Neo Kingstone Hardware Limited v Maina (Civil Appeal E811 of 2021)
[2024] KEHC 12380 (KLR) (Civ) (16 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12380 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E811 OF 2021

JM OMIDO, J

OCTOBER 16, 2024

BETWEEN

NEO KINGSTONE HARDWARE LIMITED ..... APPELLANT

AND

JOHN CHEGE MAINA ..... RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. D. O. Mbeja, Principal Magistrate delivered on 26th November, 2021 in Nairobi CMCC No. 7088 of 2018)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. D. O. Mbeja, Principal Magistrate delivered on 26th November, 2021 in Nairobi CMCC No. 7088 of 2018, which was a tortious liability claim.

2. The appeal, preferred by Neo Kingstone Hardware Limited hereinafter referred to as "the Appellant") against John Chege Maina (hereinafter referred to as "the Respondent") is on both liability and quantum.

3. In the matter before the lower court, the Appellant was the Defendant while the Respondent was the Plaintiff.

4. Judgement on liability in the lower court was entered in favour of the Respondent, at 100% against the Appellant. The trial court proceeded to assess special damages at Ksh.3,550/- and general damages for pain, suffering and loss of amenities at Ksh.800,000/-.

5. Being aggrieved with the judgement of the lower court, the Appellant presented the following grounds of appeal vide a Memorandum of Appeal dated 8th December, 2021:

1. That the learned Honourable Magistrate erred in law and fact in finding the Appellant 100% liable for causing the accident completely disregarding the circumstances under which the accident occurred especially the fact that the Plaintiff was clearly to blame for causing the accident and he admitted the same in cross-examination.

2. That the learned Honourable Magistrate erred in law and in fact in awarding the Plaintiff (sic) Ksh.800,000/- in general damages.

3. That the learned Honourable Magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented and filed by the Appellants.

4. That the learned Honourable Magistrate erred in awarding a sum in respect of damages which was inordinately high and excessive in the circumstances occasioning miscarriage of justice.

5. That the learned Honourable Magistrate erred in law and fact in failing to consider conventional awards in cases of similar nature.

6. 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.

7. 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."

8. Going to the evidence before the trial court, the Respondent (the Plaintiff in the lower court matter), presented the suit vide a plaint dated 18th July, 2018, seeking for special and general damages, costs of the suit and interest, arising out of injuries that he sustained in a road traffic accident that occurred on 5th October, 2017.

9. In his testimony, the Respondent adopted the contents of his witness statement dated 18th July, 2018. As per his statement, he was involved in a road traffic accident on 5th October, 2017. He stated therein that he was lawfully driving motor vehicle registration number KCA 175C along the Eastern Bypass road when the driver of motor vehicle registration number KBL 967U and/or managed the said vehicle in a manner that was careless and/or negligent by making a turn without indicating as a result of which he lost control, allowing the said vehicle to collide with the Respondent's vehicle, occasioning the Respondent serious injuries.

10. Upon cross-examination, the Respondent told the trial court that the accident occurred on the left side (the Respondent's side) of the road.

11. The Respondent produced the following documents in support of his case:Treatment notes from Komarock Modern Healthcare.Prescription from Kenyatta Hospital.Police abstract.P3 form.Copy of

records and receipt.Demand letter and Statutory Notice to the Appellant's insurers.Medical report prepared by Dr. G.K. Mwaura.

12. The Appellant called John Githinji Wambui as the defence witness, who adopted the contents of his statement dated 6th November, 20200. He stated in his statement that he was lawfully driving motor vehicle registration number KBL 967U along the Eastern Bypass when the Respondent's motor vehicle approached from the opposite direction, encroaching onto the Appellant's lane. The Appellant swerved to the extreme left and stopped but the other vehicle followed his vehicle rammed into it, on the Appellant's side of the road.

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

14. There is no dispute that the accident occurred. From the evidence on record, the Respondent blamed the Appellant for causing the accident, stating that the driver of the Appellant's vehicle made a turn without any warning and caused the vehicle to collide with the Respondent's vehicle on the latter's lane or side of the road. On his part, the Appellant's witness stated that the Respondent was to blame for the accident as he drove his vehicle onto the Appellant's lane or side of the road and rammed into the Appellant's stationary vehicle.

15. Although the accident was reported to the police, neither party called the police officer(s) who attended to the scene of accident and investigated the same. The results of the investigations, if any, were not presented to the trial court. No independent or neutral witness was called by either side.

16. Having considered the Memorandum and Record of Appeal and the submissions filed by the parties, I deduce the issues for determination in this appeal to be as follows:

    a. Whether the learned trial Magistrate reached the correct finding on liability.

    b. Whether the learned trial Magistrate reached the correct findings in assessing damages.

17. With regard to the first issue for determination, the learned trial Magistrate rendered himself as follows in his judgement:

> " The occurrence of the accident herein is not disputed. Evidence so far on record suggests that DW1 is to blame for causing the accident. He ought to have taken reasonable measures to avoid the accident by slowing down or otherwise acting in a manner that could have aided him to avoid the accident having in mind the presence other (sic) road users on the road and particularly the Plaintiff at the time. It is apparent from the evidence so far on record that DW1 could not avoid knocking Plaintiff's (sic) vehicle and in the opinion of the court he was not observant.....
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> .....This court is reluctant to hold the Plaintiff liable for causing the accident. Given the circumstances obtaining above, this court is satisfied that the Plaintiff has established a prima facie case against the Defendant on a balance of probabilities. There's nothing absolutely DW1 did to avoid the accident. I will hold the Defendant liable for causation of the accident at 100% all circumstances considered flowing from the negligence of the driver and the Defendant is vicariously liable. Consequently, judgement is entered against the Defendant on liability at 100% all the circumstances of this case considered."

18. From the evidence on record, the Respondent told the trial court that the accident occurred on his (the Respondent's) side of the road and blamed the Appellant's driver (DW1) for driving negligently. On the other part, DW1 claimed that it is the Respondent who was negligent in driving his vehicle and that the accident occurred on his (DW1's) side of the road.

19. The police abstract that was produced by the Respondent does not indicate who was to blame for the accident or whether a decision was reached to charge any of the two drivers and indeed whether any such charges were preferred against any of them. The document further indicates that the investigations were pending when the abstract was issued and as I have stated above, neither party called the police officer(s) who attended to the scene of accident and investigated the same to tender evidence on the outcome of the investigations.

20. The two versions presented by the two drivers as to how and where the accident occurred drastically differ and there being no other available evidence on the manner in which the accident occurred, I cannot with certainty tell and an attempt to do so would be to speculate.

21. The age-long principle of the rule of evidence is that he who alleges a fact must prove it. This rule has been grounded in law under Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya. The same was enunciated by Majanja, J. in the case of *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR when he said that:

> "...As a general proposition 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 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya), which provides:
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> "107. (1) 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...".

22. The above provisions of the law are clear that it was the duty of the Respondent (the Plaintiff in the lower court) to present evidence before the trial court to prove liability against the Appellant (the Defendant in the lower court) on a balance of probabilities.

23. 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."

24. In the judgement of the lower court, the learned trial Magistrate reached the persuasion that the Appellant was wholly to blame for the accident. He seems to have considered the version of the Respondent to be the correct one but did not give the basis or reasons as to why he so considered and why he rejected (without stating so) the Appellant's version.

25. As can be seen from the original record and as stated above, each of the two drivers blamed the other and claimed that the accident occurred on their respective sides of the road. As I have stated above, none of the two parties called the police officer(s) who attended to the scene and/or investigated the accident, to shed light on the manner in which the accident occurred, who was to blame and the results of investigations.

26. How then is a matter to be decided in a case where each party blames the other and no sufficient evidentiary material is presented to the court to determine the issue of liability?

27. I will in the circumstances take guidance from Ringera, J (as he then was) in *Gandhi Brothers v H.K. Njage T/A H.K. Enterprises Nairobi* (Milimani) HCCC No. 1330 of 2001 where the court held that in such circumstances the court is constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in Section 3 of the *Evidence Act* Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. Liability was in the circumstances not proved.

28. Consequently, it is my finding that the trial magistrate erred by reaching the finding that the Appellant was negligent, which finding was not made on the basis of the evidence that was on record. I take further guidance from the decision of *Mburu & 6 others v Kirubi (Civil Appeal E246 of 2021)* [2023] KEHC 3599 (KLR) (20 April 2023) (Judgment) in which L.N. Mugambi, J. stated thus:

> " This court nevertheless appreciates that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings." (Emphasis mine).

29. From the foregoing, my persuasion is that liability as against the Appellant was not proved and the suit against the Appellant ought to have been dismissed.

30. With respect to the appeal on the awards made, it is clear from the judgement of the trial court that the learned trial Magistrate was guided by decisions from superior courts that concerned comparable injuries as those sustained by the Appellant in reaching the figure of Ksh.800,000/- in general damages. The trial court cannot be faulted as the assessment was properly done.

31. In respect of the head of special damages, the rule applicable is that the same must be specifically pleaded and proved (see *Equity Bank Limited v Gerald Wang'ombe Thuni* [2015] eKLR). Under the head, the Respondent pleaded Ksh.3,000/- and Ksh.550- being payments for the medical report and the copy of records respectively. The two items were proved by production of receipts and were therefore properly awarded to the Respondent.

32. Having analyzed the evidence, I reach the result, that the appeal is merited on the issue of liability and I proceed to allow it appeal in the following terms:

    1. I hereby set the lower court's finding on liability and substitute thereof with an order that the Respondent (Plaintiff) did not prove liability against the Appellant (Defendant) on a balance of probabilities.

    2. The lower court's findings on general damages for pain, suffering and loss of amenities and special damages is upheld.

    3. Ultimately, the judgement entered in the lower court in favour of the Respondent (the Plaintiff) and against the Appellant (the Defendant) is set aside and substituted thereof with an order dismissing the Respondent's (Plaintiff's) suit with costs to the Defendant (the Appellant).

    4. The Respondent shall bear the Appellant's costs of this appeal.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 16TH DAY OF OCTOBER, 2024

JOE M. OMIDO

JUDGE

For The Appellant: Mr. Keiro.

For The Respondent: Ms. Mumbi Holding Brief For Mr. Waiganjo.

Court Assistant: Ms. Njoroge.