Mulumbi v Njakai & another (Civil Appeal 318 of 2011)
[2023] KEHC 45 (KLR) (Civ) (17 January 2023) (Judgment)

Neutral citation: [2023] KEHC 45 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 318 OF 2011

DAS MAJANJA, J

JANUARY 17, 2023

BETWEEN

RUMONA ASIMINI MULUMBI ..... APPELLANT

AND

JANE W NJAKAI ..... 1ST RESPONDENT

HARRISON MUNGA NJAKAI ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. C.W.Meoli, CM delivered on 14th June 2011 at the Magistrates Court at Kiambu in Civil Case No. 124 of 2007))

JUDGMENT

1. The subordinate court dismissed the appellant's claim against the respondents seeking damages for injuries sustained following a road accident that took place on January 7, 2007 at about 6.30am along the Gigiri-Gachie Road involving the 1st Respondent's motor vehicle registration number KAU 035F in which she was a passenger and another vehicle causing her injuries.

2. The appeal is grounded on the Memorandum of Appeal dated July 12, 2011. In her written submissions, the appellant has consolidated the fourteen grounds of appeal into three broad grounds. First, that the trial magistrate failed to render a fair and just decision based on the evidence adduced and the circumstances of the case. Second that the trial magistrate erred in holding that the appellant had failed to prove the case on the balance of probabilities. Third, that the trial magistrate descended into the arena of conflict by assisting the respondents fill in the gaps and deciding the case to the prejudice of the appellant.

3. In her submissions, the appellant contends that the judgment is a nullity since it was not signed. The Supreme Court in *Geoffrey M. Asanyo and 3 others v Attorney General* [2019] eKLR held as follows:

> It is also trite that for a Judgment of the Court to be valid, it must be dated signed and delivered in open court. The High Court, Makhandia, J, (as he then was) aptly stated in *South Nyanza Sugar Co Ltd v Elijah Ntabo Omoro* Civil Appeal No 60 of 2005; [2011] eKLR that, "[i]t is a mandatory requirement that for a judgment of the court to be valid, it must be dated, signed and delivered in open court... Thus a judgment that is neither dated nor delivered in open court is a nullity. We agree.

4. While the submission that an unsigned judgment is a nullity is correct, in this case the original record shows that the handwritten judgment was delivered and signed on 14th June 2011 though in the absence of the parties hence this objection lacks merit.

5. Turning to the merits of the appeal, the thrust of the appeal is that trial magistrate erred in failing to hold that Appellant had proved her case on the balance of probabilities. Whether the Respondent are liable is a question of fact and in considering this appeal, this court, as the first appellate court, is required to re-evaluate the evidence adduced before the trial magistrate before reaching its own independent determination whether or not to uphold the decision of the trial magistrate. The court should bear in mind that it neither saw nor heard the witnesses testify (see *Peters v Sunday Post Ltd* [1958] E.A 424).

6. The appellant (PW 1) and her witness, Dr Washington Wokabi (PW 1) testified. The defendant did not call any witness. In the Judgment, the court noted that the appellant's case was uncontroverted but her testimony was inconsistent with the pleading hence the claim was not proved.

7. The appellant's case as set out in the Plaint dated May 4, 2007 is that, "the 2nd defendant (respondent) so negligently drove ..... the motor vehicle that he caused the same to collide with and/or ram into an oncoming motor vehicle thereby causing an accident ...." In the particulars of negligence against the respondent, she also pleaded, inter alia, that the driver failed to, "control, and or competently manage the Motor Vehicle .... thereby allowing it to loose control, ram into and/or collide with another motor vehicle causing an accident and occasioning serious injuries to the plaintiff (appellant)."

8. In her testimony, PW 1 recalled stated as follows:

> I was involved in (a) Road Traffic Accident on January 7, 2007 while travelling in a Nissan KAU 035F along Gachie/Nairobi Road. An accident occurred along the way. Near Aga Khan Hospital the vehicle was going at a speed suddenly I heard a burst. I got confuse. When I came wound, I was Aga Khan Hospital. I had sustained injuries. I was seated behind the drivers seat.

When cross-examined on the issue she stated as follows:

> Vehicle was going fast. I did not know the name of the scene of the accident. Road was an incline and tarmac. I could tell the vehicle was moving at a high speed.....

9. I hold that the trial magistrate was correct to hold that the appellant testimony was inconsistent with her pleading. Her case as pleaded was based on the 2nd respondent driving carelessly and thereby causing a collision of the 1st Respondent's motor vehicle and another vehicle. This did not emerge from her testimony and neither was it supported by the Police Abstract which showed that the accident was self-involving. I agree with the decision of the Court of Appeal in *Josiah M. Nyabicha v Kenya Tea Development Authority and others* KSM CA Civil Appeal No. 302 of 2018 [2013] eKLR that parties

are bound by their pleadings and the court should not seek to amend the pleadings in the judgment as to do so would amount to descending into the arena of conflict. Further in *Independent Electoral and Boundaries Commission and another v Stephen Mutinda Mule and 3 others* NRB CA Civil Appeal No. 219 of 2013 [2014] eKLR, the Court of Appeal affirmed the view that:

> It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support he averments in the pleadings, or put it another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.

10. It follows that although the Appellant's testimony was not challenged, her case as proved was inconsistent with her pleadings hence the trial magistrate was right to dismiss the case.

11. The appellant contends that the trial magistrate failed to apply the doctrine of res ipsa loquitor when there was sufficient evidence to support her case. In *Nandwa v Kenya Kazi Limited* [1988] eKLR, Court of Appeal (Gachuhi JA) cited, with approval, *Barkway v South Wales Transport Company Limited* [1956] 1 ALL ER 392, 393 B on the nature and application of the doctrine of res ipsa loquitur as follows:

> The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed.

12. As the Court of Appeal explained, once the plaintiff establishes a prima facie case, the defendant must discharge the burden by showing that it was not negligent or that the accident was fortuitous and occurred without any negligence on its part. In this case, the Appellant failed to establish the facts leading to the accident as pleaded in the Plaint hence the doctrine court not be applied. The doctrine of res ipsa loquitur is a not a substitute for failure to establish the primary facts from which an inference of negligence may be made. From the totality of the pleadings and evidence, I come to the same conclusion as the trial magistrate that the Appellant failed to prove her case.

13. Turning to issue of quantum of damages, the trial magistrate doubted the veracity of the Appellant's claim that she sustained the injuries set out in the Plaint. She pointed out that the although she alleged she was treated at Aga Khan, she did not produce any records to that effect and that the P3 Medical Form was illegible. Further, the Discharge Summary from Kenyatta Hospital did not bear a stamp or identify a signatory to the documents and that the Appellant did not produce follow up treatment cards used in follow up treatment at Butere Hospital. The court noted that Dr Wokabi did not take his own X-rays but relied on those brought by the Plaintiff. PW 1 admitted that he could not tell whether the Plaintiff has previous injuries.

14. I have considered the evidence and since PW 1's case was not controverted meaning that the accident took place and that she was injured, any discrepancy in the documents would only affect the nature and extent of the injuries particularly since medical reports, P3 Medical Form and the police abstract were produced without objection from the respondent. The Police Abstract confirmed that the Appellant was a passenger and that she was injured. The P3 Medical Form is dated April 30, 2007, three months after the accident.

15. In his report dated June 11, 2007, Dr Wokabi recalled that he examined the appellant on June 7, 2007 who brought along the original case summary from Kenyatta National Hospital, X-ray films and P3 forms. He noted that he sustained a deep cut wound on the forehead and compound fractures of the right and left tibia. On examination of the Appellant, he noted that at the deformity of both legs consisting of bow leggedness resulting in pain and 25% disability.

16. The appellant cited *Willy Leins v Leisure Lodge Ltd* HCCC No. 931 of 1998 (UR) to support the submission that the appellant was entitled to Kshs. 1,000,000.00 as general damages. I have looked at the abstract submitted by the appellant and it does not set out the nature and extend of the injuries hence I cannot rely on it. Likewise, the appellant did not provide the report for Kilagha Mukaya v Katana Charo and 2 others MSA HCCC No. 381 of 1991 (UR) although the summary states that the claimant suffered a severe compound fracture of the tibia and fibula necessitating amputation of the left knew. He was awarded Kshs. 490,000.00.

17. In assessing and awarding general damages, the court does the best it can to make an award that reflects the nature of injuries bearing in mind that similar injuries ought to attract similar level of damages. In *Aloise Mwangi Kahari v Martin Muitya and another* [2020] eKLR the plaintiff had sustained compound fracture of right tibia and fibula, bleeding from left lower limb and swollen leg and was awarded Kshs 500,000 as general damages. In *Daniel Otieno Owino and another v Elizabeth Atieno Owuor* [2020] eKLR the plaintiff sustained compound fractures of the tibia/fibula bones on the right leg; deep cut wound and tissue damage on the right leg; head injury with cut wound on the nose; blunt chest injury and soft tissue injury on the left lower limb involving the high and ankle region. The court set aside the trial court award of Kshs 600,000.00 and substituted it with an award of Kshs 400,000.00. Bearing in mind that the Subordinate Court judgment was rendered in 2011, I would award Kshs. 400,000.00 as general damages.

18. Since the appellant did not prove that the Respondents were liable, the appeal is dismissed with costs to the Respondents.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2023.

D.S. MAJANJA

JUDGE

Mr Odero instructed by R. M. Mochache and Company Advocates for the Appellant.

Mr Ndegwa instructed by S. W. Ndegwa and Company Advocates for the Respondents.