Ogada v G4S Security Company & another (Civil Appeal 11 of 2022) [2023] KEHC 20983 (KLR) (20 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20983 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 11 OF 2022

RPV WENDOH, J

JULY 20, 2023

BETWEEN

JANET AWOUR OGADA ..... APPELLANT

AND

G4S SECURITY COMPANY ..... 1ST RESPONDENT

EVANS ONUKO ONGODI ..... 2ND RESPONDENT

(Appeal against the judgement and decree of Hon. M. Obiero (SPM) dated and delivered on 20/1/2022 in Migori CMCC No. 1666 of 2016.)

JUDGMENT

1. This is an appeal by Janet Awour Ogada (the appellant) against the judgement and decree of Hon. M. Obiero (SPM) dated and delivered on 20/1/2022 in Migori CMCC No. 1666 of 2016. The appellant was the plaintiff in the trial court while the 1st and 2nd respondents were the 1st and 2nd defendants respectively.

2. By a plaint dated 29/1/2016, which was amended on 30/1/2020, the appellant filed a suit seeking general damages, special damages, costs of the suit, interest and any other relief against the respondents. The appellant pleaded that the 1st defendant was the owner, possessor, controller and/or the insured of motor vehicle registration number KCH 523F (suit motor vehicle) while the 2nd respondent was the driver of the suit motor vehicle; that on or about 7/11/2016, the appellant was lawfully travelling in the suit motor vehicle when the suit motor vehicle collided with motor vehicle registration number KBK 497V, hence occasioning the appellant severe injuries. The appellant pleaded the particulars of the negligence on the part of the 2nd appellant, particulars of injuries and particulars of special damages.

3. The appellant further pleaded that the doctrine of res ipsa loquitor, the provisions of the Highway Code, *Traffic Act* and other relevant laws were applicable.

4. The respondents entered appearance and filed a defence dated 9/4/2018 which was amended on 28/2/2020. The respondents denied the occurrence of the said accident and the injuries sustained by the appellant. The respondents blamed the driver of motor vehicle registration number KBK 497V and particularized the negligence on the part of the driver of the motor vehicle registration number KBK 497V. The respondents also denied that the doctrine of res ipsa loquitor was applicable. The respondents asked the trial court to dismiss the suit with costs.

5. The suit proceeded for hearing and the appellant testified as PW1. The respondents did not call any witnesses in support of their case.

6. The trial Magistrate in a judgement dated 20/1/2022 dismissed the appellant's suit with costs.

7. Being dissatisfied with the judgement, the appellant preferred the instant appeal on the following eight (8) grounds: -

    a. That the learned Magistrate erred in law and in fact by holding that the appellant did not prove liability against the respondents yet the respondents gave no evidence in rebuttal;

    b. That the trial court erred by shifting the burden of proof contrary to the established principles of law and hence arriving at a wrong verdict;

    c. That the trial court erred in law and in fact by selectively analysing the evidence of the appellant unfavourably, ignored the evidence that came on examination in chief and cross - examination thus arriving at a wrong determination;

    d. That the trial court ignored the fact that no single respondent's witness was called to rebut the plaintiff's testimony and claim thus the plaintiff's evidence remained uncontroverted;

    e. That the trial court erred in holding that the appellant was a passenger in the respondent's motor vehicle which was involved in an accident leading to injury to the appellant, but the respondents were not liable for the said accident;

    f. That the trial court erred by failing to rely on the further statement recorded by the plaintiff;

    g. That the judgement was contrary to the weight of the evidence presented;

    h. That the trial Magistrate misdirected himself in treating the submissions of the appellants very superficially thereby erroneously arriving at a wrong conclusion in law.

8. The appellant prayed that this appeal be allowed, the decree of the lower court be set aside and judgement be entered in favour of the appellant at 100% on liability. The appellant also asked to be awarded costs of the lower court and the appeal herein.

9. The appeal was canvassed by way of written submissions. The appellant filed her submissions dated 13/1/2023 on even date and the respondents filed their submissions dated 24/1/2023 on 25/1/2023. I have duly considered the submissions by both parties.

10. This being the first appeal, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusion but bearing in mind that it neither saw nor heard the

witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in Selle & Another vs Associated Motor Boat Co. Ltd (1968) EA 123.

11. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in Mbogua Kiruga v Mugecha Kiruga & another (1988) eKLR.

12. The Court of Appeal in Alfarus Muli vs. Lucy M Lavuta & Another Civil (1997) eKLR held that:-

> " The appellate Court interferes only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence."

13. Guided by the above principles, I have considered the appeal, the proceedings in the trial court and the submissions by both parties. The main issue for consideration is:-

    a. Whether the trial court erred in dismissing the appellant's suit.

14. There is no dispute that the respondents did not call any witnesses in support of the defence. The consequence thereof was succinctly stated by Makau J in North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi (2019) eKLR it was held:-

> "It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on balance of probability in absence of the defendant's evidence. In the instant case the plaintiff gave evidence which was not challenged, proved documents in support of her claim. I find the plaintiff's evidence to be credible and I am satisfied the plaintiff pleaded and proved her claim for special damages."

15. In the absence of the respondents calling any witnesses or any documents in support of their case, it is proper to conclude that the appellant's case remained uncontroverted. However, there is a duty imposed by the law for the plaintiff to prove his case on a balance of probability as per Sections 107 and 108 of the *Evidence Act*.

16. In Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR it was held that:-

> "As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as

Section 108 of the *Evidence Act* provides, the burden lies in that person who would fail if no evidence at all were given as either side."

17. Similarly, the Court of Appeal in Karugi & another vs Kabiya & 3 others (1983) eKLR held: -

> "The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant.... The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

18. Therefore, even in the absence of evidence controverting the appellant's case, the appellant needed to prove her case against the respondents on a balance of probabilities.

19. In Gideon Ndungu Nguribu & another vs Michael Njagi Karimi (2017) eKLR the Court of Appeal stated that

> "determination of liability in a road traffic case is not a scientific affair"

and proceeded to quote Lord Reid 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."

20. The appellant's case was based on the negligence of the 2nd respondent. The Court of Appeal in Kiema Mutuku vs Kenya Cargo Hauling Services Ltd (1991) 2 KAR 258 held: -

> "There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

21. In Masembe vs. Sugar Corporation and Another (2002) 2 EA 434, it was held that:-

> "Negligence is not actionable *per se* but is only actionable where it has caused damage and in that regard the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage or injury complained of;and where the damage was caused by the negligent acts of different persons, to assess the degree of their

respective responsibility and blameworthiness, and apportion liability between or among them accordingly...There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."

22. Musinga J (as he then was) in South Nyanza Sugar Co. Ltd vs. Wilson Ongumo Nyakwemba (2008) eKLR quoting Statpack Industries Limited vs. James Mbithi Munyao HCCA No. 152 of 2003 (UR) where it was held that:-

> "It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence."

23. At paragraph 6A of the amended plaint, the appellant pleaded: -

> "On or about the 7th November 2016, the plaintiff was lawfully travelling in motor vehicle registration number KCH 532F along Migori - Kisii Highway when the said motor vehicle 'collided on' motor vehicle registration number KBK 497V hence occasioning the plaintiff severe injuries."

24. During her testimony in chief, on the manner in which the accident occurred, the appellant stated: -

> "I do remember that I was involved in an accident on 7/11/2016, we were going to Oyani. We were in a motor vehicle registration KCH 523F. The driver was driving at a high speed. The driver was making a branch from the highway. The motor vehicle which was following our vehicle knocked it from behind."

25. In cross examination, the appellant reiterated: -

> "I was in a motor vehicle registration number KCH 523F. The other motor vehicle hit our vehicle from behind."

26. It is clear from the testimony of the appellant both in chief and in cross examination, that the suit motor vehicle she was travelling in, was hit from behind by another motor vehicle. The suit motor vehicle which she was travelling in, was not the one which hit another motor vehicle from behind as pleaded. There is variance between the pleadings and testimony of the appellant.

27. From the testimony of the appellant, she did not lead evidence to show that the damage suffered resulted from the defendants' negligence. There has to be a nexus between the damages suffered and the persons who are alleged to have caused the damages due to negligence. This is the law on causation. Alnashir Visram J (as he was then) addressed the requirement for causation when he stated in Elijah Ole Kool vs George Ikonya Thuo (2001) eKLR :-

> "When will an act or omission be said to be the cause of the Plaintiff's injuries? A defendant will only be held liable for negligence if his act or omission is either the sole effective cause of the Plaintiff's injury or the act or omission is so connected with it as to be a cause materially contributing to it. The first case will rarely raise contentions."

28. If at all it is a different motor vehicle which hit the suit motor vehicle from behind, I do not see how the driver of the suit motor vehicle ought to have been blamed. The appellant should have sued both the owner and/or the driver of the other motor vehicle which hit the suit motor vehicle from behind if she could not tell who the negligent party was. Order 1 rule 7 of the Civil Procedure Rules provides that: -

> "Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties."

29. The trial Magistrate observed as follows in his judgement: -

> "The plaintiff's uncontroverted evidence is very clear. It is to the effect that it was the driver of the motor vehicle registration number KBK 497V who caused the accident. I am actually unable to comprehend why the plaintiff found it difficult to include the driver and/or the owner of the motor vehicle registration number KBK 497V as defendants in this matter."

30. The respondents in their amended defence, attributed negligence on the part of the driver of motor vehicle registration number KBK 497V. The respondents averred that the owners, possessors, controllers and/or insured of motor vehicle registration number KBK 497V be held vicariously liable for the acts of his driver, agent and/or servant.

31. The respondents having denied being the persons who caused the accident, they should have taken out third party proceedings against the owners, possessors, controllers and/or insured of motor vehicle registration number KBK 497V as provided for under Order 1 Rule 15 of the Civil Procedure Rules.

32. Failure to take out third party proceedings, would mean that the respondents were to shoulder 100% liability. In the case of Benson Charles Ochieng & another v Patricia Atieno (2013) eKLR Kimaru J (as he was then) held:-

> "The trial court could not have apportioned liability between the Appellants and a person who was not even a party to the suit."

The trial court was also of the same view when it held: -

> "I have further noted that the defendants have substantively addressed the issue of the motor vehicle registration number KBK 497V in the amended statement of defence and in the submissions, but they have not enjoined the driver or the owner of the said motor vehicle and as such, this court cannot enter judgement in respect of the said motor vehicle for reasons that it is not part of the proceedings herein."

33. Flowing from the above discourse, the respondents would have been held 100% liable for the road traffic accident which allegedly occurred on 7/11/2016 for the sole reason that they failed to take-out third-party proceedings against motor vehicle registration number KBK 497V. However, the said vehicle was not made part of these proceedings.

34. I find that the trial court was right in finding that the appellant had failed to prove her case against the respondents to the required standard of balance of probabilities and the trial court rightly dismissed the suit.

35. In the end, I find no merit in the appeal. The appeal is hereby dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 20TH DAY OF JULY 2023

R. WENDOH

JUDGE

Judgment delivered in the presence of;

Mr. Abisai for the Appellant.

Mr. Odero for the Respondents.

Emma and Phelix Court Assistants.