he pointed out that that OB No was about an officer being sent to Kisumu and not about an accident. He was emphatic that the Respondent was not involved in the said accident.
31. When he was cross-examined, he confirmed that the handwriting in the Police Abstract Report was not his. He also admitted that he did not go to Cheptulu Police Station where the accident was first reported. He further stated that he could not confirm thirty five (35) people were in the subject Motor Vehicle.
32. Although the Respondent and the Trial Court leaned heavily on the Appellant’s failure to prove fraud, this case was about whether or not the Respondent herein was a passenger of the subject Motor Vehicle at the material time.
33. Notably, both PW 3 and DW I did not visit the scene of the accident on the material date. They did not also make the entries in the OB. They relied entirely on the records availed to them from Vihiga Police Station. They both agreed that the Respondent’s name was not in the OB. They also agreed that the OB the Respondent relied upon was not in respect of the accident herein.



34. PW 3 stated that the OB No 1/13/6/2019 that was extracted from OB No 7/13/6/2019 that she relied upon related to a loss of a document while DW I stated that OB No 7/13/6/2019 extracted from 7/13/6/2019 was about an officer being sent to Kisumu.
35. There was no clearer evidence than the discrepancy in the OB entry that made this court doubt the authenticity of the Respondent's claim. In addition, two (2) police officers from Vihiga Police Station adduced conflicting evidence regarding the Police Abstract Report that was purportedly issued to the Respondent herein. One tendered in evidence a Police Abstract Report while the other retract the same in a letter dated 10th March 2020 that was tendered as evidence.
36. The Respondent was obligated to adduce evidence from Kaimosi Police Station to confirm that his name was actually recorded amongst other names because that is where he allegedly reported the incident.
37. This court's doubt was further compounded by the fact that the Respondent did not tender in evidence the Treatment Notes. As was correctly stated by the Appellant, documents that were marked for identification did not form the evidence that a trial court could rely upon to prove a case. Documents that were marked for identification had to be produced before a party closed its case otherwise once a case was closed, those documents were shut out.
38. This court took the view that the Trial Court's conclusion that failure to produce the Treatment Notes from Jumuia Hospital Kaimosi was not fatal to the Respondent's case because PW 2 relied on the same when completing the P3 Form was a misapprehension of the law. In fact, the Treatment Notes were crucial to the Respondent's case as his involvement in the accident was hotly contested and formed the primary documents from which all other documents were dependent and/or authority to comment was derived from.
39. Notably, PW 3 testified that he saw the Respondent thirty five (35) days after the said accident by which time he had fully recovered. He relied on the said Treatment Notes to fill the P3 Form. It was not clear why the Respondent did not produce the said Treatment Notes to support his case. Failure to do so raised the court's antennae.
40. This court also had great difficulties when on being cross-examined, he stated that he did not have any hospital documents and that he did not know the name of the doctor who filled his P3 Form. This was strange because PW 3 confirmed that he was the one who filled the P3 Form for him.
41. Indeed, the Respondent did not give any good reason why he did not adduce the same in evidence yet he was represented by counsel who was well aware of the rules of evidence.
42. The Respondent's assertion that the Appellant did not mention anything about fraud in his Statement of Defence which the Trial Court agreed with as it stated that DW I did not take any steps to prove fraud on the part of the Respondent did not find any favour with this court.
43. The burden of proof remained on the Respondent to prove that he was actually involved in the accident herein. The Appellant was under no obligation to adduce any evidence to counter his case.
44. Having carefully re-evaluated the evidence on record, this court came to the firm conclusion that the Respondent did not prove his case on a balance of probabilities which was the standard of proof in civil cases. This case was contested and it was the duty of the Respondent to show a nexus between the Police Abstract Report he was allegedly issued with and/or the entries in the OB which did not relate to the accident herein. The arguments about fraud were not material to this case and were therefore rendered moot.



45. The Trial Court therefore erred in both law and fact in having found the Appellant to have been wholly liable for the injuries that the Respondent purportedly sustained in the aforesaid accident.
46. In the premises, Grounds of Appeal Nos (1), (2) and (4) of the Memorandum of Appeal were merited and the same be and are hereby upheld.

II. Quantum

47. Grounds of Appeal Nos (3) and (4) of the Memorandum of Appeal were dealt with under this head.
48. Having found that the Respondent did not prove his case, this court did not find it necessary to analyse his Written Submissions on the general damages that he was awarded. Suffice it to state that in the event this court would have found that he proved his case to the required standard, this court would not have interfered with the award of general damages as the award was reasonable compensation for the nature of injuries that the Respondent was said to have sustained.

Disposition

49. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 25th October 2022 and lodged on 28th October 2022 was merited and the same be and is hereby allowed.
50. In view of the fact that this court formed the opinion that the Respondent's claim was not genuine, it was not persuaded that it should depart from the general principle that costs follow the event and hereby directs that the Respondent will bear the Appellant's costs of this Appeal.
51. Orders accordingly.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF JULY 2024

J. KAMAU
JUDGE

