Luganje v Omugah (Civil Appeal E356 of 2021)
[2024] KEHC 12368 (KLR) (Civ) (14 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12368 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E356 OF 2021

JM OMIDO, J

OCTOBER 14, 2024

BETWEEN

MAGGIE UMAZI LUGANJE ..... APPELLANT

AND

STEPHEN OMONDI OMUGAH ..... RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. M.W. Murage, Senior Resident Magistrate delivered on 19th May, 2021 in Nairobi CMCC No. 4168 of 2018)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. M.W. Murage, Senior Resident Magistrate delivered on 19th May, 2021 in Nairobi CMCC No. 4168 of 2018, which was a material damage claim.

2. The appeal, preferred by Maggie Umazi Luganje hereinafter referred to as "the Appellant") against Stephen Omondi Omugah (hereinafter referred to as "the Respondent") is on both liability and quantum.

3. In the matter before the lower court, the Appellant was the Plaintiff while the Respondent was the Defendant. In its judgement, the trial court dismissed the suit with costs.

4. Being aggrieved with the judgement of the lower court, the Appellant presented the following grounds of appeal vide a Memorandum of Appeal dated 21st June, 2021:

    1. That trial Magistrate erred in law and fact in holding that the Appellant had not proved its claim on a balance of probabilities.

2. That the trial Magistrate erred in law and fact in disregarding the clear uncontroverted evidence of the occurrence of the accident, damage to her motor vehicle KAS 052E and the cost of assessment and repairs thereto which was produced by consent of the parties on record.

3. That the learned trial Magistrate erred in law and fact in failing to find that the Appellant's claim was properly proved on a balance of probabilities in the absence of evidence by the Respondent to controvert the same.

4. The judgement/decree is inconsistent with the evidence on record.

5. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

6. In Selle, Sir Clement De Lestang observed that:

> " This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
>
> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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."

7. Going to the evidence before the trial court, the Appellant (the Plaintiff in the lower court matter), presented the suit vide a plaint dated 27th April, 2018, seeking judgement against the Respondent (the Defendant in the lower court matter) for special damages of Ksh.58,200/-, being cost of repairs to her motor vehicle, costs of the suit and interest, being a claim arising out of a road traffic accident that occurred on 29th April, 2015.

8. The Appellant called Burton Isindu (PW1) as her sole witness. The witness adopted the contents of his witness statement dated 17th April, 2018. As per his statement, he was involved in a road traffic accident on 29th April, 2015. He stated therein that he was lawfully driving motor vehicle registration number KAS 052E, that was registered in the name of his spouse (the Appellant) along Lang'ata Road/ Mbagathi Way roundabout when the driver of motor vehicle registration number KBM 220E suddenly negligently turned right while on the roundabout, instead of driving straight to exit the roundabout, causing his vehicle to collide with the Appellant's vehicle, occasioning damage to the Appellant's vehicle.

9. The Appellant blamed the Respondent for causing the accident.

10. The Appellant's witness produced the following documents in support of her case:Police abstract.Motor vehicle assessment report.Receipts for a total of Ksh.53,200/-.Demand letters.

11. PW1 was cross-examined and asked whether he had a letter of instructions to prosecute the suit before the lower court on behalf of the Appellant and his response was in the negative. He further stated that he had no document to show who the owner of the motor vehicle that he was driving was. He stated that he did not have the receipts of the spare parts that he bought.

12. The Respondent did not call any witnesses before the lower court.

13. There is no dispute that the accident occurred. From the evidence on record, the Appellant blamed the Respondent for causing the accident, stating that Respondent negligently changed lanes while on the roundabout without any warning and caused the vehicle to collide with the Appellant's vehicle.

14. The accident was reported to the police and a police abstract issued. It is instructive from the police abstract that the driver of motor vehicle registration number KBM 220E was wholly blamed for the accident. The position as stated in the police abstract was not challenged or controverted by the Respondent as no contrary evidence was presented.

15. I have perused the Memorandum of Appeal, the Record of Appeal, the submissions by the parties and the record of the lower court. I deduce the following to be the issues for determination:

    i. Whether the learned trial Magistrate erred in finding that PW1 ought to have filed an Authority to Act on behalf of the Appellant.

    ii. Whether the learned trial Magistrate erred in finding that the failure by the Appellant to testify was fatal to the Appellant's case.

    iii. Whether the learned trial Magistrate erred in finding that the Appellant had not proved her case on a balance of probabilities and in ultimately dismissing the Appellant's case with costs.

16. I will address the first two issues together.

17. In her judgement, the learned trial Magistrate rendered herself as follows:

> " PW1 Burton Isindu told court that on 29th April, 2015 he was the driver of the motor vehicle in question, motor vehicle KAS 052E registered in the name of the Plaintiff. He relied on his witness statement. He also relied on the list of documents filed in court on 30th April, 2018 which includes police abstract, motor vehicle accident report, receipts (payment) and demand letters.
>
> In cross-examination, he told court that he did not have letter of instructions to prosecute the case on behalf of the Plaintiff. He did not produce any document as prove (sic) of ownership. Costs of damaged parts was Ksh.31,600/-.
>
> The Defendant did not call any witness.
>
> I have carefully considered evidence adduced against the pleadings filed. The issue for determination is whether the Plaintiff has proved the case on a balance of probability.
>
> The Plaintiff did not testify. Her husband testified but did not have authority to act on behalf of the Plaintiff. The witness (PW1) did not prove ownership of the motor vehicle which allegedly belong (sic) to the Plaintiff.
>
> In as much as the Defendant did not call any witness, it was the duty of the Plaintiff to prove her case. She failed to discharge her duty. I am not persuaded to find that the Plaintiff proved her case on a balance of probability. In the end I dismiss the suit with costs to the Defendant."

18. In Hagos Birikti Tewoldebrehen & Another v Evans Ihura & Another [2020] eKLR where the court held as follows:

> "...it is not mandatory for a plaintiff to attend court to testify in support of his or her case. What is important is that a plaintiff can use the evidence of any other competent witness to bolster his or her case."

In the case of Julianne Ulrike Stamm -vs-Tiwi Beach Hotel Ltd [1998] eKLR, the Court of Appeal held inter alia as follows:

> "There is no reference in this rule to the plaintiff himself, giving evidence first or at all. But a plaintiff is bound to produce evidence in support of the issues, which he is bound to prove and which evidence can be given by any competent witness not necessarily himself. A plaintiff does not have to be personally present when he is represented by duly instructed counsel as was the case here. It is for a plaintiff's counsel to decide how to prosecute his case. If a plaintiff can prove his case by the evidence of someone else he does not have to be present at the hearing of the suit. Similarly, if a plaintiff can prove his case by means of legal arguments only, he does not also have to be physically present at the hearing of the suit so long as his advocate is present to prosecute his suit. In short, according to Order 17 rule 2(1) a plaintiff can prove his case by the evidence of a witness or witnesses other than himself, or by the arguments of his counsel.

19. What I hear the court to be saying in the case above is simply that the law does not require that a Plaintiff or Defendant must testify in a matter. (See also Sofie Feis Caroline Lwangu v Benson Wafula Ndote [2022] eKLR). The learned trial Magistrate therefore fell into error by holding that the Appellant's case ought to fail on the basis that she did not testify.

20. The learned trial Magistrate further misdirected herself in holding that PW1 ought to have filed an Authority to Act on behalf of the Appellant. As this was not a representative suit, such Authority was not required. We have seen above that a Plaintiff in a suit does not have to testify if her case can be presented and proved by other witnesses.

21. With regard to the third issue, from the judgement of the lower court, the learned trial Magistrate did not address the issue as who was negligent between the two drivers and to what extent. The issue is one that ought to have been determined on the basis of the evidentiary material that was presented before the court, the standard for the determination being on a balance of probabilities.

22. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> "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."

23. As can be seen from the original record, the only available evidence was that provided by PW1 who blamed the Respondent for the accident, stating that he changed lanes on the roundabout without any warning. The witness produced a police abstract and the contents therein indicate that the Respondent was wholly to blame for the accident. Considering that the Respondent did not call any witness to

contradict or controvert the evidence of PW1, I do not find it difficult in reaching the persuasion that the Appellant proved on a balance of probabilities that the driver of motor vehicle registration number KBM 220E was wholly to blame for the accident and ought to have carried 100% liability.

24. The police abstract also indicated that the Respondent was the driver of motor vehicle registration number KBM 220E. That evidence was not controverted by the Respondent and the Respondent was therefore to blame in his capacity as the driver.

25. As the Respondent was sued in his capacity as the driver of the offending vehicle, it was enough for the Appellant to simply prove that the Respondent was indeed the driver of the vehicle, which the Appellant did. There was in the premises no necessity for the Appellant to prove that the said vehicle, registration number KBM 220E, was registered in the name of the Respondent as was suggested by the trial court, in such a case where liability was established against the driver.

26. In respect to special damages, the rule applicable is that the same must be specifically proved and proved (see Equity Bank Limited v Gerald Wang'ombe Thuni [2015] eKLR. The trial court did not make any determination on this head of damages, perhaps because the learned trial Magistrate was of the opinion that the Appellant did not prove liability against the Respondent.

27. The claim in the suit before the lower court under the head of special damages was pleaded under the following items:Cost of damaged parts Ksh.31,700/-.Painting of bumper/left wing Ksh.11,500/-.Labour charges Ksh.10,000/-.Assessor's fees Ksh. 5,000/-.

    Total Ksh.58,200/-.

28. In support of the claim for special damages, the Appellant produced the following documents:Motor vehicle assessment report.Receipt for Ksh.5,000/- for preparation of the assessor's report.Invoice for Ksh.53,200/- for repairs with the word "paid" inscribed on it.

29. By its very nature, a material damage claim is a claim for special damages. How is such a claim to be determined in a case where there are no receipts produced for the purchases of spare parts or in a case where the repairs are yet to be undertaken?

30. To answer this question, I take guidance from the case of Abdi Ali Dere v Firoz Hussein Tundal & 2 Others [2013] eKLR in which the Court of Appeal referred to the authority of Kenya Industrial Industries Limited v Lee Enterprises Limited [2009] KLR 135 where it was stated as follows:

> "Generally speaking, the normal measure of damages for damage to goods is the amount by which the value of the goods has been diminished. The cost of repair is prima facie the measure of diminution in value of the goods and therefore the correct measure of loss suffered. Where, however, the goods are destroyed, the owner is entitled to restitution in integrum and the normal measure of damages is the cost of replacement of goods, that is the market value at the time and place of destruction."

31. In the Court of Appeal decision of Nkuene Dairy Farmers Cooperative Society Ltd & another v Ngacha Ndeiya [2010] eKLR, the court rendered itself thus:

> "In our view special damages in a material damage claim need not be shown to have been actually incurred. The claimant is only required to show the extent of the damages and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's

vehicle which were damaged. Against each item he assigned a value. We think the value of repairs was given with some degree of certainty."

32. The same court in the case of David Bagine v Martin Bundi [1996] eKLR, in asserting the probative value of an assessor's report in a material damage claim, reiterated that:

> " The Assessor's report was sufficient proof and the failure to provide receipts for any repairs done was not fatal to the respondent's claim".

33. There is also the case of Silas Mutua Mberia v Muthoni Njue Veronica [2021] eKLR where the High Court observed as follows:

> " It is thus clear that the Appellant only needed to prove the extent of the damage to his motor vehicle and what it would cost to repair it without necessarily proving that, the repairs were actually done and paid for. It must always be remembered that the balance of proof on the Appellant was at all times on a balance of probabilities and not higher. The claim by the Appellant was not for an expense already incurred but a claim to restore his damaged motor vehicle to its pre-accident state. The value of the damage was assessed and a report produced in evidence. It was therefore not necessary to demonstrate that indeed the costs of repairs were incurred, because the report was sufficient proof on a balance of probabilities.
>
> I find that the trial court erred in dismissing the Appellant's claim for special damages on account of damage to the motor vehicle when there was tendered uncontroverted evidence in the assessment report produced by the assessor."

34. The court went on to conclude as follows in Silas Mutua Mberia (supra):

> " .....in conclusion, the appeal is allowed, the decision of the trial court disallowing the special damages claim is set aside and in its place substituted a judgment in the sum of Ksh.250,000/- being the loss occasioned to the Appellant by the Respondent's tortious conduct."

35. The jurisprudence that emerges from the authorities that I have referred to above (which include those from the Court of Appeal, which bind this court) is that in a material damage claim which is a claim for special damages, a claimant does not necessarily have to produce receipts to prove that he expended monies in repairs and that an assessor's report suffices as proof of the claim. This court reaches a finding, therefore, that the Respondent proved on a balance of probabilities, vide the assessor's report which was produced as an exhibit, and the receipt for Ksh.5,000/- that was paid for preparation of the report the special damages totaling Ksh.58,2000/-.

36. The last issue concerns the learned trial Magistrate's finding that the Appellant did not prove that the vehicle that PW1 was driving belonged to the Appellant.

37. On this issue, I need not restate that the evidence that was tendered by PW1 was not controverted by the Respondent, particularly his contention that the vehicle he was driving belonged to the Appellant, who was his spouse. I further note that the Respondent did not specifically deny such ownership in the defence that he filed. To that, my finding is that the Appellant, through the evidence of PW1 proved on a balance of probabilities that motor vehicle registration number KAS 052E.

38. Having analyzed the evidence adduced in the lower court as above, I reach the result, that the appeal is meritorious.

39. Consequently, I allow the appeal and hereby set the lower court's findings that the Appellant (the Plaintiff in the lower court) did not prove her case on a balance of probabilities and substitute therefore with the orders that the Appellant proved her case on a balance of probabilities and that Judgement is entered in favour of the Appellant (the Plaintiff) against the Respondent (the Defendant) as follows:

    a. On liability at 100%.

    b. Special damages at Ksh.58,200/-.

    c. Costs of the suit and interest. Interest on the special damages to accrue from the date of filing the suit in the lower court.

40. The Respondent shall bear the costs of this appeal.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 14TH DAY OF OCTOBER, 2024.

JOE M. OMIDO

JUDGE

For The Appellant: No appearance.

For The Respondent: Mr. Muthoni holding brief for Mr. Njuguna.

Court Assistant: Ms. Njoroge.

Ms. Muthoni: I seek 30 days stay of execution.

Court: Stay of execution granted for 30 days.