Gathera v Kingori (Civil Appeal E040 of 2021)
[2024] KEHC 9839 (KLR) (6 August 2024) (Judgment)

Neutral citation: [2024] KEHC 9839 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E040 OF 2021

S MBUNGI, J

AUGUST 6, 2024

BETWEEN

JOHN MWANGI GATHERA ..... APPELLANT

AND

JAMES NDIRANGU KINGORI ..... RESPONDENT

JUDGMENT

1. The appeal arises from a decision of Hon. F. Muguongo (SRM) on a trial in which the appellant had sued the respondents for special damages on account of material damage caused to the appellant motor vehicle registration number KAK 992F following a road traffic accident of 23/04/19 involving the appellant's motor vehicle and the defendant's motor vehicle registration number KAN 352L. After a full trial and consideration of the evidence and authorities cited to Hon. Muguongo on 14/07/2021 found that the cost of repairs under the special damages were not pleaded and hence must fail and that the appellant had not proved his case on a balance of probability. That judgement triggered the present appeal as epitomised in the memorandum of appeal crafted as follows:-

    a. That the learned trial magistrate erred in law and fact by applying the wrong principles of law thus erroneously dismissing the appellant's claim for lack of an assessment report whereas the parties had produced by consent a certificate of examination and test of vehicle (inspection report) which captured the damages on the appellant's motor vehicle thereby occasioning gross miscarriage of justice.

    b. That the learned trial magistrate erred in law and fact by applying the wrong principles of law thus erroneously dismissing the appellant's claim for special damages whereas the same had been specifically pleaded and strictly proved thereby occasioning a gross miscarriage of justice.

c. That the learned trial magistrate erred in law and fact by taking into account extraneous and irrelevant considerations thus arriving at erroneous findings in the judgement thereby occasioning a miscarriage of justice.

d. That the learned trial magistrate failed to address her mind to the pleadings on record and the evidence by the parties thereby occasioning a miscarriage of justice.

e. That the learned trial magistrate erred in law and in fact in failing to evaluate the entire evidence as well as submissions as presented by the appellant thereby occasioning a miscarriage of justice.

2. The appeal was canvassed by way of written submissions. The appellant vide its submissions dated 10th February 2023 gave brief facts of the case and identified issues for determination to be as follows:-

a. Whether the appellant had strictly proven special damages?

b. Whether the appellant proved his case on a balance of probabilities?

c. Whether the magistrate failed to address her mind to the pleadings and submissions of the appellant?

Appellants Submissions

3. The appellant citing a plethora of decisions submitted that the award for special damages was pleaded with particularity through the certificate of examination and test of vehicle produced as evidence which was in actual sense an assessment report since it outlined the damage that the vehicle had at the time of inspection after the accident and contained all material information that would be in a standard assessment report.

4. The appellant also submitted that he had proved his case on a balance of probabilities by virtue of the list of documents submitted by consent by both parties as evidence as proof of the specific damages as prayed for.

Respondent's Submissions

5. The respondent, agreeing with the finding of the trial court, submitted that the appellant had failed to plead the amount of money he claimed for compensation as his claim was of material damage which ought to have been specifically pleaded.

6. Further the respondent submitted that the assessment report was not produced as evidence and without it it was not possible for the court to establish whether the damage was a direct result of the accident and therefore the estimated cost of repairs. The appellant ought to have pleaded with certainty the alleged damages, as it was not enough saying my vehicle was damaged as a result of an accident and he incurred costs of repairing it.

Analysis And Determination

7. Having considered the submissions of the parties in this appeal, this is the view I form of this matter. This being a first appellate court, as was held in Selle –vs- Associated Motor Boat Co. [1968] EA 123:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 the 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

8. In Coghlan vs. Cumberland (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows -

> Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgement appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgement is wrong.When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

11. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

9. However, as was appreciated in Peters –vs- Sunday Post Limited [1958] EA 424:

> "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the court of appeal) of having the witnesses before him and observing the manner in which their evidence is given... Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself, and appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it

> unmistakably so appears form the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question....it not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

10. It was therefore held by the Court of Appeal in *Ephantus Mwangi & Another –vs- Duncan Mwangi, Civil Appeal No. 77 of 1982* [1982-1988] 1KAR 278 that:

> "A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

11. In this appeal, it is clear that the determination of the appeal revolves around the question of special damages. That the burden of proof was on the appellant to prove his case. Section 107 (1) of the *Evidence Act*, provides that:

> "Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

12. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 and 112 of the same Act as follows:

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

13. The two provisions were dealt with in Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which 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 cast 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."

14. It follows that the general rule is that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the respondents, depending on the circumstances of the case.

15. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> "As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

16. Further the Court of Appeal's position in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

> "It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

17. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau vs George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> "In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

18. Similarly, Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

19. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> "Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

20. What was the effect of the consent with the stipulation of both parties in the production of the Certificate of examination and test of vehicle? Was the double effect to automatically obviate the need to produce further evidence as proof of the liquidated damages for vehicle repair?

21. The rule of law suggested by the Appellant is that once parties have stipulated to the production of a document, then that production becomes categorical proof of the contents of that document. With respect, that is not the legal position. Stipulation to the production of a document is not the same as stipulation to the contents of that document. Stipulation to the production of a document obviates the need to call the maker of the document by stipulating to its authenticity. It does not mean that the opposing party has automatically established the contents of the document. In this case, therefore, the production of the certificate of examination and test of vehicle did not automatically mean that the assessed amounts therein became established by evidence.

22. This takes me to the first and most consequential question: in the circumstances of this case, was it unjust for the Trial Magistrate to deny recovery for the costs of repairs yet it was established by evidence that the accident occurred; that the motor vehicle was, in fact, repaired; and that both parties agreed on the certificate of examination and test of vehicle?

23. The Learned Trial Magistrate relied on the rule that special damages must be strictly proved to deny recovery under this heading. Relying on a number of cases the trial magistrate cited; Omari Gulea Jana v BM Muange (2010)eKLR where Justice Okwengu held;-

> "Although it was alleged that the motor vehicle KAC 996F was damaged, the assessment report was not produced in evidence. This was crucial evidence as without an assessment report it was impossible for the court to establish the damage to the motor vehicle on the estimated cost of repairs."

24. The trial magistrate opined that: in the instant case there is no loss assessment carried on the plaintiffs vehicle. As such it is not easy to determine the spare parts that would be required for repairs or replacement as this case may be. The inspection report in my view is not sufficient as it does not show the cost of repairs. It is therefore not easy for this court to ascertain how the garage that repaired the plaintiff's vehicle arrived at what parts to repair and what part to replace as it was the work of a specialist and it wasn't done.

25. The question in this appeal, then, is whether the Trial Court should have relaxed the strict rule on proof of special damages in the circumstances of this case. The Court of Appeal in Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR stated as follows:

> "We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc.However, the claim herein did not fall in that class."

26. The aim of Tort law is to, as much as possible, return the victim to where he would have been if he had not suffered the tort. The rationale for the rule that special damages must be strictly proved is to police the practice so that Plaintiffs do not present exaggerated claims not tied to actual losses.

The rule is, therefore, that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted or otherwise demonstrate with the permitted degree of certainty what loss or amount he will suffer in the future.

27. In the present appeal the appellant while demonstrating that indeed his car was damaged there was no proof how that figure pleaded under special damages was arrived at. I find no reason departing from the finding of the trial court where the claim on repairs under special damages must fail.

28. Appeal is therefore dismissed. The Appellant shall bear the costs of the appeal (Cost of the appeal awarded to the Respondent).

Right of appeal 30 days

SIGNED, DELIVERED & AT KAKAMEGA VIRTUALLY THIS 6TH DAY OF AUGUST 2024.

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HON. JUSTICE. S. MBUNGI

JUDGE.

Court:

Judgment read in absence of the parties/advocates.

Right of appeal within 30 days explained.