Chai v Milly Fruit Processors Limited & another (Civil Appeal 184 of 2007) [2023] KEHC 17529 (KLR) (8 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17529 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 184 OF 2007

DKN MAGARE, J

MAY 8, 2023

BETWEEN

JUSTINE TSUWI CHAI ..... APPELLANT

AND

MILLY FRUIT PROCESSORS LIMITED ..... 1ST RESPONDENT

STANSLOUS MWAKAI CHOONGA ..... 2ND RESPONDENT

(Being an Appeal from the Judgment and decree of Hon. T. Nzioka dated the 21st September, 2007 in CMCCC NO. 3201 of 2005 JUSTINE TSUWI CHAI VS MILY FRUIT PROCESORS & ANOR)

JUDGMENT

1. This judgment rises from the decision of T. Nzioka delivered on 21/9/2007 in 3201 of 2005 – Justine Chai Tsuwi = vs= Milly Fruit Processors & Another.
2. The Appellant filed the memorandum of Appeal on 19/10/2021. The Appellant raised three grounds which were: -
    a. Ownership of the motor vehicle.
    b. Vicarious liability of the 2nd Respondent
    c. Uncontroverted evidence.

Pleadings

3. The appellant pleaded that the 1st Respondent was the registered owner of motor vehicles registration No. KAN 131E, driven by the 2nd Respondent. He blamed his injuries on the Respondents and set forth particulars of negligence.

4. He pleaded injuries, which are not subject to this Appeal. The Respondent entered appearance jointly and denied liability. Their denial were those referred in the case of The case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> 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 0 6 r 13(1)(a)."

5. The attributed negligent to the Appellant. They also stated that the 2nd defendant took all necessary steps and as such the accident was inevitable.

Duty Of The Appellate Court

6. 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.

7. This was aptly stated in the cases of Peters vs 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..."

8. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...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..."

9. The test as to whether an Appellate Court may interfere with an award of damages was stated in the case MBOGO & ANOTHER –Vs- SHAH (1968) E.A. 93 as follows:-

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

Evidence

10. The appellant testified on 17/1/2007. The appellant was a passenger in the 1st Respondents vehicle. He boarded the motor vehicle because matatus were on strike. The driver lost control while receiving a phone. PW2 PC Thomas Murithi Kamaugu testified that the driver was charged and convicted. The defence did not call any evidence. The effect of closing the case without calling evidence is profound. Under Section 112 of the *Evidence Act* 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."

11. The driver was privy to all the events leading to the accident. He chose not to testify. Effectively they court must construe the same against him.

12. Further, any evidence the Respondent could have relied on the main just that allegation. By pleading inevitable accident, the appellant shifted the burden to themselves. This is borne in the case of Sammy Ngugi Mugo v Mombasa Salt Lakes Ltd & another [2014] Eklr, where the court held as doth: -

> "On a balance of probability, the doctrine of Res Ipsa Loquitur applied. Iam fortified by the Court of Appeal decision in the case of EMBU PUBLIC ROAD SERVICES LTD VS RIIMI [1968] EA 22 where it was held that "where an accident occurs and no explanation is given by the defendant which could exonerate him from liability, then the court would be at liberty to apply the doctrine of res ipsa Loquitur and hold the defendant liable in negligence." The Court further held at p. 26 that: "While the driver had to meet a sudden emergency and what was required of him was not perfect action, nevertheless on the evidence it had not been shown that the emergency was so sudden that he could not have taken that amount of corrective action which should be expected of a competent driver of a public service vehicle."

13. By failing to prove inevitable accident the Respondents admit negligence. In the case of Beatrice Wambui Nginga v Samuel Gichuru Kariuki & 3 Others [2016] eKLR,

> "The appellant blamed the respondents for the causation of the accident. They denied responsibility and put her to strict proof. They however pleaded inevitable accident and/or "act of God" in the alternative. As for the pleading of inevitable accident by the respondents, the cases of Hussein Omar Farah (supra) and Rahab Micere Murage (supra) reiterated that where a party pleads inevitable accident, the burden of proof shifts to such a party first to give particulars of the alleged inevitable accident; and then to prove the same. The respondents neither gave particulars of the alleged inevitable accident, nor tendered evidence

to prove the same. They should not therefore, have been shielded from responsibility for the causation of the accident in which the deceased met his death.

14. In the case of Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR, the court stated: -

> " 109. The burden of proof as to any particular fact lies on the person who wishes the court it believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In Civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disposing that fact is on him."

15. A vehicle properly driven does not involve itself in any accident. It thus behooves a party who denies negligence, in such circumstances to proof once evidence has cast the same on him.

Ownership

16. Ownership of the motor vehicle was not denied and as such it was not open to the court to decide the same. Order 2 Ruler 4 (1) provides as doth:-

> 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 r. "land" includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land.

17. Ownership is only is an issue that will surprise the other party. It must be specifically traversed and pleaded. The Respondents only pleaded issues of negligence.

18. In the circumstances, there was no opening for discussions. Issue of ownership cannot be originated at submissions level. In any case such evidence of both witnesses were uncontroverted.

19. The issue of not being an authorized passenger arose only on cross examination. It is not in the pleadings. The case of Shighadai= vs= Kenya Power & Lighting Co. Ltd and Another (1988) KLR 682 is a pursuant authority but still good law. It however, deals with an issue that was controversy in that case. I am not persuaded that it was left to parties in this one. In that case, the court quoted lord Denning MR as then he was, summed up the liability of an owner of a motor vehicle for the negligence of his driver thus:

> " It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is with the owner's consent, driving the car on the owner's business or for the owner's purposes" Ormrod v Crossvile Motor Services [1953] 2 ALL ER 753 at p. 754. Lord Scarman L J in

Rose v Plenty & Another [1976] 1 ALL ER 97, put it differently but the message is basically the same. This is what he said at p. 103.

"But Basically, as I understand it, the employer is made vicariously liable for the tort of his employee not because the plaintiff is an invitee, nor because of the authority possessed by the servant, but because it is a case in which the employer, having put matters into motion should be liable if the motion that he has originated lead to damages to another.".

20. An unleaded issue can only be dealt with, if parties left it to the court. A perusal of the appellant's submissions in the court below, shows otherwise

21. The decision in THURANIRA KARAURI vs AGNES NCHECHE [1997] eKLR, turned on its own facts. It has since been overturned as bad law.

22. The police gave evidence of ownership. The same was provided by the driver who was subsequently convicted for careless driving. In the case of Fredrick Odongo Otieno v Al-Husnain Motors Limited [2020] eKLR,

"

"18. It is important first to consider the circumstances under which a court considers a Police Abstract sufficient proof of ownership. The position taken by various courts as conceded by both parties in this appeal is that a Police Abstract when produced as evidence can be sufficient proof of ownership save where it is successfully challenged. In the case quoted by the Respondents herein, Joel Muga Opija v East African Sea Foods Ltd [2013] eKLR the court in affirming this position held:

"in our view an exhibit is evidence and in this case the appellant's evidence that the police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect that the learned Judge in failing to consider in depth the legal position of what is required to prove ownership erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the Abstract is not challenged and is produced in court without any objection, its contents cannot be later denied."

23. The police evidence was not procured by fraud. In the circumstances, the court erred in law and in fact in failing to find that ownership had been proved. In the circumstances I find that the appeal has merit and allow it with costs.

24. Before I depart I need to point out that the delay in prosecuting this matter has been monumental. No explanation has been given and it is a bad show. The appellant will have to pay for that.

25. In circulating interest, the court shall exclude 4 years interest as a reprieve to the parties of the delayed appeal.

Determination

26. I make the following orders: -

a. I find the appeal merited and allow the same, set aside the order dismissing the Appellants case against the 1st Respondent and in lieu thereof order that judgment be entered for the Appellant against the Respondents jointly and severally at 100% liability.

b. General damages of Kshs. 300,000 as awarded with interest from 21/9/2011 (being the date of judgment plus 4 years).

c. Special damages of Ksh. 2,550. The same to attract interest form the date of filing.

d. Costs of Ksh. 90,000/= to the appellant against the 1st Respondent.

e. Stay for 30 days.

f. This file is hereby closed.

g. This judgment be served on the trial court.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 8TH DAY OF MAY, 2023.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Miss Julu for the appellant

No Appearance for the respondent

Court Assistant - Firdaus