Awinda v Oluoch (Civil Appeal E161 of 2023)
[2024] KEHC 12633 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12633 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E161 OF 2023

RE ABURILI, J

OCTOBER 17, 2024

BETWEEN

PATRICK AWINDA ..... APPELLANT

AND

EDWIN OLUOCH ..... RESPONDENT

(An appeal arising out of the Judgment of the Honourable G.C. Serem in the Small Claim's Court at Kisumu delivered on the 1st September 2023 in Kisumu Small Claims Case No. E206 of 2023)

JUDGMENT

Introduction

1. The appellant was sued by the respondent vide a statement of claim dated 20.6.2023 in which the respondent had averred that he sustained injuries following an attack by the appellant that led to the respondent sustaining injuries. The respondent sought general damages of Kshs. 500,000, special damages of Kshs. 50,000, costs of future treatment as well as costs and interest.

2. The appellant filed his response dated 22.7.2023 in which he denied the contents in the respondent's statement of claim. The appellant further denied assaulting the respondent and thus prayed for the respondent's claims to be dismissed with costs.

3. In her judgement, the trial court found the appellant 100% liable for assaulting the respondent. The trial magistrate went on to award the respondent general damages of Kshs. 500,000, proven special damages of Kshs. 31,610 as well as cost of the suit with interest.

4. Aggrieved by the trial court's judgement on quantum, the appellant filed his appeal dated 29th September 2023 in which he raised the following grounds of appeal:

1. The learned magistrate completely misunderstood the evidence on record before her, wrongly analysed same and the honourable court failed to notice the discrepancies on the dates of the alleged assault hence arriving at a wrong decision.

2. The learned magistrate erred in law and fact by failing to appreciate the totality of the evidence before her and the submissions made on behalf of the appellant reaching a conclusion full of contradiction and thereby failing to appreciate what was presented before her by the appellant.

3. The learned trial magistrate erred in law and fact in considering and admitting frivolous, vexatious and unsupported facts thus arriving at a wrong decision and to which decision had occasioned a miscarriage of justice.

4. The learned magistrate erred in law by failing to follow the law especially established through judicial precedent in regards to direct evidence especially in respect of a criminally procured and falsified P3 form and other medical evidence.

5. The weight of the evidence is totally against the probability that the incident occurred or at all and the honourable court unfairly ignored exhibits tendered by the appellant.

5. The appeal was canvassed by way of written submissions though the respondent did not file any submissions despite service.

The Appellant's Submissions

6. The appellant submitted that the learned trial magistrate erred in law and fact in considering and admitting frivolous, vexatious and unsupported facts thus arriving at a wrong decision and to which decision had occasioned a miscarriage of justice specifically the admittance of the P3 form despite the evidence adduced by RW4 and thus the hiding by the trial magistrate 'nothing negates' (sic) the assault was totally unsupported and contrary to the evidence adduced by RW4.

7. The appellant further submitted that his complaint as raised ought to succeed since the hiding caused by a miscarriage of justice could not lead to the appellant being held 100% liable for the assault.

8. It was further submitted that the trial magistrate erred by relying only on the respondent's affidavit to conclude that he had been assaulted yet there was no medical report or P3 substantiating the same and consequently that the respondent failed to prove any form of negligence to qualify for the quantum awarded by the trial magistrate.

9. The appellant relied on the case of East Produce Kenya Limited v Christopher Astiado Osino where it was held interalia that there was no liability without faults and that a plaintiff must proof some negligence against the defendant where the claim is based on negligence.

10. The appellant thus submitted that the appeal be allowed and that the judgment and decision of the adjudicator be set aside as the respondent's claim was unsustainable.

Analysis and Determination

11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In

Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

12. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

13. Having considered the Appellant's Grounds of Appeal and his written Submissions, it appears to this court that the only issue for determination is that of liability, specifically Whether or not the apportionment of liability was fair and reasonable in the circumstances of this case.

14. In Khambi and Another v Mahithi and 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 cases, 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."

15. That was the position in Isabella Wanjiru Karangu v Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde v George M Angira Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

16. The law is clear that he who alleges must proof. Thus, this court must answer the question whether the respondent herein discharged the burden of proof that the appellant was liable in negligence for the assault as a result of which he sustained his injuries.

17. To ascertain liability and determine whether the same was properly determined by the trial court, there is need to examine the evidence presented before the trial court and specifically the evidence as to whether the assault incident complained of occurred. The respondent was the only one amongst his witnesses who was present when the incident occurred. The respondent testified as CW1 and adopted his witness statement filed together with his statement of claim as his evidence in chief.

18. It was the respondent's case that on the 16.11.2022, as he was going through his normal business of selling food at Kondele area, he reached the appellant's business premises where he bent down to serve some of his customers who asked him to serve them porridge and as he bent down, the appellant kicked his mouth causing him severe injuries.

19. It was the respondent's case that the injuries he sustained were as follows:

    i. Fracture of the mandible

ii. Injury on the shoulder

iii. Bruises on the lower lip

iv. Injury on the head and face.

20. It was the respondent's case that prior to the date of assault, he had seen an empty water bottle and that he asked the appellant's employees whether he could take it to which they acquiesced but that on the date of the assault, the appellant queried him why he had picked the water bottle which was at his work premises and as the respondent bent to serve one of the customers, the appellant kicked him on his jaws.

21. The respondent testified that he went to the chief's place where he found one of the community personnel and informed him of the same and they proceeded to the appellant's place where the appellant saw them but left in his car. He testified that he proceeded to Kondele police station where he reported the incident. It was his testimony that he later received a call from one Madam Kwach to report at Obunga Police Station where the appellant had made a report about being assaulted. The respondent testified that he went to Obunga Police Station where he explained the incident and that the appellant agreed to take care of his medical bills starting off with Kshs. 10,000 and subsequently Kshs. 2,000 but when he informed him of the need for further medical expenses, the appellant stated that the did not have any money and would not facilitate it.

22. The respondent testified that at Obunga Police Station, the police retained his P3 form and did not return the same to him and so he went to Kondele Police Station where he got another P3 form from one P.C. Kirui.

23. In cross-examination, the respondent reiterated his testimony and admitted that the appellant had warned him not to go back to his workshop as he had stolen a water bottle. He admitted that he had not refunded the appellant the Kshs. 12,000 that had been advanced to him for medical expenses.

24. CW2 confirmed that the claimant bought medicine a their pharmacy while CW3 testified that the hospital pass book for the claimant was issued at Migosi subcounty hospital. CW4 did a procedure on the claimant who had a fractured mandible while CW5 confirmed that the claimant had reported an assault case which was recorded in the OB and they issued the claimant with a P3 form.

25. CW6, Noel Otieno Kassim, the Community Policing officer at the Assistant Chief's in Nyawita sub-location in Kondele location testified that on the date of the incident, he received a call from the respondent about the assault and that later the respondent went to the Chief's place to report the incident after which they proceeded to the appellant's workshop. It was his testimony that at the workshop, the appellant only proclaimed that the respondent was the one who stole his things but on inquiry as to why he had not reported the theft with the authorities, the appellant walked away.

26. On his part, the appellant testified as RW2. He adopted his filed statement as his evidence in chief. He stated that he had interacted with the claimant while selling food to the fundis and that he had never clashed with the claimant and that no bottle was stolen otherwise it would have been recorded. That the money he send to the claimant was a refund after the sale of a coffee table did not materialize and that he last saw the claimant on 6/11/2023 when the two quarreled but that he never assaulted the claimant.

27. In cross-examination, the appellant denied assaulting the respondent. He maintained that the Kshs. 12,000 sent to the respondent was for a coffee table that the respondent had pre-ordered and was paying slowly. In cross-examination, the appellant testified that he never saw the respondent with any problem in the mouth.

28. RW1, Inspector Francis Mooki admitted in his testimony that a complaint was made at Kondele Police station vide OB 38/16/11/2022 of an assault and a P3 issued to the complainant but that the complainant never returned to the police station. In cross-examination, he admitted that it was not an offense to re-issue a P3 but that the correct procedure has to be followed.

29. RW3 also adopted his witness statement and denied that there was any fight between the claimant and the respondent but that he saw the claimant carrying a bottle and that on 16/11/202 3he had brought peace between the two parties hereto. He denied seeing Patrick.

30. RW4 stated that the P3 form did not emanate from their office but that the doctor who filled it went to their facility on 21/3/2023.

31. I have considered the evidence above. Justice Mativo (as he then was) in Hellen Wangari Wangechi v Carumera Muthini Gathua [2015] eKLR, quoted with approval Lord Brandon in Rheir Shpping Co. SA. v Edmunds [1955] IWLR 948 at 955 as follows:

> " No Judge likes to decide case on the burden of proof if he can legitimately avoid having to do so. There are cases, however in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just cause to take."

32. Justice Mativo, in the above decision, went on to state as follows:

> " Whether one likes it or not, the legal burden of proof is consciously, or unconsciously the.....test applied when coming to a decision in any particular case. The fact was succinctly put forth by Rajah JA in Britestone PTE Ltd v Smith & Associates Far East Ltd [2007] 4SLR (R) 855 at 59: 'The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."

33. The principle is that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding, lies on that person, who fail if no evidence at all were given on either side, See also (Section 107 of the *Evidence Act*).

34. In the instant case, the respondent in presenting his case on the version of events was firm and reiterated that it was the appellant who kicked him on the face as he bent over to serve a customer. He testified that he subsequently proceeded to the assistant's chief where he reported the same to the community policing officer. The community policing officer on his part corroborated the respondent's case to this extent and further testified that when he confronted the appellant, the appellant stated that the respondent had stolen his property after which he walked away after being probed on why he did not report the theft.

35. On the part of the appellant, he denied assaulting the respondent or that the incident occurred. The appellant further denied seeing the injuries on the respondent and explained that the Kshs. 12,000 sent to the respondent was for the coffee table that the respondent had pre-ordered. On this the respondent refuted this claim and stated that he could not afford a coffee table from the appellant's workshop. RW1, the appellant's witness, Inspector Mooki testified that an assault incident was reported at Kondele police station and that a P3 was issued related by the respondent.

36. From the evidence adduced on record, Iam satisfied that the claimant proved his case on a balance of probabilities against the appellant herein that it was the appellant who assaulted him and that following

the assault, the claimant respondent herein sustained injuries. The appellant's defence, in my view, was a mere denial. It failed to controvert the allegations made by the respondent.

37. Taking all the factors into consideration I am persuaded that the respondent proved on a balance of probabilities that the appellant was 100% liable for causing the injuries that he sustained. I am therefore unable to find that the trial court erred in its finding of liability against the appellant.

38. On the damages awarded, I find no reason to interfere with the same as no basis was laid to enable this court interfere. I uphold the award.

39. The upshot of the above is that I find that this appeal lacks merit and I proceed to dismiss it with costs to the respondent, assessed at Kshs 40,000 payable within 60 days of today and in default, the respondent is at liberty to execute for recovery. Subject to the costs herein assessed, this file is closed.

40. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF OCTOBER, 2024

R.E. ABURILI

JUDGE