**Owino v Kiarie & another (Civil Appeal 1 of 2019)**
**[2023] KEHC 25374 (KLR) (15 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 25374 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIVASHA**

**CIVIL APPEAL 1 OF 2019**

**GL NZIOKA, J**

**MAY 15, 2023**

**BETWEEN**

**MICHAEL AMOLO OWINO ..... APPELLANT**

**AND**

**STEPHEN NJOROGE KIARIE ..... 1ST RESPONDENT**

**PETER NGANGA KURIA ..... 2ND RESPONDENT**

***(Being an appeal against the judgment of Hon. M. Mutua Resident Magistrate (RM) dated 14th December 2018, delivered in the Chief Magistrate's Court at Naivasha vide Chief Magistrate Civil Case No. 5 of 2008)***

## JUDGMENT

1. By a plaint dated 17th October, 2007, amended on 7th March, 2008, 15th April, 2009 and further amended on 8th July 2011, the plaintiff (herein 'the appellant") prayed for judgment against the 1st and 2nd defendants (herein "the 1st and 2nd respondent") for; general damages, special damages, costs of the suit, and interest

2. The appellant averred that on 16th July 2005, he was walking along Koinange Street, in Naivasha Town, when he was knocked down by a motor vehicle registration number KXR 881 driven by the 2nd respondent and owned by the 1st respondent. That he sustained soft tissue injuries on the chest, both elbow joint and hips and a deep cut wound on his back.

3. As a result, he instituted the Chief Magistrate Civil Suit No 5 of 2008, on the ground that, the 2nd respondent was liable for causing the accident by driving the motor vehicle at excessive speed, failing to slow down, swerve and/or control the vehicle to avoid the accident and driving a defective vehicle while the 1st defendant is vicariously liable for the acts of the 1st respondent.

4. However, the respondents denied liability and all particulars of negligence attributed to them vide a statement of defence dated 12th February, 2008 and amended on 7th May 2009. In particular, the 1st respondent denied being the owner of the subject motor vehicle registration KXR 881 and that the 2nd respondent was his driver.

5. The respondents further, denied that the accident took place and averred that on a without prejudice basis if the accident occurred it was caused solely and/or substantially contributed to by the appellant, who recklessly got onto the road, failing to heed warning signs and hooting by the driver, deliberately courting disaster and failing to take any action to stop the accident.

6. However, the appellant filed a reply to the amended defence reiterating the averments in the re-amended plaint and denied particulars of negligence attributed to him.

7. On the 2nd May, 2016, the appellant sought for judgment against the 3rd defendant; Chandaria Industries Limited for failure to enter appearance and file a defence.

8. Be that as it may, the matter proceeded to full hearing where the appellant testified that the motor vehicle registration number KXR 881 hit him from the rear and that the driver did not hoot before hitting him. Further after the accident, the driver sped off but the registration number of the vehicle had already been noted.

9. That he reported the matter at Naivasha Police Station and was issued with a P3 form that was filled at Naivasha District Hospital. Further, that the driver of the said motor vehicle was charged vide Traffic Case No 1 of 2015 at the Chief Magistrate's Court at Naivasha with the offence of careless driving and failing to stop after the accident.

10. The appellant supported his case by calling PW2 No 80090 PC Paul Muthengi who testified that the accident was reported by the appellant's friend who was at the scene. That, the driver of the said motor vehicle was arrested and charged as aforesaid. However, he absconded and the case has not been concluded.

11. The 1st respondent in evidence led by one, Stephen Njoroge denied owning motor vehicle KRX 881 and that the 2nd respondent was his driver. He stated that the motor vehicle belongs to Chandaria Industries Limited and that the 2nd respondent was their driver.

12. At the conclusion of the case, parties filed their submissions and on 14th December 2018, the learned trial magistrate delivered a judgment and held that the appellant had failed to prove the case on the balance of probabilities against the respondents and dismissed the suit in its entirety.

13. However, the appellant is aggrieved by the decision of the trial court, and has lodged the appeal herein through his memorandum of appeal, dated 8th April 2021, on the grounds that:

    a. That the learned Magistrate erred in fact and in law in finding that the appellant had not proved his case on a balance of probabilities despite there being overwhelming evidence.

    b. That the learned Magistrate erred in fact and in law in disregarding the appellant's testimony and in disregarding the evidence tendered by the appellant during the hearing of the above suit.

    c. That the learned Magistrate erred in fact and in law disregarding the appellant's submissions on record.

    d. That the learned Magistrate erred in fact and in law in in dismissing the appellant's suit despite there being overwhelming evidence to hold the respondents 100% liable.

e. That the learned Magistrate erred in fact and in law in failing to deliver judgment on quantum despite the appellant having tendered in evidence.

14. The appeal was disposed of by filing of submission. The appellant in his submissions dated; 6th August 2021 submitted that evidence of the appellant on the manner in which the accident occurred was corroborated by PW2 No 80090, PC Paul Muthengi who despite not being the investigating officer, relied on what the investigating officer recorded in the police file and therefore his evidence was cogent that the court could rely on.

15. That, the occurrence of the accident was not in dispute as the 1st respondent was only disputing ownership of the motor vehicle and still failed to clarify the issue of ownership despite the police abstract indicating that he was the owner or insured of the motor vehicle.

16. Further, the 1st respondent did not object to the production of the police abstract and was therefore in agreement with the contents thereof. Reliance was placed on the case of; *Samuel Mukunys Kamunge v John Mwangi Kamuru* [2005] eKLR where the court held that, the respondent had failed to contradict the evidence of the police abstract and therefore the ownership of the motor vehicle had been established on the balance of probability.

17. The appellant further submitted that the learned trial magistrate erred in failing to assess damages awardable to the appellant and cited the cases of; *Joseph Wabukho Mbayi v Frida Lwile Onyango* [2019] eKLR and *Elijah Kinyua Mwangi v Haggai Ikelo Wanangasa & another* [2020] eKLR where it was held that, the trial court should assess damages it would have awarded an appellant even when dismissing a case for the purposes of considering damages on appeal.

18. He urged the court to award general damages of; Kshs. 400,00 based on the injuries he suffered and taking into account inflation. He relied on the case of; *Devki Steel Mills Limited v James Makau Kisuli* (2012) eKLR where the court awarded Kshs 250,000 for two soft tissue injuries and the case of *Francis Ochieng & Another v Alice Kajimba* [2015] eKLR where the plaintiff was award general damages of Kshs 350,000 for multiple soft tissue injuries.

19. On special damages, the appellant submitted that he had proved to the required standard through production of receipts a sum of; Kshs 4,600 but the trial magistrate did not make an award on the same.

20. However, the respondents vide submissions dated; 3rd October 2022, argued that the appellant failed to prove his case as he never called the good samaritans who rushed him to hospital and reported the matter to the police station to explain how the accident happened.

21. Further, the police officer who testified was not at the scene nor was he the investigating officer to guide the court on how the accident occurred and how the police determined that the subject motor vehicle was involved. Reliance was placed on the case of; *Sally Kibii & Anotherr v Francis Ogaro* [2012] eKLR where the court held the burden of proof was on the plaintiff to prove negligence and that failing to call witnesses undermines the case drastically.

22. The respondents further submitted that, the appellant had failed to link the respondents to the motor vehicle that purportedly knocked him down as, copy of records indicate the motor vehicle is owned by Chandaria Industries Limited and cited the case of; *Statpack Industries v James Mbithi Munyao* Nairobi HCCA 152 of 2013 where it was held the plaintiff must prove the casual link between someone's alleged negligence and his injuries.

23. On damages, the respondents submitted that there was no good reason for the trial magistrate to award damages in both general and special damages where there was no proof of liability.

24. That further in the cases of; *Peters v Sunday post limited* (1958) EA 424 as quoted in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR the court stated that it was a strong thing for an appellate court to differ with finding of the trial court that saw and heard the witnesses.

25. Lastly, the respondents submitted that the receipts used to prove the special damages totalled to Kshs 3550 but urged the court to dismiss the appeal with costs.

26. Having considered the appeal in the light of the material placed before the court and the arguments advanced vide submissions, I find that, the main issue is to determine whether the learned trial magistrate properly dismissed the appellant's case.

27. In that regard, the law is settled that the role of the 1st appellate court is to re-evaluate the evidence adduced in the trial court afresh and draw its own inference giving regard to the fact that it did not witness the demeanour of the witnesses (see *Selle & Another v Associated Motor Boat Co Ltd & others* (1968) EA 123)

28. Similarly, the appellate will not interfere with the trial court's discretion in assessing damages unless in exercising that discretion the court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into misjustice (see *Mbogo & another v Shah* (1968) EA and *Mkube v Nyamuro* [1983] KLR 403).

29. Pursuant to the aforesaid I shall first deal with the issue of liability of the 1st respondent. The amended plaint dated 8th July 2011, states that at all times the 1st defendant was the registered owner of motor vehicle registration number, KXR 881.

30. The 1st respondent denied being the owner of the subject vehicle vide paragraph 2 of the amended defence and put the appellant to strict proof therefore as such the appellant had to prove the same.

31. It suffices to note that, vide amended plaint dated, 8th July, 2011, the appellant brought in another 3rd defendant, Chandaria Industries Limited. The body of the plaint at paragraph 4A describes the 3rd defendant but does not state why they were sued.

32. The introduction of the 3rd defendant clearly supports the averments by the 1st respondent that the 3rd defendant was the registered owner of the subject motor vehicle; otherwise why would it be sued.

33. In proving the registered owner of the vehicle, the appellant produced a police abstract which shows the owner of the motor vehicle herein as Stephen Njoroge Kiarie, the 1st respondent. He also produced copy of records dated 11th May, 2010 showing the owners of the subject motor vehicle as Chandaria Industries Ltd.

34. It is noteworthy that the only proof of ownership of a motor vehicle beyond reasonable doubt is the copy of records, not a police abstract as such there is no record showing the 1st respondent owned or owns the motor vehicle in question. It therefore follows that the pleading at paragraph 4 of the amended plaint that, the 1st respondent is the owner of the said vehicle is not substantiated.

35. If the appellant cannot and did not prove that the 1st respondent is the registered owner of the motor vehicle or was at the material time, then he cannot be vicariously liable for the negligent (if proved) acts of the 2nd respondent.

36. For the liability to arise under vicarious liability, the appellant had to establish inter alia that; the 1st and 2nd respondent had a master-servant relationship, that the 2nd respondent was acting in the ordinary

scope or course of his authorised duty and not on a frolic of his own and he was negligent in the given circumstances.

37. No evidence was adduced to prove the 2nd respondent was an employee of the 1st respondent. Indeed the police abstract does not prove the 2nd respondent was an employee of the 1st respondent.

38. In my considered opinion, the case of the appellant fell on the rock when he chose to bite too much by suing both the 1st and 3rd defendants as owners of one and the same motor vehicle, yet they are separate and distinct persons. You cannot sue a person as the owner of the motor vehicle based on records from Registrar of Motor Vehicles and a different party based on a Police Abstract and the mere fact that the latter is the insured of the subject vehicle.

39. Pursuant to the aforesaid it is the finding of the court that liability against the 1st respondent was not proved. The appellant should have should have sued the 3rd defendant who then would have brought in the 1st respondent as a third party so that the nexus between the 1st and 3rd defendants as it relates to the subject motor vehicle would have been established, as to how one is the registered owner and the other insured and/or both.

40. To advance the afore argument, I shall move to liability of the 3rd defendant. It is noteworthy that paragraph 4A of the subject amended plaint, the appellant merely describes the 3rd defendant and its registered office address. As already stated there no further averments relating to the 3rd defendant save for that paragraph yet evidence was led that it was the registered owner of the motor vehicle at the material time or vicariously liable. At the expense of repeating what is already stated, there is no reason advanced as to why the 3rd defendant was sued.

41. It is trite law that parties are bound by the pleadings. The appellant had an interlocutory judgment against the 3rd defendant. But the case against the 3rd defendant was subject to formal proof and the appellant was duty bound to formally prove the allegations (if any) against the 3rd defendant. The learned trial magistrate did not address this issue and indeed the 3rd defendant has not appealed against the interlocutory judgement.

42. However, this court is called upon to determine the issue of the 3rd defendant in that all defendants were set free from liability. It is the finding of the court that liability was not established against the 3rd defendant during formal proof.

43. As regards the liability of the 2nd respondent, the pleadings at paragraph 5, states that he negligently drove the motor vehicle. The particulars of negligence are outlined at paragraph 5 of the amended plaint. PW1 testified on 23rd March 2018 that he was knocked down by the motor vehicle KRX 881 on 16th July 2005. That the driver did not hoot before knocking him.

44. The Police abstract admitted in evidence and contents thereof indicates that the driver of the motor vehicle was Peter Ng'ang'a Kuri, the 2nd respondent, the date of accident as 16th July 2005. That the plaintiff was a pedestrian involved in the accident.

45. It is notable that the 2nd respondent was charged with the offence of careless driving and failure to stop after the accident. That corroborates appellant's evidence as the charges were preferred after investigations. PW2 in re-examination indicates the traffic case is not concluded as the accused absconded.

46. Therefore, the conduct of the 2nd respondent of allegedly not stopping after the accident and absconding the traffic case proceedings leads to an inference of guilt or liability. Indeed, the evidence of

PW1 and PW2, as to the role of the 2nd respondent played in the accident is not rebutted. The liability in civil case is on the balance of probability.

47. I note from the judgment of the trial court that, the court held as follows: -

> " The plaintiff herein has stated that he was hit from behind and was only informed of what hit him by good Samaritans who also made a report to the police. The plaintiff did not call any of the good Samaritans to shed light as to how the accident occurred. The plaintiff and his witnesses also did not shed light how the accident occurred. The plaintiff on his part merely states that he was hit from behind. He does not indicate as to whether he was walking off the road or at the middle of the road.
>
> In my humble view, the plaintiff has thus failed to prove negligence on the part of the driver of the vehicle that hit him. PW2 testified that upon investigations, it was ascertained that the plaintiff was hit by motor vehicle KXR 881. If I were to believe the police officer who was not at the scene of the accident when the accident occurred, then the plaintiff has failed to prove negligence on the driver of motor vehicle KXR 881, then the owner(s) cannot be said to be vicariously liable for the accident."

48. With utmost respect, the court cannot have dismissed the appellant's case, when it had no evidence to rebut the evidence adduced by him. The appellant was not duty bound to prove the case beyond reasonable doubt. I therefore find that, the trial court erred in its finding that, the 2nd respondent was not liable for the accident. I set aside that finding and substitute it with a finding of liability against 2nd defendant.

49. As regards quantum, the learned trial magistrate having found no liability against the defendants did not assess the same. I hold the view, he should have. Be that as it were, the injuries the appellant sustained as per the Naivasha District Hospital in-patient/out-patient continuation sheet dated 16th October, 2005, are:

a. Multiple cuts on the back

b. Tenderness on the right thigh

c. Three cut marks on the back bleeding

And as per the P3 form dated 28th July 2005, the injuries are stated as: -

a. Cuts on the back deep and bleeding

b. Tenderness of the right thigh and leg

Finally, the report by Dr. Obed Omuyoma dated 17th August 2007 are: -

a. Soft tissue injuries on the chest

b. Deep cut wound on the back

c. Soft tissue injuries on both elbow joints

d. Soft tissue injuries on both hips.

50. It is the finding of the court that the injuries are pure soft tissue injuries, for which the appellant was treated and discharged to go home. It's also notable there is no claim of any medical expenses. Therefore, the injuries were not serious.

51. The appellant sought for a sum of Kshs 400,000 as general damages whereas the 1st respondent submitted that a sum of Kshs 50,000 was adequate. Taking into account comparative awards, in *David Okoka Odero v Kilindini Tea Warehouses Ltd* [2008] eKLR the court award Kshs 40,000 where the plaintiff sustained soft tissues injuries on the lumbar spine and attended hospital once.

52. In addition in the case of; *Sasini Tea & Coffee Limited v Chris Wafula Kibet* [2009] eKLR the court awarded Kshs 50,000 where the respondent suffered soft tissue injuries with no permanent incapacity or residual effect. In *Kengeta Beer Distributors Limited v Kubai Kiringo & 2 others* [2018] eKLR the court upheld the award of Kshs 60,000 awarded in the year 2005 where the plaintiff sustained soft tissue injuries on the chest and left arm. In *Sofia Yusuf Kanyare v Ali Abdi Sabre & another* [2008] eKLR the court awarded Kshs 70,000 for serious soft tissue injuries that had healed.

53. In *Njau Nyanjui Thitu & Another v Lawrence Kimani Nyanjui & 7 Others* [2007] eKLR the court awarded Kshs 40,000 for soft tissues injuries. In *Abdalla Shikuku Okello v Mumias Sugar Co Ltd* [2014] eKLR the court awarded Kshs 40,000 for soft tissue injuries that would heal in a year.

54. I hold the view that a sum of Kshs 50,000 adequate and/or sufficient as general damages. I further award special damages of Kshs 4,600 together with costs and interest. The interest accrues from date of judgment in the trial court to date of filing the appeal and, from the date hereof until payment in full.

55. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 15TH DAY OF MAY 2023.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Ms. Kiberenge for the appellant

PK Njuguna for the respondent

Ms Ogutu court assistant