Munyovi v Busuru (Civil Appeal E003 of 2022)
[2023] KEHC 1737 (KLR) (10 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1737 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E003 OF 2022

PJO OTIENO, J

MARCH 10, 2023

BETWEEN

VICTOR LUSIRI MUNYOVI .... APPELLANT

AND

TIMOTHY SAKWA BUSURU .... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. R. Ndururi (PM) in Kakamega CM's Civil Case No. E20 of 2020 delivered on 13{{^th}} January 2022)

JUDGMENT

1. The appellant sued the respondent before the trial court seeking the recovery of both special and general damages pleaded to have been suffered when the appellant was riding as a pillion was allegedly knocked down by the respondent motor vehicle Reg. No. KCA 873S. The particulars of the injuries as well as those of negligence were set out to accompany the plaint. The Appellant filed a witness statement, a list of witnesses and a list of eleven (11) documents.

2. For the respondent, when served, a statement of defence was filed in which all, save for the description of the parties, was denied. In particular, the respondent denied being the registered owner of the motor vehicle, denied the occurrence of the accident at the place pleaded, denied that it was occasioned by negligence and all particulars of negligence were denied. An alternative pleading was then set up that, if any accident occurred as alleged, then the same were never attributable to the defendant or his agent but was wholly or substantially contributed to by the appellant and or the motor cycle rider.

3. Particulars of negligence of both were set out with an indication that a third party notice would be preferred. In addition the applicability of the res ipsa loquitor, doctrine, was refuted. That the Appellant suffered the pleaded was equally denied as was the special damages as pleaded. Even service of demand notice was denied.

4. At the trial the appellant called a police officer who testified as PW1 while he testified as PW2 and a medical doctor gave evidence as PW3. PW1 was a police officer, not the investigating officer, who attended court with the accident file and produced its contents including the police abstract and P3 form. On cross-examination, the witness told the court that the police team which visited the scene did not find both motor vehicle and motor cycle at the scene and that it was not established if the rider was licensed. He added that nobody was blamed for the accident and that the matter was referred to insurance but conceded that the respondent was drunk but could not tell why he was not charged. In re-examination he said that it was not legal to drive while drunk and that it was not acceptable for a driver to knock other road users from behind.

5. For the appellant, evidence was led to the effect that on the material day he was a pillion passenger when the respondent in utter disrespect of traffic rules negligently and carelessly that the same knocked him resulting in serious injuries as pleaded. He added that as a result he need a surgery at a cost of Kshs. 200,000.00 but had not undergone same on account of lack of money.

6. On being cross-examined, he told the court that the weather was fine and that he had on helmet and a reflector jacket. He however admitted that he broke the law by being carried as the second passenger on the motor cycle and that he was told by the police that the respondent was to blame but had not been called in court to give evidence against him in a traffic offence but mentioned that it was wrong for respondent to knock them from behind.

7. The last witness was the doctor who produced the medical report as P.Exh.2 and told the court that he expected the appellant to heal completely within 1 ½ years and that he did not assess any prospects of a permanent disability ensuring.

8. The defence case was closed without any evidence being tendered. The effect of that development in law is that the pleadings filed stood as mere allegations and not proved

9. In its Judgment, the trial court found no liability to touch on the respondent and held that had liability been established an award of Kshs. 1,500,000.00 would have been commensurate to award.

10. In that Judgment the trial court isolated seven issues for determination and answer all in the affirmative save for whether or not the appellant had proved negligence against the respondent. In answering the issue as to whose negligence caused the accident, the court said:-

> " The plaintiff accuses the defendant of negligence, and set out the particulars of the alleged negligence in the plaint. He did not however produce any evidence to support this allegation. He who alleges, as the maxim goes, bears the burden to prove. In civil cases, he degree of prove is on a balance of probabilities. In this case, the plaintiff merely states that he was riding as a pillion passenger on the unknown motor cycle, and that the accident motor vehicle knocked him down. From the evidence of PW1, the rider of the unknown motor vehicle escaped from the scene with the motor cycle. The police abstract shows that the result of the investigations carried out were that the matter was referred to the insurance. Although PW1 indicated that the defendant's blood sample was taken and analyzed and found to contain alcohol in the ratio of 245/100mls, she indicated that no charges were preferred against the defendant based on this information. In the premises, it has not been proved that the defendant was driving the accident motor vehicle while being under the influence of alcohol. The fact that the rider of the unknown motor cycle fled the scene is indicative that he is the one who was to blame for causing the accident. Lastly, the plaintiff stated that whereas he was aware that it is against traffic laws for a motor cycle to carry more than one pillion passenger, he was riding on the unknown motor cycle as the second pillion

passenger. It is quite possible that his action of riding as a second pillion passenger either caused or contributed to the causation of the accident. Suffice it to say that theplaintiff has not produced any evidence to prove any of the particulars of negligence as set out in the plaint. He has not established liability on the part of the defendant."

11. That excerpt of the Judgment when juxtaposed against the four grounds of appeal narrows down the issues for determination in the appeal to be:-

    a) Whether the appellant proved negligence against the respondent.

    b) Whether special damages were due for award.

    c) What orders should be made as to costs.

12. Parties have respectively filed Submissions on the appeal. In their Submissions, the appellant's side contends that without any evidence from the respondent, the pleadings in the defence were not proved, remained bare allegations and could not controvert the evidence by the appellant. Several decisions including *North End Trading Co Ltd v City Council of Nairobi* [2019] eKLR, *Joel Muga Opija v East African Sea Foods Ltd* [2013] eKLR and *Benard Muia Kilovoo v Kenya Fresh Produce Exporters* [2020] eKLR were cited for that proposition.

13. The decision in *Immaculate Kanini Mulwa v Daniel Maguru Irungu* [2019] eKLR was cited for the proposition of the law that a driver on a public road must exercise due care which an ordinary and skillful driver would have in all circumstances and that reasonable skillful driver is one who avoids excessive speed, keeps good lookout and observes traffic signs and signal said who keeps a speed he can maneuver in the event of an emergency. It was thus the case of the appellant that the evidence led at trial was overwhelming in proving the negligence of the Respondent.

14. On special damages, it was submitted that the appellant did plead and prove the sum of Kshs. 20,550.00 as due in special damages and that in failing to award same, the trial court erred.

15. For the respondent, the submissions offered were that merely that the respondent did not lead evidence did not substract from the onus of the appellant to prove its case. The decision in *Hon. Danial Arap Moi v Mwangi Stephen Muriithi* [2014] eKLR was cited for the proposition that even where no defence or affidavit is filed by the defence to contest the plaintiff's case, the plaintiff still had the duty to lay his proof to the requisite standards and where the evidence falls short of the legal standard, the claim is still subject to dismissal. The decision in *Kiema Muthuku v Kenya Cargo Handling Services Ltd* [1991] 2 KAR 258 was cited for the law that there cannot be liability without fault and that in a case grounded on tort of negligence, the plaintiff has the duty to prove some negligence so that the link between the defendant's actions and the cause of action. In addition, *Statpack Industries Ltd v James Mbithi Munyao* [2005] eKLR and *Nzoia Sugar Company Ltd v David Nalyanya* [2008] eKLR were cited for the proposition of the law that an injury per se is not sufficient to hold one liable and that were occurrence of an accident is not enough to attach liability several other decisions were then cited on what amounts to proof within a balance of probabilities.

Analysis and Determination

16. While the appellant set out seven particulars of negligence, his witness statement adopted as evidence in chief and the evidence tendered to court at trial made no attempt to prove any of the particulars. At the end of the case there was never evidence on how the accident occurred. No proof was laid on how there was failure to keep a proper lookout, failure to slow down, stop, swerve or otherwise maneuver

the motor vehicle so as to avoid the collision. In fact no evidence at all was led on the blameworthiness of therespondent.

17. The onus to prove the ingredients of the cause of action in negligence was always upon the appellant and it was only after that burden was discharged that the evidential burden was to shift and cast upon therespondent to controvert the position so proved. Where no evidence is laid to establish liability against the defendant no obligation arises to lead evidence unless the endevour would be to call upon the defendant to help build the unbuilt blocks in the plaintiff case. In any event even the doctrine of res ipsa loquitor only applies where is evidence for the court to conclude that the events as narrated by the party seeking to rely on the doctrine, leads to the inference that there is no other explanation of the occurrence of the accident other than the negligence.

18. In this matter, other than the proof a collision between two moving vehicles; a motor cycle and a motor vehicle, there ought to have been some evidence of the directions of each of the two vehicles so that the kerb rules regarding right of way and lane could be applied to the case. It was of no help that in re-examination PW2 was led to say that it is not right to knock one from behind, when there had been a pleading nor evidence on how the collision took place.

19. On the same vein, it was inadmissible to lead evidence about the defendant having been drunk when that had not been pleaded as a factor of blameworthiness of the defendant.

20. It is the finding of the court, upon executing the mandate as a first appellate court, that no evidence was led by theappellant to prove negligence against the respondent and therefore the finding by the trial court that no liability was established was the inevitable result of due evaluation and appraisal of the evidence led. The court thus finds that no error has been proved against the trial court to merit reversal of the decision reached and thus the appeal on liability lacks merit and is hereby dismissed.

21. On special damages, the law remains that the same must be specifically pleaded then strictly proved. It is undeniable that the appellant specifically pleaded and particularized special damages in the sum of Ksh. 20,550, which sum included a figure of Kshs. 10,000 being the legal fees for service of a demand letter. It is also undeniable that in the Judgment no mention was made of special damages. In doing so that prayer is deemed dismissed . The question is whether there was never proof to merit such dismissal. Upon review of the evidence led, the court finds that the receipts filed as documents were produced without protest and that there was sufficient proof and it was erroneous not to make that award.

22. However, special damages need not be extended to include the legal costs incurred in the same litigation. That would be tantamount to assessing as taxing costs before the matter is concluded. I consider and determine that the costs of issuing a demand letter to be pursued as costs in a bill of costs and not special damages. Accordingly, theappellant would only be entitled to Ksh. 10,550 had the suit succeed.

23. Ultimately, the appeal fails on liability and is therefore dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 10TH DAY OF MARCH 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for Abok for the Appellant

Ms. Namukhala for Respondent

Court Assistant: Polycap