Otieno & another v Wamai (Civil Appeal E1094 of 2023)
[2024] KEHC 10647 (KLR) (Civ) (11 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10647 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1094 OF 2023

RC RUTTO, J

SEPTEMBER 11, 2024

BETWEEN

JOSEPH CARITUS OTIENO ..... 1ST APPELLANT

ALEX OUDA OTIENO ..... 2ND APPELLANT

AND

DAVID NGATIA WAMAI ..... RESPONDENT

(Being an appeal from the judgment delivered by Hon.V. M Mochache (RM & Adjudicator) on 6th October, 2023 in Nairobi SCCC No. E1703 of 2023)

JUDGMENT

Background

1. The Appellants aggrieved by the decision of the Small Claims Court in SCCC No. E1703 of 2023 dated 6th October 2023 lodged this appeal seeking to set aside the judgment and the Respondent's suit in Nairobi SCCC No. E1703 of 2023 be dismissed with costs to them.

2. The Respondent by a Statement of Claim dated 14th April 2023, and amended on 22nd June 2023 sought judgment in the sum of Kshs 815,538/=, general damages for economic loss, costs of the claim and interest. The judgment sought was for compensation for the loss and/or damage of motor vehicle registration number KAQ 058D, which was written off as a result of an accident.

3. It was averred that the Respondent was the owner of Motor Vehicle Registration number KAQ 058D while the 1st Appellant was the authorized driver of Motor Vehicle Registration KAT 757K, a Toyota Land Cruiser, while the 2nd Appellant was the owner, having purchased the vehicle from Omuma Investments Limited via a sale agreement dated 28th January 2023.

4. That on or about 30th April 2022, the Respondent, authorized one Shinyali (deceased) to possess and drive his motor vehicle registration No. KAQ 058 D. on the same day , along Namanga Road at the Shell Station area, the 1st Appellant, while driving Motor Vehicle Registration KAT 757K, negligently and recklessly caused a collision with Motor Vehicle Registration number KAQ 058D. The Respondent enumerated the particulars of negligence on the part of the Appellants.

5. The Appellants through their amended response dated 10th July 2023, denied the claim in its entirety. They asserted that it is the Respondent together with his driver that were to wholly blame and be held responsible for the accident. They proceeded to set out the particulars of negligence of the Respondent's driver.

6. During the hearing, the Respondent called one witness, while the Appellants called two witnesses.

7. Upon considering the pleadings, supporting documents and hearing all parties, the trial court set out two issues for determination as follows;

    a. Who is to blame for the said accident?

    b. Whether the claimant is entitled to the reliefs sought.

8. Thereafter the court found in favor of the Respondent and entered judgment against the Appellants herein, jointly and severally, as follows: -

    i. Liability at 100%

    ii. Special damages at Kshs 765, 538/=

    iii. Costs of the suit

    iv. Interest at court rates from the date of filing suit until payment in full.

The Appeal

9. Being aggrieved by the said decision, the appellants filed a memorandum of appeal dated 18th October, 2023 setting out nine (9) grounds of appeal as follows: -

    i. That the learned trial magistrate erred in law and in fact in holding that the Respondent had proved his case against the Appellants.

    ii. That the learned trial magistrate erred in law by shifting the burden of proof onto the Appellants.

    iii. That the Learned Magistrate erred in law and in fact in finding the Appellants 100% liable for the accident yet;

        a. The Respondent did not adduce evidence to show that the 1st Appellant was negligent and/or caused the accident.

        b. The Respondent did not testify on how the accident occurred and who caused the accident.

        c. There is uncontroverted documentary evidence that the Respondent's motor vehicle was unroadworthy.

        d. The Respondent did not controvert the evidence adduced by the 1st Appellant on how the accident occurred and who was at fault.

iv. The Learned Magistrate erred in law and in fact in holding that the 1st Appellant was driving on the wrong lane when the accident occurred.

v. The Learned Magistrate erred in law and in fact in concluding that it is not possible for a Motor Vehicle to be driven at around 3 to 4am without lights on, yet the 1st Appellant in his evidence laid the foundation for such a possibility.

vi. The Learned trial Magistrate erred in law and in fact in putting more weight on the Respondent's assessor's report as opposed to the Appellant's assessor's report yet the Respondent assessors did not testify in support of his report whilst the Appellants' assessor testified and was cross-examined on his report by the Respondent.

vii. The Learned Trial Magistrate erred in law and in fact in awarding the Respondent the sum of Kshs 765, 568/= yet the Appellants tendered credible evidence on the pre-accident and salvage value of the Respondent's motor vehicle.

viii. The Learned Magistrate erred in law and in fact by failing to take into consideration the totality of the evidence on record and the Appellant's submissions.

ix. In all circumstances of the case, the findings of the Learned Magistrate cannot be sustained in law or on the basis of the evidence adduced.

10. The appeal was canvassed by way of written submissions. The Appellants' submissions were dated 25th March 2024 while the Respondent's submissions were dated 4th April 2024.

Appellant's submissions

11. Despite raising nine grounds, the Appellants only submitted on grounds 1, 2, 3, 6, and 7 on issues of law only. Grounds 1 to 3 were urged together, and grounds 6 and 7 were also addressed together as the issues were interrelated.

12. On ground 1 to 3 the Appellants submitted that the Respondent failed to discharge his burden of proof on a balance of probability. They fault the trial court finding on the burden of proof that led to erroneous finding that the Appellants were 100% liable for the accident. They argue that when the trial court determined the question of liability at Paragraph 10 of the judgment, it improperly shifted the burden of proof onto the Appellants

13. Reliance was placed on Section 107 (1) and (2) of the *Evidence Act*, as well as the case of Gichinga Kibutha v Caroline Nduku [2018] eKLR. Additionally, the Appellants submitted that the Respondent failed to discharge the burden of proof as to how the accident occurred and who was responsible. They relied on the cases of Leonard Mwashume Shinga & Another v Auto Selection (K) Ltd, Eastern Produce (K) Ltd v Bonafas Shoya [2018] eKLR, Treadsetters Tyres Limited v John Wekesa Wepukhulu [2010] eKLR, and Grace Kanini v Kenya Bus Services, Civil Case No. 4708 of 1989, among others.

14. The Appellants further submitted that the trial court erred in law in relying on the contents of the police abstract and the occurrence book as proof of negligence on the part of the 1st Appellant. They urged that it is trite law that a police abstract is only evidence that an accident was reported at a particular police station. They make reference to the case of Kennedy Nyangoya vs Bash Hauliers (2014) eKLR; and ZOS & CAO (Suing as the Legal Representative in the Estate of SAO (Deceased) vs Amollo Stephen (2019)eKLR.

15. In addressing Grounds 6 and 7 of the appeal it was submitted that it is trite law that special damages must be pleaded and strictly proved see *Hahn- vs Singn Civil appeal No 42 of 1983*(185) eKLR 716. Thus, the Appellants stated that although the Respondent pleaded special damages, he did not strictly prove the same.

16. It was their submission that the respondent relied on an assessment report that was not produced by the maker contrary to section 63(2)d of the *Evidence Act* and the trial court overruled their objection on the same.. they contend that the assessment produced by the Appellants ought to have been considered credible than that produced by the respondent given that it was produced by its maker. Reference was made to the case of Amosam Builders Developers Lts v Betty Ngendo Gachie & 2 others (2009) eKLR.

17. They urge this court to find that the appeal has merit on the ground that the trial court erred in law as to the burden of proof and that it misapprehended the evidence and arrived at an erroneous conclusion both in law and fact.

Respondent's submissions

18. The Respondent set out two issues for determination namely; whether the trial court misapprehended the facts to warrant this honourable court determination of the facts and whether the Respondent sufficiently proved his case on a balance of probabilities.

19. In addressing the first issue, the Respondent submitted that it is not disputed that a fatal accident involving motor vehicle KAQ 058 D and KAT 757 K occurred on 30th April 2022, hence the excerpt of the Occurrence Book report provided details of the accident, including the timing, attending officers, and the attributed fault of the driver involved.

20. It is his submission that the Appellants failed to present any evidence to controvert the Respondent's evidence except for the 1st Appellant's testimony, which merely alleged without substantiating that the headlights of the Respondent's motor vehicle were off.

21. The Respondent further submits that they were charged in the Magistrate's Court at Mavoko under Traffic Case No. 837 of 2020 for the allegation that the motor vehicle lacked an inspection sticker, rendering it unroadworthy. However, this charge was withdrawn when the Investigating Officer declined to appear at the Mavoko Magistrate's Court to prosecute the case after learning that the court had issued an order for the production of the Abstract Form and the excerpt from the Occurrence Book. The Respondent submits that the trial Court did not use the aforementioned charge to assign culpability as the same had been withdrawn.

22. The Respondent further submits that, although both parties presented conflicting valuation reports, it is undisputed that the Appellant's report was prepared solely from images of the wreckage, without a physical inspection. That it is impractical to assess certain parts, such as the engine and gearbox, solely from images. Additionally, the Appellant's witness, Johnstone Soi, who produced the report, confirmed this position. Therefore, the trial court's reliance on the Respondent's valuation report is justified.

23. The Respondent urged this court to refrain from making a determination on the facts in accordance with Section 38(1) of the *Small Claims Court Act*, 2016.

24. on the second issue as to whether the Respondent sufficiently proved his case on a balance of probabilities, the Respondent submits that he produced a police abstract and a copy of the Occurrence Book, which attributed fault for the accident to the 1st Appellant for driving on the wrong lane. This was corroborated by the 1st Appellant's testimony, which stated that he tried to swerve to the left

but was too late. Based on the 1st Appellant's testimony, it can be discerned that he was driving on the wrong lane, as he attempted to swerve to the left moments before the fatal accident. The accident claimed the life of the Respondent's driver, hence he could not testify. The Respondent thus submits that he proved his case on a balance of probabilities and, this court should uphold the trial court's decision.

Analysis and Determination

25. This court has considered the Record of Appeal, and the submissions by all parties. Before setting out the issues for determination, I must remind myself of the provisions of Section 38 of the *Small Claims Court Act* (the Act) which limits appeals from the Small Claims Court to matters of law only. Therefore, I must first address the issue as to whether this Appeal is on matters of law.

26. Section 38 of the Act provides;

    1. A person aggrieved by the decision or an order Appeals. of the Court may appeal against that decision or order to the High Court on matters of law.

    2. An appeal from any decision or order referred to in subsection (1) shall be final."

27. What constitutes a point of law has been settled. In the case of J N & 5 Others -vs- Board of Management, St. G School Nairobi & Another [2017] eKLR, in addressing a point of law and a point of fact, Justice Mativo stated thus:

> " In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.
>
> In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."

28. I note that the grounds of appeal as set out in the memorandum are on both fact and law. However, guided by the above authority this court will discern the issues to be determined and limit itself to only issues of law. Thus, the issues arising for determination before this court are;

    i. Whether the Respondent proved its case on a balance of probabilities, as required under section 107 of the *Evidence Act*?

    ii. Whether the special damages were strictly proved.

    Whether the Respondent proved its case on a balance of probabilities, as required under section 107 of the *Evidence Act*?

29. This appeal is premised on the ground that the Respondent in urging his claim did not discharge the burden of proof on a balance of probability to the required standard. The appellants state that the trial court held them 100% liable yet there was evidence that the Respondent's motor vehicle was unroadworthy, as reflected in the charge sheet in Mavoko Traffic Case No. E837 of 2022. That the trial court relied on the police abstract and extract from the Occurrence Book as proof of negligence on the

part of the 1st Appellant when it is trite law that a police abstract is only evidence that an accident was reported at a particular police station.

30. In response the Respondent stated that this charge in Mavoko Traffic Case No E837 of 2022 was withdrawn on 28th September 2023 when the Investigating Officer failed to appear at the Mavoko Magistrate's Court hence the trial court could not use the aforementioned charge to assign culpability and liability for the accident. Further, that the abstract and excerpt of the Occurrence Book report provided details of the accident, including the timing, attending officers, and the attributed fault of the driver involved. The Appellants failed to present any evidence to controvert the Respondent's evidence

31. 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."

32. Going back to the record before this court it is noted that the Respondent (CW1), adopted his witness statement and produced all documents listed in his bundle of documents. He testified that on 30th April 2022, he authorized one Shinyali (deceased) to use his motor vehicle, Registration Number KAQ 058A (hereinafter referred to as "the subject motor vehicle"), to transport charcoal to Nairobi. In the process he was involved in a collision between the subject motor vehicle and the 2nd Appellant's motor vehicle, Registration Number KAT 757X (hereinafter referred to as "the 2nd Appellant's motor vehicle"), the driver (Shinyali) passed away, and the subject motor vehicle was written off.

33. RW1, the 1st Appellant and driver of the 2nd Appellant's motor vehicle, adopted his witness statement dated 14th July 2023 as his evidence in chief. He also produced documents listed in his bundle, which include the charge sheet in Mavoko Traffic Case No. E837 of 2022, a Motor Vehicle Assessment Report dated 5th July 2023, emails, and photographs of the accident motor vehicle. According to the 1st Appellant, he was driving towards Kitengela on the Nairobi-Namanga Highway when the accident occurred near Shell Petrol Station, Athi River. He stated that visibility was good as the vehicle's headlights were on; however, as he approached Shell Petrol Station, the lights of an oncoming vehicle suddenly flashed, although he had not seen any lights approaching him prior to that. He claimed that the oncoming vehicle was driving on his lane, and he tried to swerve to his left, but it was too late, resulting in a collision between the two vehicles. RW1 attributed the blame for the accident and the damage to the vehicle to the Respondent's driver and criticized the Respondent for allowing a defective motor vehicle to be driven on the road, among other reasons.

34. The trial court in arriving at its determination analysed the evidence adduced by both parties and observed that; flowing from the totality of the evidence on the record it is not difficult for the court to discern that the respondent's driver was driving in the wrong lane when the accident occurred. From his own testimony he confirms that upon seeing the on coming motor vehicle headlights at a distance of about 100meters away he tried to swerve to the left but it was too late hence the accident. That line of the evidence clearly, shows that the respondent's driver was on the wrong lane of oncoming motor vehicle and upon noticing an on coming vehicle that is when he tried to move back to his rightful lane but it was too late.

35. Having restated what the trial court held; I wish to state that a trial court has a duty to examine the totality of evidence placed before it to determine whether a claim has been proved to the required standards in this case it is on a balance of probability. I therefore disagree with the Appellants submission that the trial court relied on the entries in the police abstract and the extract from the O.B to find the Appellants liable thereby shifting the burden of proof onto them.

36. 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."

37. In the case of William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 (Kimaru J as he then was) 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."

38. Also in Re H and Others (Minors) [1996] AC 563, 586 the court 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 even 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....."

39. From the evidence on record, it is not disputed that an accident occurred on 30th April 2022 between the subject motor vehicle and the 2nd Appellant's motor vehicle. The Respondent has blamed the Appellants for the accident, which also resulted in the death of his driver. The Respondent produced various documents that, the Appellants contend lacked evidential value in establishing liability. Notably, it is the evidence of the 1st Appellant that gave details of how the accident occurred. It was upon the court analysing his evidence that it arrived at the finding that he was 100% liable for the accident. Indeed, the uncontroverted and unchallenged evidence of the 1st Appellant on his omission and commission is what led to the finding of liability.

40. The standard of proof in civil matters is on a balance of probability. I have considered the evidence presented to determine whether the Respondent proved his case on this standard. It is my view that the Respondent discharged the required burden of proof, and there was no shift of the burden of proof. The Appellants were only required to present evidence that would counter and dislodge the Respondent's evidence and demonstrate on a balance of probability that they were not liable.

41. From the foregoing, I have no reason to interfere with the finding on liability. This ground of appeal therefore fails.

Whether the special damages were strictly proved.

42. The Appellants argued that the Respondent relied on an assessment report not produced by its maker, in contravention of Section 63 (2) (d) of the *Evidence Act*. They contend that this undermined the

credibility of the Respondent's report compared to the assessment report produced by the Appellants. Consequently, the Appellants assert that the trial court erred in relying on the Respondent's assessment report while disregarding the Appellants' report.

43. I find this position misconceived. Section 32 of the *Small Claims Court Act* provides for a less stringent application of the rules of evidence to advance the court's purpose and objectives. The Small Claims court by its very nature is intended to be simple and devoid of procedural and other technicalities.

44. The trial court in its decision held that it was inclined to rely on the report by the claimant as the estimates therein were arrived at upon careful and physical scrutiny of the wreckage as opposed to the Respondent's assessor who only looked at the photos to arrive at the decision.

45. I draw inference in the case of Nkuene Dairy Farmers Co-op Society Ltd & Another -vs- Ngacha Ndeiya [2010] eKLR, where the Court of Appeal took the position that:

> " Motor vehicle parts are sold in shops. An assessor, we think would be in a position to know their cost. The prices may vary from one shop to another but the prices are nonetheless ascertainable even without purchasing the item and fixing it on the damaged vehicle. Motor vehicle parts are common items and any price which the assessor might have given could be counterchecked and either accepted or disproved. The Appellants having not questioned those prices must be taken to have accepted the report as representing the correct market prices of the various parts which were shown on the Assessor's report. The experience of the Assessor was not challenged...The Respondent, to our mind, particularized his claim in the plaint and called acceptable evidence to prove the same and we have no basis for faulting both the trial and first appellate courts in the concurrent decision they came to. Indeed the decision of *David Bagine vs. Martin Bundi Civil Appeal No. 283 of 1996* which Mr. Kaburu cited to us, does state that a motor vehicle Assessor's report would provide acceptable evidence to prove the value of material damage to a motor vehicle...We agree with Mr. Charles Kariuki that the Assessor's report was sufficient proof and the failure to produce receipts for any repairs done was not fatal to the respondent's claim..."

46. Consequently, guided by the provisions of section 32 of the Small Claims Act and the above quoted authority I find that the trial court did not err in relying upon an assessor's report that was not produced by the maker.

47. In conclusion and for the reasons set out above, the court finds this appeal to be bereft of any merit and the same is hereby dismissed with costs to the respondent.

Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 11TH DAY OF SEPTEMBER 2024

For Appellants:

For Respondent:

Court Assistant: Peter Wabwire