Munene & another v Nthenge (Civil Appeal 14 of 2017)
[2023] KEHC 21250 (KLR) (24 April 2023) (Judgment)

Neutral citation: [2023] KEHC 21250 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 14 OF 2017

G MUTAI, J

APRIL 24, 2023

BETWEEN

LUIGI WAMBUGU MUNENE ..... 1ST APPELLANT

JAMES MBURU KIMANI ..... 2ND APPELLANT

AND

JOHN MUIA NTHENGE ..... RESPONDENT

JUDGMENT

1. This is an appeal from the decision of Honourable Shikua given on January 11, 2017 arising out of Yatta RMCCC 223 of 2014. The Appeal is on both Quantum and liability.

Duty of the first Appellate court

2. 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, keep at the back of its 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.

3. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated as follows: -

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

4. The duty of the 1st Appellant Court was settled by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another versus Associated Motor Boat Company and Others [1968]EA 123. The said judges pronounced themselves as follows:-

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."
>
> [The appellate court] is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

5. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

6. In the case of Peters vs Sunday Post Limited [1985] EA 424, court therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

7. Regarding quantum, Justice D.S Majanja, in Nyambati Nyaswabu Erick versus Toyota Kenya Ltd & 2 Others (2019) eKLR held as follows:-

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

8. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

9. The foregoing was settled in the cases of Butter versus Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph 8:-

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

10. The court, in deciding whether to disturb quantum given by the Lower Court, should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously to ensure that the award is not too high or too low as to be an erroneous estimate of damages. The High Court, pronounced itself

succinctly on these principles in the case of Kemfro Africa Ltd versus Meru Express Services versus A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages".

11. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as follows regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

12. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors;

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages; and

    c. To ascertain if the award is simply not justified from evidence.

13. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

14. Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages :-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

15. For the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

Pleadings

16. The Respondent filed suit on November 18, 2014 claiming injury over an accident that took place on 13th June 201 while traveling as a fare paying passenger in motor vehicle Registration No. KAN

872X along Matuu- Thika Road. The said motor vehicle collided with the Appellant's motor vehicle registration KBV 586R. The Respondent pleaded that he suffered the following injuries: -

a. Deep cut on the forehead;

b. Blunt chest injury;

c. Blunt back injury;

d. Blunt injuries to both elbows;

e. Blunt injuries to both knees.

17. The Appellant filed defence on December 18, 2014 and attributed liability to the owner of motor vehicle registration No. KAN 872 X. What I understand the appellant as saying is that they are not to blame but motor vehicle registration number KAN 872X should be help culpable.

Evidence

18. The Respondents doctor testified on August 12, 2015. The Respondent called PC Dorcas from Matuu Police station. She blamed the lorry KBV 586R for swerving to the right side and hitting the pick-up.

19. The Respondent testified on the injuries and occurrence of the accident. He was cross examined on whether he had a seat belt on.

20. The first Appellant testified that he tried to avoid the accident. He blamed the accident on the other motor vehicle.

Analysis

21. The first issue I note is the extra ordinary nature of cross examination that the Respondent was subjected to. He was only asked about a seat belt. I take judicial notice that a matter of public notoriety that there is no legal or other requirement for wearing of wear belt in a three wheeler.

22. The issue of the seat belt was raised for the first tie in evidence. Order 1 rule 4 of The Civil Procedure Rules provide as follows; -

> " 4. Matters which must be specifically pleaded [Order 2, rule 4.]
>
> (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.
>
> (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

(3) In this "land" includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land.

23. In this case, the plea that the Respondent case is not maintainable, should be accompanied by pleading of such elements before proceeding to have the same in evidence.

24. On this sole important issue, the law is clear that he who alleges must proof. The term burden of proof draws from the Latin Phrase Onus Probandi and when we talk of burden we sometimes talk of onus.

25. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:

> " Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win."

26. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

27. Section 107-109 of *Evidence Act* deals with the Burden of Proof as follows: -

107. Burden of proof

(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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provide

28. From the pleadings, nothing could have turned on the fact that the respondent had no seat belt. The cause of accident could not have been the set belt. Further, there are no particulars of negligence attributed to the Respondent in the defence. The Respondent was a passenger. He was not driving either vehicles.

29. It is a cardinal principle of law that parties are strictly bound by their pleadings. There was no pleading on the contribution of the third vehicle. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, the court stated as follows: -

11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

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

    ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

12. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

    "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....'"

30. The appellants attributed negligence to the owner of motor vehicle registration No. KAN 872X. I understand that the Appellants were contending that they are entitled to contribution or that the other motor vehicle was to blame. This kind of pleading could be useful exercise if they had applied to join the owner of driver of KAN 872X into the suit.

31. In the case of EN v Hussein Dairy Limited & 3 others [2020] eKLR, the court, P.J.O. OTIENO, held as doth: -

    16) This excerpt is the residence of the answer to my first issue for determination. It cannot be denied that in deed that was the accurate capture of what Dw1 had said in his examination in chief. However, that is the furthest a court could go. It was not open to the court to consider how negligent a party not before it could be. The law confines a court to determining only the rights of the partied before it and upon the evidence availed by and against such parties. In fact, I doubt whether it was admissible to receive evidence against anon-party and consider same without affording him a right to be heard. I take the view that the legal thing for the 2nd respondent to have done was to seek the joinder of the owner and driver of the bus, either as a third party of co-defendant before seeking to push a burden in the case against them.

    17) I agree with the Appellant's submissions that this point was moot and given that in the absence of the third party, the trial magistrate could not apportion liability in the manner he did. This

position was similarly adopted in the case of Pauline Wangare Mburu v Benedict Raymond Kutondo NKU HCCC No. 210 of 2003 [2005] eKLR where the court observed as follows,

[T]he defendant did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129 V to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability. [Emphasis mine].

32. The provisions of sections 107,109 and 112 of the *Evidence Act*, on the burden of proof, were extensively dealt with in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

33. In the case of Mohamed Muyunga v Vinoth Abwolet Eshepet [2020] eKLR, the court held that:-

> 38. Lastly, there was the complaint about non-consideration of the appellant's and respondent's submissions, the court in which I consider not meriting much consideration here as its consideration appears to ignore the mandate of a first appellate court. Since the ground seems to recur in every appeal in this registry. I reiterate what the court said in Joshua Mung'athia v Evarick Muthuri Ntoiba & another (suing as the legal Representative of the Estate of Fredrick Ntoiba Baraya (Deceased) 2021) eKLR."
>
> " this grievance in reality ought not be taken seriously when regard is taken of the court's mandate on a first appeal. It bears no premium that the submissions were not regarded when the appellate court is to carry out a re-evaluation in order that it comes to its own conclusion. That is what I have done and I consider it immaterial that the trial court may have not demonstrated having considered the appellant's submissions. While I consider it important that parties 'industry be appreciated, and a court need to appreciate the assistance offered by submissions, I consider it a point that cannot stand on its own to upset a decision on a first appeal"

34. In this case, the Respondent discharged his burden of proof. Instead of the appellant discharging it, they blame a non party who they never sought to bring on board. The court has no jurisdiction to apportion contribution between a party and a non party.

35. In the circumstances the court cannot lay blame on the Respondent who was a passenger or other people who are non-parties.

36. Further on the evidence on record, the 1st Appellant swerved to the right. There is no justification in swerving to the right where there are vehicles on the road. The appellant were rightly held 100% liable for the accident.

Quantum

37. The injuries pleaded were supported by the evidence of Dr. Okere treatment notes, P3 form, those injuries healed. He however complained of recurrent headaches and backaches.

38. The court considered several authorities showing that the award ought to be between Kes. 150,000/- to Kes. 250,000/-. He however gave, judgment for Kes.120,0000/-. This award is low but not inordinately low. The Respondent, in any case did not appeal. The Award is definitely not excessive. In the circumstances I do not find fault with award of damages awarded.

39. The appeal is therefore begging to be dismissed, which I oblige.

Determination

40. The upshot of the foregoing is that the entire appeal is bereft of merit and is consequently dismissed with costs of Kes.90,000/- to the Respondent. The file is closed.

DELIVERED, DATED and SIGNED at MOMBASA on this 24th day of April 2023. Judgment delivered through Microsoft TEAMS.

.....

GREGORY MUTAI

JUDGE

In the presence of:

No appearance for the Appellant;

No appearance for the Respondent; and

Court Assistant - Winnie Migot