Kon'ani v Kukhumbilo (Civil Appeal 63 of 2010)
[2023] KEHC 17543 (KLR) (22 May 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 63 OF 2010

DK KEMEI, J

MAY 22, 2023

BETWEEN

SAMUEL KUKHONGE KON'ANI ..... APPELLANT

AND

TELEWA KUKHUMBILO ..... RESPONDENT

(Being an appeal against the judgement and decree of Hon. E.C. Cherono (PM) delivered on 7th June 2010, in Webuye SRMCC No. 44 of 2006)

JUDGMENT

1. By a Plaint dated 22nd December 2005, the Appellant as the Plaintiff sued the Respondent as the Defendant claiming special damages, general damages, costs and interests.

2. The cause of action, according to the Plaint, arose on or about 23rd December 2003 along Webuye-Nzoia Road. According to the Appellant, he was lawfully cycling along Webuye-Nzoia murram road when at Milo area motor vehicle registration number KCA 084J was so negligently driven that the same was allowed to veer off the road and knock down the Appellant as a result of which the Appellant sustained severe bodily injuries. Both the particulars of negligence, injuries and special damages were pleaded. As a result, the Appellant claimed damages.

3. The Respondent's defence was that the accident was caused by the negligence of the Appellant, particulars whereof were pleaded.

4. This being the first Appellate Court, there is need to give a fresh look at the evidence adduced before the lower Court bearing in mind that I did not have the benefit of seeing or hearing the witnesses as they testified. This is the principle espoused in the case of Abok James Odera t/a A.J Odera & Associates v

John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where the Court of Appeal stated the following with regard to the duty of a first appellate Court:-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held, inter alia, that:-
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> "On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

5. In Margaret Njeri Mbugua v Kirk Mweya Nyaga [2016] eKLR the Court of Appeal stated as follows of the role of the first appellate court:

> " ..... The above is also true for the High Court sitting on a first appeal. The learned Judge should have reconsidered the evidence, evaluate it herself and drawn her own conclusions. In doing so she should have therefore considered the application to strike out the defence, the affidavit and evidence in support as well as the reply by the respondent. She failed to do this and therefore failed to consider matters she should have considered."

6. Examining the trial record, the Appellant who testified as PW1, adopted his witness statement in which he stated that on 23rd December 2003 while on his way home from Webuye along Milo murram road, cycling, he was knocked by a vehicle near Milo Secondary School. According to him, the said motor vehicle registration No. KAC 084J Saloon emerged from his front side and hit him. It was recklessly driven that it encroached onto his lane. As a result, he sustained injuries on his head, left hand was broken and that he received treatment at Webuye District Hospital where he was later discharged on 24th December 2003. He proceeded to report the incident at the Police station where he was issued with a P3 form and a police abstract. He produced the P3 form in Court as Pexhibit 2 while the treatment booklet was marked for identification as PMFI 1 and the police abstract as PMFI3.He told the Court that he was examined by Dr. Aluda who prepared a medical report and he paid Kshs. 1, 500/= which he produced in Court as Pexhibit 5. It was his evidence that he had not fully recovered as he still experienced pain on his hands and that he only learnt about the driver of the motor vehicle at the Police station.

7. On cross examination, he told the Court that the motor vehicle was being driven at a high speed moving at a zig zag manner and that when he was knocked down,he lost consciousness. He further testified that he had tried to avoid the motor vehicle by veering off the road but as the vehicle was approaching him the driver kept on hooting. He told the Court that he did not do a search to establish ownership of the motor vehicle as he became aware of the registration number at Webuye Police station.

8. On re-examination, he told the Court that the motor vehicle knocked him on the left side of the road as one faced Milo and he only realized that the vehicle was being driven in a zigzag motion when it almost reached him.

9. The Appellant called Dr. Samuel Aluda who testified as PW2. According to him, he examined the Appellant on 28th November 2005 where he established that he had been involved in a road traffic accident on 23rd December 2003 and was admitted at Webuye District Hospital and later discharged.

He told the Court that the Appellant sustained the following injuries: forehead was swollen and with lacerated wound; left forearm was swollen and tender; double fracture on the left ulna. At the time of his examination, the injuries had healed and that they were both soft and hard tissue injuries. He observed healing on the sharp elbow joint which was also deformed. He prepared a report which he proceeded to present it as Pexhibit4.

10. On 22nd June 2009, a consent was recorded by the parties and which was adopted in Court after confirmation by both parties. The same noted thus: the Police abstract dated 13th December 2005 marked as PMFI 3 be produced in Court as Pexhibit 3; the treatment notes marked as PMFI be produced in Court as Pexhibit 1.

11. At the close of the Appellant's case, the Respondent proceeded to close the defence case as he had no witness in Court.

12. In his judgement, the learned trial magistrate found that from the evidence, the Appellant failed to prove that the Respondent was to blame for the accident as no certificate of search from the Registrar of Motor Vehicles or traffic proceedings from a traffic jurisdiction were availed. He further held that failure to prove liability, the other issues in his view were inconsequential. As a result, the Court noted that the claim was not proved on a balance of probabilities and proceeded to dismiss the same with no orders as to costs.

13. The relevant antecedent facts in this Appeal are discernible from the record and as summarized herein above.

14. The Appellant being aggrieved and dissatisfied with the judgment and decree of the learned Magistrate through his advocates filed Civil Appeal Nos. 63 of 2010 on the following grounds; -

    i. That the learned Magistrate erred in law and fact by disregarding the weight of the Appellant's evidence.

    ii. That the learned Magistrate erred in law and fact by failing to make a finding that the Appellant's evidence had not been rebutted or controverted.

    iii. That the learned Magistrate erred in law and fact in failing to take cognizance of the Appellant's evidence.

    iv. That the learned Magistrate erred in law and fact in finding that the Appellant had not established liability of the Respondent.

    v. That the learned Magistrate erred in law and fact in arriving at his decision by considering extraneous issues and matters.

    vi. That the learned Magistrate erred in law and fact in finding that the Appellant had not proved his case on a balance of Probability.

    vii. That the learned Magistrate erred in law in disregarding the submissions of the Appellant.

    viii. That the learned Magistrate erred in law in arriving at a decision of dismissing the Appellant's suit basing on wrong principles and inapplicable principles of law.

15. Vide this Court directions, the appeal was canvassed by way of written submissions. However, only the Appellant filed his submissions as directed by this Court.

16. It was submitted that the Appellant did establish his case against the Respondent on a balance of probability. According to him, the police abstract Pexhibit 3 was produced by consent of the parties

and at no instance did the Respondent challenge the contents of the Police abstract. It was submitted that where the evidence is unchallenged and in the absence of any evidence challenging the contents of police abstract on the issue of ownership, it was fair that the trial Magistrate do consider the Appellant's submissions. Counsel relied on the case of Joel Muna Opija vs East African Sea Food Limited (2013) eKLR. It was submitted that the Respondent's statement of defence did not show the Respondent denying ownership of the suit motor vehicle as it only denied the occurrence of the accident thus the presumption that the Respondent is the actual owner of the suit motor vehicle.

17. On quantum, the Appellant submitted that based on the medical report by Dr. Aluda produced in Court as Pexhibit 4 and who opined that the injuries sustained by the Appellant were severe and stated that he has a stiff left elbow joint which cannot bend and that the same shall remain a permanent feature and a disability on him. He prayed for an award of Kshs. 400,000/= and that this Court takes into account inflation rates and lapse of time.

18. Having considered the submissions of the Appellant in this appeal, it is the duty of this Court to delve at some length into factual details and revisit the facts as present in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it that the trial Court had the advantage of hearing the parties.

19. I have considered the appeal, the proceedings before the trial Magistrate, the pleadings and the submissions.

20. This being a first appeal, this Court has a duty to evaluate the evidence and come up with its own independent finding. In the case of: Mwana Sokoni -vs- Kenya Bus Service Limited (1982 -1988) 1 KAR 278 and Kiruga -vs- Kiruga (1988) KLR Page 716 where it was stated;

> " On a first appeal it is now well settled that, the role of the Court is to revisit the evidence on record, evaluate it and reach its own conclusion, however the Court will not interfere with findings of facts by the trial Court unless they were based on no evidence at all or on a misapprehension of it, or the Court is shown demonstrably to have acted on wrong principles in reaching its findings."

21. The central issue which arises for determination relates to the ownership for motor-vehicle and the attendant liability.

22. The Appellant did not produce a certificate issued by the Registrar of motor-vehicles to prove that the Respondent was the registered owner of motor-vehicle. Section 8 of The *Traffic Act* provides that a person who is registered shall be deemed to be the owner of the motor-vehicle unless the contrary is proved. This means that the registration of a person as a registered owner of the motor-vehicle is a prima facie evidence of ownership. However, this evidence can be controverted as the Act provides, 'unless the Contrary is proved.'

23. The Appellant chose to rely on a Police abstract which he produced in Court as P. Exhibit. 3. The Appellant had the burden to prove that the Respondent was the registered owner of the motor-vehicle. A party is said to bear the burden of proof, if he would lose if he failed to discharge that burden. In the case of; Miller-vs- Minister of Pensions (1947) 2ALL. ER 372 as quoted in the Court of Appeal in the case of; Ignatius Makau Mutisya -vs- Reuben Musyoki Muli (2015) eKLR where the Court stated;

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a Criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not.' Thus, proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot

decide one way or the other which evidence to accept, where both parties explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

24. He who alleges must proof. Section 107, 108 and 109 of the *Evidence Act* provides for the instance of burden of proof. Section 107, 108 and 109 of the *Evidence Act* Cap 80 Provide as follows;

Evidence Act provides;

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 provided by any law that the proof of that fact shall lie on any particular person.

25. A party is bound by his pleadings, and what the Appellant pleaded is that the Respondent is the registered owner of the motor-vehicle registration number KAC 0847J Toyota Saloon.

26. The Appellant was therefore supposed to adduce evidence in support of that allegation to prove that indeed the Respondent is the registered owner of the motor-vehicle.

27. The Court of Appeal in the case of; Ignatius Makau Mutisya -vs- Reuben Musyoki Muia (2015) eKLR stated that; Section 8 of the *Traffic Act* has been interpreted to mean that the registration of the motor-vehicle is not conclusive proof of ownership and cited the case of: Osapil -vs- Kaddy (2000)1 EALA 187 where the Court of Appeal of Uganda held that;

" Registration card or logbook was only prima facie evidence of title to a motor-vehicle. The person to whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise." And that the Court of Appeal adopted this interpretation in the case of; Securicor Kenya limited -vs-Kyumba holdings Civil Appeal No. 73 of 2002. The Appellant in this case sought to prove ownership of the motor-vehicle by the Defendant by the production of the police abstract.

28. The question is whether the police abstract is sufficient to prove ownership. The Court of Appeal in the case of; Joel Muga Opija -vs- East African Sea food limited (2013) eKLR quoted in the case of; Ignatius Makau Mutisya -vs- Reuben Musyoki Muli (2015) eKLR stated that "we agree that the best way to proof ownership would be to produce to the Court a document from the Registrar of Motor-vehicle to show who the registered owner is, but when the abstract is not challenged and is produced in Court without any objection the contents cannot later be denied."

29. However, the trial court in its judgement relied on the decision of: Thuranira Karauri -vs- Agnes Mocheche (1997) eKLR where the Court stated that; "where ownership is denied it was incumbent

on the Plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor-vehicle showing the registered owner of the lorry."

30. The Court of Appeal in these binding decisions is clearly stating:

    (i) That the presumption that the person registered as owner of the motor vehicle in the logbook is the actual owner is rebuttable.

    (ii) Where there exists other compelling evidence to proof otherwise then the Court can make a finding of ownership that is different from that contained in the logbook.

    (iii) Each case must however be considered on its own peculiar facts.

31. In this case, the Appellant did not produce a search from the Registrar of Motor-vehicles as proof of ownership. He relied on a Police abstract which was not challenged by the Respondent and that the Respondent cannot deny the contents in the police abstract. See the case of; Joel Muga Opija -vs- East Africa Sea food Limited (2013) eKLR.

32. The Respondent did not challenge the Police abstract. The police abstract indicated that the Respondent was the owner of the motor-vehicle and had insured the motor-vehicle, and that the particulars of the insurance cover were stated. This police abstract contained all the relevant information including the name and address of the owner, and the insurance company.

33. This is information that must have been gathered by the police from the motor-vehicle. This information is proof on a balance of probabilities that the vehicle was owned by the Respondent. It has been stated that 'a copy of the log book is only prima facie evidence of ownership and it can be rebutted.' I find the information in the police abstract is compelling evidence of proof that the Respondent was the owner of the motor-vehicle either registered or having possessory and or beneficial ownership of the same.

34. In this case, the evidence tendered by the Appellant proved on a balance of probabilities that the Respondent was the owner of the motor-vehicle at the time of the accident. Indeed, the Respondent failed to rebut and or offer evidence disputing the contents of the police abstract that pointed him as the owner of the vehicle that caused the accident. The Appellant has discharged the burden of proof that the Respondent was the owner of the said motor-vehicle at the time of the accident.

35. The trial Magistrate thus erred when he held that the lack of presentation of a certificate of search signed by the Registrar of Motor Vehicle showing the registered owner of the suit motor vehicle and that reliance on the content of a police abstract is not sufficient proof of ownership. I find that the Appellant had proved his case on a balance of probabilities before the trial court and hence the finding by the trial magistrate must be interfered with.

36. As the Respondent has been found to have been the owner of the vehicle at the time of the accident, his driver, servant or agent was negligent in the manner he controlled the vehicle as the same lost control thereby hitting the appellant and occasioning him injuries. The appellant was off the road and thus did not contribute to the accident in any way. The fact that the respondent's driver left the road is clear proof that he was reckless and did not adhere to the Highway Code of traffic. I find the Respondent was solely liable for the accident which I hereby put liability against the respondent at 100%.

37. On the issue of quantum of damages, it is noted that the trial court had proposed an award of Kshs 250, 000/ as general damages had the suit succeeded. The appellant sustained soft tissue injuries on the forehead, left forearm as well as a double fracture of the left ulna. Dr Aluda who examined him opined that the left elbow joint was stiff and could not bend and would continue to be a permanent feature and a disability. Learned counsel for the appellant had relied on the case of Margaret Ochieng Vs David

Njihia & Another NBI HCC No. 57 of 1993 where a plaintiff who sustained a fracture of radius and ulna was awarded Ksh 250, 000/ as general damages. It was submitted before the trial court that the sum of Kshs 400,000/ be awarded. In this appeal, learned counsel for the appellant proposed the said sum. Looking at the injuries sustained by the appellant and the period the matter has taken, iam of the view that a sum of Kshs 400, 000/ would be adequate as general damages for pain and suffering. On special damages, the sum of Kshs 1700/ was pleaded but only Kshs 1500/ was specifically proved. I will award the sum of Kshs 1500/ as proved specials.

38. In the result, it is my finding that the appellant's appeal has merit. The same is allowed. The trial court's judgement is hereby set aside and substituted with an order that judgement be and is hereby entered for the appellant against the respondent in the following terms:

    a. Liability against the Respondent at 100%.

    b. General damages; Kshs. 400, 000/=.

    c. Special damages; Kshs 1, 500/=.

    d. Costs of the suit and interest from the date of judgement in the lower court.

    e. Cost of the appeal awarded to the appellant.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF MAY 2023

D. KEMEI

JUDGE

In the presence of:

No appearance Ndinya Omolo for Appellant

No appearance Owinyi for Respondent

Kizito Court Assistant