Paperlast Limited v Mugame (Civil Appeal E506 of 2021)
[2023] KEHC 19368 (KLR) (Civ) (23 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19368 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E506 OF 2021

AA VISRAM, J

JUNE 23, 2023

BETWEEN

PAPERLAST LIMITED ..... APPELLANT

AND

PATRICK ROBERT MUGAME ..... RESPONDENT

(Being an appeal from the entire judgment/decree of the Chief Magistrate Court at Nairobi, Milimani Commercial Courts (Hon.D.O Mbeja (Mr) (PM) dated 23rd July, 2021 Civil Suit No. 331 of 2020)

JUDGMENT

Introduction

1. This judgment determines the Appellant's appeal vide its Memorandum of Appeal dated 16th August, 2021. The appeal relates to the issues of quantum and liability.

2. The background to the appeal is based on allegations by the Respondent (Plaintiff in the lower court) who pleaded that he was injured following a road accident which occurred on 7th September, 2019. According to the Respondent, the accident was caused by the Appellant's motor vehicle, registered as, KHMA 924L ("the Motor Vehicle"), which was being driven in a negligent manner by the Appellant, thus knocking down the Respondent.

3. The Respondent claimed that he sustained injuries and suffered loss and damages as a result of the accident.

4. After conducting a hearing, the lower court entered judgment in favour of the Respondent. The court awarded liability at 100% in the following terms together with costs of the suit:-

a. General damages on pain and suffering - Kshs. 800,000/-

b. Special damages - Kshs. 5,550/-

Total - Kshs. 805,550/-

5. Aggrieved by the said judgment, the Appellant filed this appeal dated 16th August, 2021 based on the following grounds:-

a. The Learned Magistrate erred in law and in fact in allowing the Respondent's claim, in finding that the Respondent had on a balance of probabilities proved his case.

b. The Learned Magistrate erred in law and in fact in failing to consider the Appellant's defence and evidence.

c. The Learned Magistrate erred in law and in fact in failing to consider the Appellant's submissions.

d. The Learned Magistrate erred in law and in fact in failing to determine the issues that were raised by the Appellant in its pleadings and submissions.

e. The Learned Magistrate erred in law and in fact in failing to correctly interpret and apply principles governing the doctrine of vicarious liability.

f. The Learned Magistrate erred in law and in fact by disregarding the police officer's testimony, that the driver of the vehicle that allegedly caused the accident is not an employee of the Appellant and is not known to the Appellant.

g. The Learned Magistrate erred in law and in fact in failing to find that the Respondent's entire suit as drawn and filed raises no reasonable cause of action against the Appellant, or at all.

h. The Learned Magistrate erred in law and in fact in taking into consideration irrelevant issues, misguiding himself and misinterpreting facts and the law; and in granting too much weight to the submissions by the Respondent while taking no consideration of the evidence placed before court by the Appellant to prove that its motor vehicle and the designated driver was never involved in the accident.

i. The Learned Magistrate erred in law and in fact by disregarding the glaring inconsistences in the Respondent's pleadings, evidence and testimonies.

j. The Learned Magistrate erred in law and in fact in finding that the Appellant was 100% liable for the accident which neither involved the Appellant's motor vehicle nor the Appellant's designated driver.

k. The Learned Magistrate erred in law and in fact in awarding the Respondent general damages, special damages, interest thereon and costs of the suit without due regards to the Appellant's defence, adduced evidence and submissions.

l. The Learned Magistrate erred in law and in fact in finding that the Appellant's designated driver was the driver that caused the alleged accident in total disregard to the evidence of the Appellant that the driver and the Appellant's motor vehicle was never involved in any accident.

m. The Learned Magistrate erred in law and in fact in finding that the accident was not disputed by the Appellant.

n. The Learned Magistrate erred in law and in fact in finding that the injuries sustained by the Respondent were attributable to the Appellant's negligence.

o. The Learned Magistrate erred in law and in fact in finding that the Respondent had proved his case against the Appellant on the required threshold.

p. The Learned Magistrate erred in law and in fact by only taking into account the Respondent's evidence and submissions whilst disregarding the Appellant's evidence and submissions.

q. On the whole, the Learned Magistrate misguided himself, and the judgment/decree appealed from is inexplicable on the facts, pleadings, evidence and the law; and the Subordinate Court (Hon.D.O Mbeja (Mr) PM) erroneously relied solely on the pleadings/averments of the Respondent, and took into consideration inconsistent and unfounded allegations by the Respondent.

6. The parties agreed to dispose this appeal by way of written submissions and accordingly filed and served their respective submissions dated 29th December, 2022 and 13th January, 2023.

Appellant's submissions

7. The Appellant submitted that its Motor Vehicle had had never been involved in the accident complained of. In support of the above submission, the Appellant relied on the decision of the High Court in Rentco East Africa Limited v Dominic Mutua Ngonzi 2021 eKLR, where the court stated as follows:-

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:-
>
> > "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally..."

8. The Appellant submitted that the lower court was mistaken when it found that DW1, John Nderitu Gathua, was the driver of the Motor Vehicle. This finding was contrary to the testimony of PW2, who stated that the driver was named Victor Bosire, and not DW1.

9. The Appellant ought not to have been found vicariously liable because even though the Motor Vehicle is registered in the Appellant's name, it had never been involved in the accident, or ever left the Appellant's company premises.

10. Numerous inconsistencies were not taken into account by the lower court, including the following:- in its letter to the insurance company, the Respondent described the Motor Vehicle as a motor cycle; the

medical report indicates that the Respondent was hit by a truck; the police abstract describes the make of the vehicle as a luoco onywoku, and further, names the Respondent as the owner of the vehicle. It is not clear which vehicle was involved in the accident complained of. Moreover, the Respondent's pleadings in the lower court had never mentioned a fork lift as the vehicle involved in the accident.

11. The Appellant submitted that it had produced attendance sheets to show the time, in and out, of employees, which shows that DW1 could not have been involved in the accident because he was within the premises (industrial area) at the time of the accident along Ngong road.

12. Further, that the said fork lift was insured by APA Insurance Limited and not Xplico Insurance Company, as demonstrated by the risk notes produced as evidence in the lower court.

13. Finally, and in summary, the Appellants submitted that based on the evidence tendered in court, the Respondent had not satisfied the applicable burden and standard of proof.

The Respondent's submissions

14. The Respondent submitted that an accident had indeed taken place on 7th September, 2019. The police abstract and occurrence book proved the same and they provided further details relating to the same.

15. The Respondent relied on Sections 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya, which provides as follows:-

> 109. 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.
>
> 112. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

16. The Respondent further relied on the decision of the Court of Appeal in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (2005) 1EA 334, where the court stated as follows:-

> " 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."

17. The Respondent submitted that the Appellant is the registered owner of the Motor Vehicle and this information is undisputed.

18. Further, that documents relied on by the Appellant to prove that DW1 could not have been involved in the accident were unverified, and photocopied attendance sheets and duty rosters. The authors of the same had not ever made available and the same were accordingly inadmissible pursuant to Section 35 of the *Evidence Act*, which provides as follows:-

> In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—
>
> a. .....

b. if the maker of the statement is called as a witness in the proceedings

Analysis and Determination

19. I have read the record in its entirety and considered the grounds of appeal raised by the Appellant. The issues that arise for determination are essentially two:-

    a. Was the lower court correct in its finding on liability?

    b. Was the lower court correct in its award of damages?

    Was the lower court correct in its finding of liability?

20. As this is a first appeal, I have a further duty to re-evaluate the evidence before me. This principle as set out in the Court of Appeal decision of Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] EA 123, where the court stated that:-

> " An appeal to this Court from a trial by the High 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 conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally."

21. Looking at the record before me, there are two different versions of the events that led to the accident.

22. The Respondent's version is that he was injured on 7th September, 2019 by a vehicle he described as a "tractor", while he was standing along the road side. His testimony was that after being hit by the tractor, he was thereafter taken to Melchezedek hospital, where he was treated for his injuries.

23. The Respondent produced several documents to prove his version of events, including:- a police abstract relating to the accident; several medical reports; and he produced a motor vehicle search to show that the registration number of the vehicle that hit him belongs to the Appellant.

24. The Appellant's version of events on the other hand is that no accident had ever occurred; or if it had, the Appellant was not a party to the same. The Appellant testified that its vehicle bore the same registration number, but that it was a commercial fork lift, not a "tractor", "motorcycle", or any of the other type of vehicle that the Respondent had reported as the cause of the accident.

25. The Appellant testified that its forklift had never left its company premises; its log book show that the driver of the fork lift had been at its premises at the time of the accident; and in short, based on those facts, it could not have been involved in the accident.

26. Looking at the evidence, it is clear to me that the Respondent was in fact involved in an accident, on the day he complained that he was injured. The medical reports corroborate his testimony relating to the same. The question is whether he was injured by the Appellant? On a balance of probability, I am not persuaded.

27. The evidence does not add up. For instance, in his demand letter dated 11th November, 2019, the Respondent initially stated that he was hit by a "motor cycle". Later on, at the hearing of the matter, he testified that he was hit by a tractor. Further, the Occurrence Book describes the same vehicle that

allegedly hit him as a vehicle by the name of "Luoco Onywoku", which this court is unable to identify. In the circumstances, it is not clear what the Respondent was hit by, and the difference between a motor cycle and commercial fork lift is too vast for this court to ignore, or for the Respondent to be so casual about.

28. Looking at the log book, I see that the vehicle registered as KHMA 942L, which allegedly hit the Respondent is indeed a fork lift, and not a motor cycle, or a tractor. The Appellant's version, that the forklift was based at its premises in industrial area makes more sense because commercial forklifts are not ordinarily driven along the main roads with other vehicles. The Magistrate does not appear to have considered the above inconsistencies in arriving at his conclusions. I do not think he could so casually ignore the same.

29. Reading the judgment of the lower court, I see that the Magistrate reached his conclusions in relation to the issue of liability based on speculation. Further, I am persuaded that he took factors into account that were irrelevant and were not before him in arriving at this decision. For instance, the court stated as follows:-

> " drivers take the biggest blame... for the accident ... They are credited for causing accidents; through speeding, ... driving under the influence of alcohol and drugs, fatigue, bad health and lack of driving skills. All these are within the parameters of human behaviour. The occurrence of the accident herein is not disputed. Evidence so far on record suggest that DW1 is to blame for causing the accident"

30. I have read the proceedings in entirety, none of the parties has testified that the driver, DW1, was under the influence of "alcohol", "drugs", or any inducement of that nature. Nor did the Respondent testify that the accident had been occasioned by 'fatigue' or ill health. This was pure speculation on the part of the Magistrate and he ought not to have based his decision on the same. That he did indeed take the said factors into account is evident because he went on to state that immediately after the paragraph above, the following words: "evidence so far on the record suggest DW1 is to blame".

31. Further, I am persuaded that the Magistrate misapprehended the Appellant's defence in the lower court. He stated that the Appellant was not disputing the occurrence of the accident, and went on to arrive at his various conclusions based on this misapprehension. Looking at the Statement of Defence, it is clear from paragraphs 3 and 4, that the Appellant was disputing the occurrence of the accident. Further, DW 1 testified in the following terms: "there was no accident along Ngong road. It did not cause the accident". Accordingly, I am persuaded that the Magistrate proceeded to determine the case based on the wrong assumptions as stated above, and accordingly reached the wrong conclusions.

32. Finally, looking at the totality of the evidence, generally, I am persuaded that the Respondent failed to prove his case on a balance of probability (in the lower court). Beyond the question of what type of vehicle hit the Respondent, which remains unanswered, the Respondent's own witness, PW2, the police officer, testified that the driver was not DW1, but rather, some other person named Victor Bosire, who was not an employee of the Appellant.

33. In short, the Respondent's entire case hinged on the Occurrence Book, which recorded the Appellant's vehicle, registration number KHMA 942 L, as the vehicle involved in the accident. This evidence was never tested by way of cross examination because PW2 was not the investigating officer, and he testified that he was relying solely on the report which was not written by him.

34. It was held in Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR, that:-

> " A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station."

35. To my mind, the Respondent ought to have called the maker of the statement to explain the various contradictions in the Occurrence Book report. Without such explanation, I am not inclined to afford the much weight to the OB given the glaring inconsistencies on the face of the record.

36. Further, I have considered the Respondent's submission that it asked the court to expunge the Appellant's daily attendance sheets from the record. I have searched in vain for orders acceding to the above request and have found none. I have therefore examined the attendance sheets produced by the Appellant and I find that the same corroborate the Appellant's testimony relating to the whereabouts of its vehicle and driver at the time of the accident. I do however, caution myself against placing too much weight on the same, given that the maker was not called to testify. Further, in the event such an order (expunging the said documents) was made (and I have erroneously considered the same), I do not think my decision would be any different based on the totality of evidence before me.

37. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR while citing Miller –vs- Minister of Pensions [1947] 2 All ER 372, the court discussed the applicable burden and standard of proof in cases such as the present one and held that:-

> " 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden 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…are equally (un)convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."

38. Based on above, I find that the Respondent failed to meet the burden of proof on a balance of probability in the lower court.

39. The upshot is that the appeal is with merit and is accordingly allowed. The judgment/ decree of the subordinate court (Hon D.O. Mbeja (Mr) (PM)) is accordingly set aside with costs incurred in this appeal and costs arising from the subordinate court.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 23RD DAY OF JUNE 2023

ALEEM VISRAM

JUDGE

In the presence of;

..... For the Appellant

..... For the Respondent