Semsum Construction Company Limited v Muindi & another (Civil Appeal E41 of 2020) [2023] KEHC 3577 (KLR) (24 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3577 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E41 OF 2020

G MUTAI, J

APRIL 24, 2023

BETWEEN

SEMSUM CONSTRUCTION COMPANY LIMITED ..... APPELLANT

AND

AGNES MUTIO MUINDI ..... 1ST RESPONDENT

THOMAS MBITHI MUOKA ..... 2ND RESPONDENT

(Being an appeal from the judgment of the Honourable Desderias Orimba, Senior Principal Magistrate delivered on the 25th day of November 2020 in Kangundo SPMCC No.59 of 2019; Agnes Mutio Muindi versus Semsum Construction Company Limited & Thomas Mbithi Muoka)

JUDGMENT

1. This is an appeal from the judgment of the Honourable Desderias Orimba, Senior Principal Magistrate delivered on 25th November 2020 in Kangundo SPMCC No 59 of 2019; *Agnes Mutio Muindi versus Semsum Construction Company Limited & Thomas Mbithi Muoka*. Directions were given that the instant appeal be canvassed by way of written submissions. When this matter came before me on 16th January 2023, I noted that the parties had filed their respective written submissions. Consequently, I reserved my judgment for 7th March 2023.

2. I underestimated the amount of time it would take me to write the judgments I accumulated during the Rapid Results Initiative, the newly appointed judges, of whom I am one, engaged in in January 2023. During the said exercise I was based in Machakos and Kajiado High Court stations. My very sincere apologies for the delay in delivering this judgment.

Background

3. This case involved two motor vehicles Motor Vehicle Registration KAU 174N Toyota Matatu and KCK 854D Nissan Pickup. The 1st Respondent was the Plaintiff while the 2nd Respondent was enjoined as the Third Party by the Appellant.

4. The lower court found the Appellant 100% liable for the accident and awarded the 1st Respondent a sum of Kes.782,550.00 made up as hereunder;

    a. General damages Kes.750,000.00

    b. Special damages Kes.32,550.00

    Total Kes.782,550.00

Duty of the appellate court

5. 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.

6. This was aptly stated in the cases of *Selle versus Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters versus Sunday Post Limited* [1985] EA 424 where in the latter case, the 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..."

Pleadings

7. By a Plaint dated 19th November 2018 the 1st Respondent pleaded that he was lawfully a passenger in Motor Vehicle Registration No. KAU 174N, when motor vehicle Registration No. KCD 845D Nissan pickup reversed in the middle of the road without ascertaining that it was safe to do so.

8. According to the Plaint, this resulted in motor vehicle Registration No. KAU 174N Toyota Matatu ramming into its rear. The 1st Respondent was seriously injured and as a result sought medical treatment and subsequently filed the suit in the court below.

9. The Appellant filed defence on 22nd May, 2019 and denied occurrence of the accident and possession of Motor Vehicle Registration No. KCD 845 D. In a rather circumlocutory way, the Appellant denied the occurrence of the accident and at the same time blamed the accident on motor vehicle Registration No. KAU 174N. Oddly they blamed the 1st Respondent for failing to have regard to Motor Vehicle Registration No. KCD 845D and to her safety.

10. I do not think that parties should waste valuable judicial time by calling for proof of facts that they know occurred. Whichever way the matter goes the extra costs of proving facts that shouldn't have been denied in the first place ought in my view be borne by the party that made proof necessary. In

the case of *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, the court of appeal stated as follows: -

> " I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the Appellant's defence. This was that if the Respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of Order 6 rule 13(1)(a)."

11. By an order of the court on 7th August 2019 the appellant was granted leave to join a Third Party to the proceedings. The Third Party entered appearance and filed a defence.

12. The Appellant relied on the principles of force majeure and rep ipsa loquitur. Black's Law Dictionary, at page 1410 (5th ed. 1979), defines force majeure as: -

> " Greater or superior force; an irresistible force."

13. In other words, a party cannot be liable because a superior force that is irresistible and naturally occurring, which is not caused by man nor preventable by humans in spite of use of utmost skill, care, diligence, or prudence caused the event or action. In the normal lingua, it is an act of God.

14. The effect of the defences raised by the Appellant and 2nd Respondent was that the evidentiary burden of proof of negligence was lifted from the 1st Respondent. For the 1st Respondent the actions of both drivers could only be explained by them in terms of sections 112 of the *Evidence Act* which provides as follows;

> 112. Proof of special knowledge in civil proceedings
>
> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

15. The drivers of two vehicles knew or ought to know how the accident occurred. The duty of the 1st Respondent was to turn up in court and show that the accident occurred due to negligence. The apportionment thereof would be made on the basis of the evidence of the drivers.

Appellant submissions

16. The Appellant filed submission on 14th October 2020. In the said submissions the Appellant argued that the Respondents were to blame.

17. The Appellant stated that the fact that the Appellant's driver was convicted, does not shield the Third Party from liability.

18. The Appellant relied on the case of *Meshack Omari Monyoro versus David Kinyanjui & 2 Others* [1998] eKLR. They also relied on the case of *Mbugu David & Another versus Joyce Gatthoni Wathena & Another* [2016] eKLR where the court held as follows: -

> " The Court of Appeal in the case of *Abbay Abubakar & Fatuma Ali v Marair Freight Agencies* CA No. 67 of 1983 held as follows on the principle of apportionment of negligence equally:
>
> > "The trial judge rightly applied to the facts before him the relevant law enunciated by Spry, VP in *Lakhamishi versus the AG* [1971] EA 118 for such cases which it is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents, it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases, as for example, where vehicles collide near the middle of a wide, straight, road, in conditions of good visibility, with no obstructions or other traffic affecting their courses, there is, in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. I think that it is usually possible, although often extremely difficult, to apportion the degree of blame between two drivers guilty of negligence, but I accept where it is not possible, it is proper to divide the blame equally between them. Where however there is lack of evidence, as opposed to a conflict of evidence, I am inclined to think that the position is different. I personally find it difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligence and if negligence on his part cannot properly be inferred from the circumstances of the accident."

19. In *Kiema Mutuku versus Kenya Cargo Handling Services Ltd* [1991] I KAR 258, *David Kinyanjui & 2 others versus Meshel Omar Monyo* HCCA 125 of 1993 and *Statpack Industries versus James Mbithi Munyao* [2005]eKLR. In the latter case the Court stated as follows: -

> " In any event, the Respondent had not pleaded in his Plaint that the Applicant was negligent by providing a dust coat instead of overalls. And this allegation should not have been the basis of a Judgment on liability".
>
> Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same.

20. In my respectful view I need not consider *Donoghue versus Stevenson* [1932] AC 562. There is surfeit of local jurisprudence on exactly the same point the court considered in the said case.

1st Respondent's submissions

21. The 1s Respondent filed submissions where she stated that the Appellant was to blame for the accident and as such should be held liable.

2nd Respondent submissions

22. I have not seen the second Respondent's submissions. If they were filed the submissions, were not transmitted to the court.

Analysis

23. Ground one is on liability while the other grounds are on quantum of general or special damages. My take is that these are only 3 issues in this appeal to wit that: -

    a. Who is liable for the accident?

    b. Whether the quantum of damages granted were so high as to amount to an erroneous estimate of damages?

    c. Whether special damages were particularly pleaded and specifically proved?

Liability.

24. It is not necessarily true the burden of proof lies the plaintiff at all times. Section 107 of the *Evidence Act* places the burden on a party depending on the circumstances. The said section reads as follows: -

    (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."

25. This is supplemented by section 108 of the *evidence Act* which state as follows:-

    " 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."

26. Given that this is a collision or accident involving two moving vehicles the burden of proof lies on the plaintiff to show that she was seated in the vehicle that was involved in the accident and that the said motor vehicle was involved in an accident with another without the plaintiff's hand in the accident.

27. All parties confirmed that the 1st Respondent was involved in the said accident. Her involvement has not been contested. Any vehicle properly driven on a road could be involved in an accident. Occurrence of an accident may be due to negligence or an act of God. Whoever wishes to proof that an occurrence of an accident is attributable to God must prove it.

28. The defence of act of God is absolute. A party asserting that there was an act of God is denying negligence. Therefore, without proof of an act of God, there is a presumption that either of the two vehicles was negligent. The 1st Respondent was not the driver of either vehicle. The drivers knew what happened. That is their special knowledge. Section 112 of the *evidence Act* provides that such possessor of special knowledge has the burden of proof. The section provides that: -

    " Proof of special knowledge in civil proceedings.

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

29. In *Anne Wambui Ndiritu versus Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334 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."

30. In *Susan Kanini Mwangangi & Another versus Patrick Mbithi Kavita* [2019] eKLR the Court, with reference to the East African Court of Appeal's decision in *Embu Public Road Services Ltd versus Riimi* [1968] EA 22 stated thus: -

> " The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant...The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence on his part; or that the accident was due to the circumstances not within his control."

31. In *Mureithi versus Wambui & 2 others* [1994] eKLR, the Court of Appeal stated:-

> " It is against this apportionment of blame that the owner of the matatu, has appealed to this Court on the grounds that the learned judge erred in apportioning blame the way he did, that he had misapplied the principles laid down in *Oluoch v Robinson* [1973] EA 108 and that no evidence was given to establish negligence on the part of the matatu driver.
>
> It is clear to us that the accident occurred on the highway and that it was caused by the lorry being driven into the path of the matatu, but was there any evidence to show that the matatu driver had on his part, been negligent in any way? There is no evidence that he was driving at a speed or in a manner which, taking the surrounding circumstances into account, can be said to be negligent. If he was driving at a speed or in a manner which was safe in the circumstances, should he then have hooted or applied his brakes? We would say no! It has to be shown on a balance of probabilities, and this was not shown in this case, that he saw the lorry being driven in such a manner towards the junction that it was or must have been, reasonably apparent to him that danger was imminent. The evidence of the only eye witness, and who has never driven in her life, the lady passenger in the matatu, does not support this proposition. And indeed, the only other person who could have given evidence on this, namely the driver of the lorry who was the third defendant in the suit before the High Court, did not give evidence. The inference that can reasonably be drawn from this is that he was to blame.

> Lastly, it being undisputed that the accident occurred on the highway upon the lorry being driven along a minor road unto the highway where the matatu was, and also that there was no evidence to show that the matatu driver should have taken precautionary steps as he approached the junction or that it must have been reasonably apparent to him that there was a possibility of an accident, the inescapable conclusion to our minds must be that, the accident was entirely due to the negligence of the lorry driver."

Evidence

32. The 1st Respondent testified on 19th August, 2020. She adopted her statement and blamed KCD 845D. On cross-examinanation she said that motor vehicle Registration No. KCD 845D was to blame as it reversed and caused the accident.

33. The Respondents closed their cases without calling any witness. The reference to statement filed are useless as they have absolutely not probative value. The evidence of the 1st Respondent is uncontested. The cause of the accident was the reversing of Motor Vehicle Registration No. No. KCK 845 D.

34. Upon closure of the defence case the particulars of negligence against the third party now 2nd Respondent became mere allegations of no probative value. It could have been different if they were co-defendants.

35. Without evidence, the court cannot apportion liability. Without defence the Third Party's case was foreclosed. Consequently, the finding of 100% liability was the only available option. I therefore dismiss the appeal on liability.

36. Given that this is the end of the road for the 2nd Respondent, the 2nd Respondent shall have NO costs as they did not participate in the appeal herein. They also did not testify in the court below.

Quantum

37. The injuries according to Dr. James Muoki were:-

    a. Open fracture of the left distal tibia/fibula;

    b. Cut wound on the right dorsum foot;

    c. Deep cut wound on the lower lip; and

    d. Deep cut wound on the chin.

38. Regarding general damages, the duty of this court is set out succinctly in various decisions of the court of appeal in *Butt v Khan* [1981] KLR 470 and *Kitavi v Coastal Bottlers Ltd* [1985] KLR 470.

> " Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

39. In *Kilda Osbourne v George Barnes* and *Metropolitan Management Transport Holdings Ltd & Another* Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in *H. West & Sons Ltd v Shephard* [1963] 2 ALL ER 625, Sykes J stated as follows:

> " The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."

40. In *Francis Omari Ogaro versus JAO* [2021] eKLR, the court stated that a sum of Kes.180,000.00 is sufficient for serious soft tissue injuries.

41. In *Elizabeth Wamboi Gichoni v Benard Ouma Owuor* [2019] eKLR, on 2nd day of December, 2019, the court found an award of Kes.300,000.00 excessive and reduced it to Kes.175,000.00 for serious soft tissue injuries.

42. In *Mbati John & Another versus China Zhogxing Construction Company Limited and Another* [2016] eKLR decided in February 2016, the Plaintiff was awarded Kes.75,000.00 for injuries involving blunt trauma to the occipital region of the head, bruises of the right shoulder girdle, blunt trauma to the anterior chest, cut wounds on the lumber region of the back and bruises of the knuckles of the left hand. This decision is, however, slightly older than the others I have referred to.

43. In *Daniel Gatana Ndungu & Another versus Harrison Angore Katana* [2020] eKLR, the Honourable Mr. Justice Nyakundi found a sum of Kes. 140,000.00 sufficient in respect of cut on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee.

44. The court awarded Kes.782,550.00 as damages made up as hereunder:-

    a. General damages Kes.750,000.00

    b. Special damages Kes.32,550.00

45. I have considered the foregoing authorities. In my view an award of Kes.500,000.00 as general damages is fair and just in the circumstances of this case. The injuries the 1st Respondent suffered were far more severe than those in the authorities I have relied on.

Special damages

46. The 1st respondent, the plaintiff pleaded the following as special damages.

    a. P3 form Kes.1,000.00

    b. Medical reports Kes.3,000.00

    c. Copy of records Kes.550.00

    Total Kes.4,550.00

47. In the case of *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited* [2015] eKLR the Court of Appeal, Warsame, M'Inoti & Murgor, JJA, stated as follows: -

> " This case has been accepted by this court as an authority for the proposition that general damages cannot be awarded for breach of contract and that proposition makes sense because

damages arising from a breach of a contract are usually quantifiable and are not at large. Where damages can be quantified they cease to be general..."l

48. The court below awarded special damages of Kes.32,550.00. It has been stated time and time again that what is not pleaded cannot be proved. I therefore set aside the said award of Kes.32,550.00 and substitute it with special damages that were pleaded and specially proved, that is to say the sum of Kes.4,550.00.

49. Based on the foregoing I enter judgment as follows: -

    a. Appeal in respect of liability is dismissed;

    b. The appeal in respect of the general damages is partly allowed. The award of Kes.750,000.00 as general damages is set aside and replaced with an award of Kes.500,000.00. Interest thereon shall accrue from the date of filing of the suit;

    c. The award of Kes.35,430.00 as special damages is set aside and in lieu thereof a sum of Kes.4,550.00 is awarded with interest thereon from the date of filing;

    d. I award the 1st Respondent costs in the sum of Kes.100,000.00;

    e. The 1st Respondent will have costs of the proceedings in the subordinate court based on the amounts awarded herein;

    f. No order as to costs regarding the 2nd Respondent;

    g. File to be closed.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF APRIL, 2023

.....

GREGORY MUTAI

JUDGE

In the presence of:

No appearance for the Appellant.

Mr. Mutinda holding brief for Mrs. Mutunga for the 1st Respondent.

No appearance for the 2nd Respondent.