Muthama v Meyo (Civil Appeal E098 of 2022)
[2023] KEHC 20445 (KLR) (19 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20445 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E098 OF 2022

FR OLEL, J

JULY 19, 2023

BETWEEN

ELIZABETH MUKONYO MUTHAMA ..... APPELLANT

AND

SARAH DEYO MEYO ..... RESPONDENT

(Being an appeal from the Judgment of Hon.B Kasavuli Principal Magistrate in Mavoko CMCC No.E 176 of 2021 delivered on 4/7/2022)

JUDGMENT

1. This appeal arising from the judgement and decree of Hon. B. Kasavuli (P.M) issued on July 4, 2021 in Mavoko CMCC No. E176 OF 2021, where he dismissed the appellant's suit for the reason that, she had failed to prove her case on a balance of probability as against the Respondent.

2. The appellant in her plaint had averred that on 03.12.2020 she was travelling as a passenger in motor vehicle KCE 271W Toyota matatu (hereinafter referred to as the 1st suit motor vehicle) along Nairobi-Mombasa road at Mlolongo foot bridge when motor vehicle KCY 896A Station Wagon (hereinafter referred as the 2nd suit motor vehicle) was negligently, recklessly and/or carelessly driven by the Respondent herself , her driver, employee and/or agent that he/she recklessly overtook other motor vehicles at high speed forcing the driver of the 1st suit motor vehicle to swerve off its lane and hit an electricity pole thereby causing the Appellant to sustain injuries and consequently suffered pain and damage.

3. The Respondent filed her statement of defence on 22.04.2021 where she denied all the averments made against her. In the alternative she blamed both the Appellant and the driver of the 1st suit motor vehicle for being negligent thereby substantially contributing to the said accident.

4. The Appellant testified that she was a student and resided in Athi River. She adopted her witness statement, which was a replica of the averments made in the plaint. As a result of the accident she was injured on her chest, suffered a bruised left hand, elbow and on left leg below the knee. She was rushed to Shalom Community Hospital by good Samaritans and received treatment. She blamed the defendant for driving at high speed and overtaking without taking due regard for other road users. The Appellant also produced all the documents in her filed list of documents as exhibit 1 -7. The defence case was closed without the respondent calling any evidence. The trial magistrate in his considered judgement did find that the appellant had failed to prove there was contact between the two motor vehicles and on a balance of probabilities failed to prove her case. The appellant's case was thus dismissed.

5. Being dissatisfied by the aforestated judgement, the appellant preferred this appeal and raised six grounds of appeal namely that;

   a. The Learned magistrate erred in law and fact in failing to find the Respondent liable for causing the accident at all;

   b. The Learned magistrate erred in law a fact by failing to appreciate and consider the evidence adduced by the appellant;

   c. The Learned magistrate erred in law and fact in not giving sufficient consideration to the weight of the evidence by the appellant;

   d. The Learned magistrate erred in law and in fact in dismissing the suit without determining the real issues in dispute;

   e. The Learned magistrate erred in law and fact in failing to consider the plaintiff's submissions and authorities in making a finding on liability;

   f. The whole judgement on liability was against the weight of evidence before the court.

6. The appellant prayed that the appeal be allowed, the judgement of the trial court be set aside, the Respondent be found 100% liable and the court do award appropriate quantum of damages to the appellant.

Appellant's Submissions

7. The appellant filed her submissions on 02.12.2022. She submitted that the trial magistrate erred when he stated that the Appellant did not produce a copy of the records from NTSA, and therefore did not bring out the nexus between the defendant and the motor vehicle.

   The appellant submitted that the said motor vehicle records was filed with the plaint and produced as Exhibit along said other documents. The nexus between the Defendant and the 2nd suit motor vehicle was thus clearly established.

8. The appellant further submitted that the Respondent's Counsel did not attend trial, nor did they cross examine the plaintiff, but filed submissions. However in his considered judgement, the trial court placed heavy reliance on the Respondent's submissions and this was an error as submissions do not amount to evidence. Cases are proved at trial and not through submissions. Reliance was placed on *Robert Ngande Kathathi -vs- Francis Kivuva Kitonde* [2020]eKLR, *Nancy Wambui Gatheru -vs- Peter W. Wanjere Ngugi* Nairobi HCCC No. 36 of 1993, *Ngang'a & Another -vs- Owiti & Another* [2008]1KLR(EP) 749,*Daniel Toroitich Arap Moi -vs- Mwangi Stephen Muriithi & Another*

[2014]eKLR and *Avenue Car Hire & Another -vs- Slipha Wanjiru Muthegu* Civil Appeal No. 302 of 1997.

9. As to whether the Appellant proven her case, it was her submissions that her evidence in court was not challenged that it was the 2nd suit motor vehicle which caused this accident due to the carelessness and recklessness of its driver, who was overtaking without proper lookout of other road users and to avoid a head-on accident, the 1st suit motor vehicle driver had to swerve off the road and ended up crushing onto a pole which resulted in the appellant sustaining her injuries. The Respondent did not adduce any evidence and therefore liability ought to be apportioned as against the respondent at 100%. Reliance was placed on *North End Trading Company Ltd. (carrying on the business under the registered name of Kenya Refuse Handlers Limited -vs- City Council of Nairobi* [2019] eKLR and Motex Knitwear Mills Limited -vs- Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002.

10. On quantum the appellant submitted that she was injured on the anterior chest wall, bruise on the left hand, left elbow region and leg below the knee. She prayed that she be awarded Kshs. 300,000/=.

    Reliance was placed on Eldoret HCCA No. 107 of 2018 *Samuel Martin Njoroge Kamunyi –vs- Mildred Okweya Baraza* and Embu HCCA No. 61 of 2017 *Francis Ndungu Wambui & 2 others -vs- Benson Maina Gaiti*

11. The appellant prayed that this court finds that this appeal has merit and it be allowed.

Respondent's Submissions

12. The Respondent submitted that the appellant failed to produce the motor vehicle search in her evidence and it was not part of the documents in the Record of Appeal and/or supplementary record of Appeal. In the circumstances, the court should not be drawn to look into documents outside the scope of the appellant's list of documents as filed and produced before the trial court. Reliance was placed on *Kenya Commercial Bank Ltd. -vs- Sheikh Osman Mohammed* CA No. 179 of 2010 and in *Jane Nyokabi Githiri (suing as administrator of the Estate of Stephen Githiri Babu) -vs- Fusion Capital Ltd. & 2 Others* [2021].

13. On issue of liability the appellant produced a police abstract, which indicated the Registration of the 1st suit motor vehicle to be in the name of Mathew Nzambu. The appellant failed to show the nexus between said Mathew Nzambu and the Respondent herein and the best way to prove ownership was to produce a copy of records showing who was the registered owner of the 2nd suit motor vehicle. Reliance was placed on *Joel Muga Opija -vs- East African Sea foods Ltd*. [2-13] eKLR and *Kiema Mutuku -vs- Kenya Cargo Hauling Services Ltd.* 1991 KLR.

14. On quantum the Respondent stated that a perusal of the treatment notes from Athi River Shalom Community Hospital indicated that the appellant visited the facility on 03.12.2020 and only complained of chest pain. The x-Ray done indicate the chest was normal with no deformity. The medical P3 form also indicating tenderness of anterior chest and tenderness of the left leg. There were no injuries on the upped limbs. From the analysis of the P3 form, Medical Report and treatment notes, it was clear that the injuries captured were not consistent and no explanation was given for the variance, and thus the court could not make a finding on quantum. Reliance was placed on *Jimnah Munene Macharia -vs- John Kama Erera* Civil Appeal No. 218 of 1998.

15. The respondent thus urged the court to uphold the trial court decision and in saying so relied on the case of Vincent Mogeni Nyakundi -vs- Naftali Wangai & another [2020]eKLR where the court faced with a similar appeal found that the appeal lacks merit and dismissed the same with costs to the Respondent.

Analysis & Determination

16. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

17. A first appeal offers a valuable right to the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari Vs Purushottam Tiwari (Deceased)* by L.Rs (2001) 3 SCC 179.

18. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko Vs Varkey Joseph* AIR 1969 Keral 316.

19. Section 107 (1) of the *Evidence Act* provides that;

> " 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."

20. Section 108 of the *Evidence Act* further provides that ;

> " The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side."

21. I also refer to The *Halsbury's laws of England*, 4th Edition, Volume 17 at para 13 and 14 where it states that;

> " The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties' case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.
>
> The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence."

22. The Question then is what amounts to proof on a balance of probabilities was discussed by Kimaru J in *William Kabogo Gitau Vs George Thuo & 2 others* (2010) 1 KLR 526 stated that;

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleased in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred.

23. I also refer to *Palace Investments Ltd Vs Geofrey Kariuki Mwnedwa & Another* (2015) Eklr , Where the judges of Appeal referred to "Denning J in *Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say;

> " 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 is more probable than not; the burden is discharged, but if the probability is equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where the parties.....are equally (un)convincing, the party bearing the burden of proof will loose because the requisite standard will not have been obtained."

24. However, as also held by the Court of Appeal in *Micheal Hubert Kloss & Another vs. David Seroney & 5 Others* [2009] eKLR:

> " 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:
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> '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...'

25. The issue in this appeal is whether the there was ample evidence on record to prove ownership of the 2nd suit motor vehicle and if indeed the Respondent was liable and/or substantially contributed to the accident, which occurred on 03.12.2020 along Nairobi-Mombasa road and which lead to the appellant suffering injuries.

26. The trial Magistrate in his judgment stated that the appellant did not produce a copy of records and therefore did not bring out the nexus between the defendant and the motor vehicle alleged to have caused the accident. The appellant did submit that the said copy of records was produced with other documents (the entire bundle of supporting documents) as filed together with the plaint. On the other

hand, the respondent's supported the trial courts finding that no motor vehicle search was produced and thus it was not proved that the respondent owned the 2nd suit motor vehicle.

27. The appellant testified on 27.01.2022. she adopted her witness statement and produced all the documents in her list of documents as Exhibit 1-7. She prayed to be compensated for the injuries she suffered and costs of the suit. The respondents counsel was not in court, when the appellant testified and she was not cross examined on the evidence presented, nor did the respondent call any witness to testify on their behalf later in in the proceedings before the trial Magistrate.

28. As per the list of documents relied upon the appellant placed motor vehicle search/ copy of records as one of the documents relied upon. In this record of appeal the said document was missing, but the appellant filed a supplementary record of appeal on 02.12.2022 wherein the said records of motor vehicle was placed before this court. Further having gone through the entire original lower court file, which was made available, the copy of motor vehicle records as at 15.01.2021 was made available together with a receipt of Ksh 550 also dated 15.01.2021. The said record was filed in the list of documents filed simultaneously with the plaint. The Motor vehicle record did indicate that the respondent was the registered owner of the 2nd suit motor vehicle. The trial magistrate was thus wrong to find that this fact had not been proved.

29. The second issue for determination was on liability. The appellant's evidence was not challenged in any manner and the respondent did not call any witness to rebut the appellants evidence. It remains basic law that the only forum where the same could have been challenged was at trial. Since the respondent failed to call any witness the appellant's evidence was remained uncontroverted and thus proved.

30. In *Motrex Knitwear Vs Gopitex Knit wear Mills Ltd* Nairobi (Millimani)HCCC NO 834 of 2002 Lessit J citing the case of *Autar Singh Bahra & Another Vs Raju Govindji,* HCCC No 548 of 1998 where it was appreciated that;

> " Although the defendant has denied liability in the amended defence and counter claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff case stands unchallenged but also that the claims made by the defendant in his defence are unsubstantiated. In the circumstances, the counter claim must fail."

31. In the case of *shaneebal limited Vs County Government of Machakos* (2018) eKLR , Odunga J relied on the case of *Trust Bank Ltd Vs Paramount Universal Bank Ltd & 2 others* Nairobi (Millimani) HCCS No 1243 of 2001 where it was held that;

> " it is trite that where a party fails to call evidence in support of its case, that parties pleadings remain mere statements of fact since in doing do the party fails to substantiate its pleadings and in the same vein the failure to adduce evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged"

32. The appellant case was thus proved and the respondent should have been held 100% liable for causing this accident. The appellant in the plaint pleaded that she suffered blunt injuries to the anterior chest well, bruises on the left hand, left elbow region, and blunt injuries to the left leg below the knee. The same injuries were confirmed by the medical report of Dr. Titus Ndeti Nzina report dated 21.12.2020, who said she suffered soft tissue injuries but anticipated complete healing.

33. The appellant in her submissions sought for compensation of Kshs.500,000/= and special damages for Kshs.7,150/=. Reliance was placed on the citations of Eldoret HCCA No 107 of 2018 *Samuel Martin*

Njoroge Kamunyu Vs Mildred Okweya Baraza & Embu HCCA No 61 of 2017 *Francis Ndungu Wambui & 2 others Vs Benson Maina Gatia.*

34. The respondent on the other hand submitted that, the appellant had not proved their case and the same should be dismissed. But in the alternative if the court were to find otherwise liability ought to be apportioned at 50:50 and the appellant be awarded Ksh.90,000/=. Special damages proved was also limited to Ksh.3,500/=. Reliance was placed on Nairobi HCC No 858 of 1988 *Lucy Muthoni Munene Vs Kenneth Muchange & Kenya Bus Service Ltd* , Nairobi HCC No 955 of 1997 *Rosebell Njeri Muriuki Vs Hon Attorney General & Ano*, Kisumu HCCA No 52 of 2021 *Dickson Ndungu Krembe & Ano Vs Anna Anyango Chaka*, *Sino hydro Corporation Limited Vs Hezra Odhiambo* (2016) eKLR.

35. Having considered all the submissions made, the cited decision's, the nature of injuries sustained and similar citations for similar injuries I would make an award of Kshs 100,000/= as being appropriate compensation for the injuries suffered. As for special damages the only receipt's produced were those of Dr Titus Ndeti Nzina Kshs.3,000/= and NTSA Kshs.550/= all totalling to Kshs 3,550/=

Disposition

36. I find that this appeal has merit. The judgment and decree of Honourable B. Kasavuli Principal Magistrate dated 4th July 2022 in Mavoko Chief Magistrate court case No E176 of 2021 is hereby set aside and the same is substituted by the following award;

    a. General damages Kshs.100,000/=

    b. Special damages Kshs.3,550/=

    c. Plus costs and interest of the suit

37. The appellant is awarded costs of this appeal which is assessed at Kshs.120,000/= all inclusive.

38. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF JULY, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 19th day of July, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant