Ndiritu v Kamunya & another (Civil Appeal 44 of 2022) [2024] KEHC 16738 (KLR) (3 October 2024) (Judgment)

Neutral citation: [2024] KEHC 16738 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 44 OF 2022

NIO ADAGI, J

OCTOBER 3, 2024

BETWEEN

ANN WAMBUI NDIRITU .... APPELLANT

AND

GRACE WANJIRU KAMUNYA .... 1ST RESPONDENT

SAMUEL NDEGWA .... 2ND RESPONDENT

(Being an Appeal from the Judgment of Hon. M. Nafula Lubia (SRM) in Nyeri CMCC No. 16 of 2020 delivered on 30/6/2022)

JUDGMENT

Introduction;

1. The Appellant has brought this appeal challenging the judgment delivered on 30/06/2022 in Nyeri CMCC NO.16 OF 2020. The said judgment dismissed the suit citing that liability was not proved.

Facts of the case;

2. By a Plaint dated 7th February 2020, the Plaintiff (Appellant herein) instituted a suit against the Defendants (Respondents herein). Her claim was that on 12th November 2018 at about 5:00 pm she was involved in a road traffic accident and sustained bodily injuries resulting to loss and harm. The accident occurred along Nyeri-Othaya road at Iriga area while she was a pedestrian. That the driver to motor vehicle registration number KAV 327Y Toyota Saloon drove, managed, steered and or controlled the said motor vehicle so negligently and permitted the same to veer off the road and knock her down as a result of which she sustained serious injuries, loss and harm.

3. The Appellant called 4 witnesses, PW1 was PC Antony Opiyo, a traffic police officer who produced the Occurrence Book (PExhibit.1), P3 Form (PExhibit.2), and OB extract (PExhibit.10).

4. PW2 was the Appellant herself who relied on her witness statement and on her list of documents both dated 7th February 2020. She produced documents listed from 5 to 9 as PExhibits 5 to 9 respectively.

5. PW3 was Dr. Muchai Mbugua a surgeon by profession practicing in Nyeri and who produced the Medical Report dated 9th December as PExhibit.3 and Receipt for Kshs.3,000/= as PExhibit.4 for its preparation charges and a receipt for Kshs.8,000/= for court attendance as PExhibit.4.

6. PW4 was PC Stephen Cheruiyot Surungai the Investigating Officer who produced the further OB extract as PExhibit.12 and stated that he had been paid Kshs.5,000/ = to attend court. The Appellant's case was then closed.

7. The Respondent did not file any witness statements or list of documents and opted to close defence case without calling evidence. The trial court directed Parties to file submissions on the suit.

8. The Appellant filed her submissions dated 24th November 2021 and the Respondent filed theirs dated 18th November 2021. Judgment was delivered on 7th July 2022 where the court found that the Appellant had failed to demonstrate on the balance of probabilities that she was involved in the accident as she alleges and that the Respondent was liable. The suit was dismissed with costs to the Respondent.

9. Being aggrieved by the said judgment, the Appellant preferred the appeal herein and filed the Memorandum of appeal dated 29/07/2022 which raises 7 grounds of appeal as follows:-

    1. The learned trial Magistrate erred in law and in fact in failing to find that motor vehicle registration number KAV 327Y Toyota Saloon was to blame for the accident.

    2. The learned trial Magistrate erred in law and in fact in failing to find that the Appellant was involved in a road traffic accident on 12/11/2018.

    3. The learned trial Magistrate erred in law and in fact in failing to hold that there was an account of the appellant involvement in the road traffic accident on record.

    4. The learned trial Magistrate erred in law and in fact in failing to hold that the Appellant did take time to explain to court how the accident occurred.

    5. The learned trial Magistrate erred in fact and law in failing to hold that injuries sustained by the Appellant were as a result of the negligence of the driver of motor vehicle registration number KAV 327Y Toyota Saloon.

    6. The learned trial Magistrate erred in law and in fact in failing to hold that the Appellant demonstrated on a balance of probabilities that she was involved in the traffic road accident.

    7. The learned trial Magistrate erred in law and in fact to consider the submissions of the Appellant as to liability hence arriving at a wrong decision.

10. The Appellant seeks the following orders

    (i) That the appeal herein be allowed,

    (ii) That the judgment on liability be set aside and this court do assess the same afresh.

    (iii) That costs of this appeal and of the lower Court matter be granted to the Appellant.

11. The court directed that the appeal proceeds by way of written submissions and I have seen the Appellant's submissions dated 3rd April 2023 but have not seen the Respondent's submissions even on the Court Tracking System.

Appellant's submissions

12. The Appellant her submissions listed the following issues for determination: -

    i. Whether this honourable court should interfere with the judgment of the trial Magistrate

    ii. Whether the trial Magistrate erred in law and fact in finding that the Appellant did not prove her case on a balance of probabilities

13. On whether this honourable court should interfere with the judgment of the trial Magistrate the Appellant submits that this court has a duty to delve at some length into factual details and revisit the facts as presented before the trial court, analyze the same, evaluate it and arrive at its own independent conclusions. The Appellant cited a number of cases including Rentco East Africa Limited v Dominic Mutua Ngozi (2021) eKLR, which cited Selle v Associated Motor Boat Co. (1968) EA 123, Coghlan v Cumberland (1898) 1 Ch. 704 and Ephantus Mwangi & Another v Duncan Mwangi Civil Appeal No. 77 of 1982 (1982-1988) 1KAR 278.

14. The Appellant submitted that based on the cited authorities, this court is not bound to follow the trial Magistrate's findings.

15. On Whether the trial Magistrate erred in law and fact in finding that the Appellant did not prove her case on a balance of probabilities, the Appellant submits that:

In reference to the judgment (page 63) the trial Magistrate erred in fact when she found that the Appellant stated that the accident occurred at 3.00pm whereas the accident as per the Occurrence Book extract indicates 6:30pm.

16. The date of the accident is not in question however what is in question is the time of the accident. It is proper to note that the Appellant testified on 09/08/2021 as seen in the proceedings (page 52), this is more than 2 years after the accident and the Appellant should not have been expected to be fluent in detailing the specifics of the accident. It is human nature for one to forget. The Appellant in her testimony relied and produced her statement (page 7) which clearly indicates the date and time of the accident and the same is supported by an abstract (page 9). It is also keen to note that the Appellant in her documents indicates on or about meaning, that it's an approximation which expands the accuracy or coverage. In that line, the Appellant was not far off as the time can be referred to as the being in the afternoon. According to proceedings (page 52 line 21) the traffic officer indicates that the accident was reported on 12th November 2018 at about 18:30 hours. This means that that was not the time of the accident but the time that the accident was reported. It is then not enough to dismiss liability against the Respondent s on the fact of mistaken time and especially when the date is correct and the pigeon hole as relates to section of the day being morning, afternoon, night etc. is also correct.

In reference to the judgment (page 63) the trial Magistrate erred in fact in finding that there is no account of any pedestrian having been hit.

17. In the Occurrence Book dated 12/11/2018 exhibit 10 the Appellant who was a pedestrian was not mentioned as she was not at the scene and had not reported the accident as at the time and date. However, according to the proceedings (page 56) the investigating officer clearly indicates that the Appellant went to the station on 14/11/2018 to report the accident and that she couldn't report earlier as she was undergoing treatment. The investigating officer further indicates that he contacted the driver of KAV 327Y via mobile phone who confirmed to have hit a pedestrian and that it was he himself who took her to the hospital. The investigating officer produced the Occurrence Book dated 14/11/2018 as exhibit 12. This is a further report of what would not have been known in the first report. It detailed

that the Appellant who was not captured in the initial report is now accounted for as this information gets to the officer at a later stage. The Magistrate hence erred in referring to only the earlier Occurrence Book and not the latter, also not taking into account the evidence of the Investigating Officer.

In reference to the judgment (page 63) the trial Magistrate erred in fact in finding that the Appellant did not take time to explain to the court how the accident occurred.

18. In South Nyanza Sugar Co. Ltd v Mary A. MIwita & another [2018] eKLR, the court stated that "Order 11 Rule 7(1) (d) of the Rules there appear to be no issue when a witness who filed a statement testifies. Ordinarily such a witness will adopt his/her statement as part of the evidence and will be examined on the same." The court states that a Plaintiff may choose to testify or rely on their statement. In this case the Plaintiff chose to rely on her witness statement (page 7) which outlines the date, time and occurrence of the accident. The Appellant apart from their witness statement, the Appellant produced evidence and called 3 other witnesses to corroborate her story. The Magistrate erred in finding that the Appellant did not explain to the court how the accident occurred.

In reference to the judgment (page 63) the trial Magistrate erred in fact in finding that it wasn't the Respondent's car that hit her nor was it the Respondent who took her to hospital.

19. According to the proceedings (page 52 & 53) the traffic officer while referring to the Occurrence Book dated 12/11/2018 exhibit 10 indicates the date, time and occurrence of the accident, specifically how motor vehicle registration number KAV 327Y hit motor vehicle registration number KCK 486Q Toyota Tiida from the back prompting it to lose control and hit a ditch. He stated that the investigating officer blamed motor vehicle registration number KAV 327Y. It is probable than not that motor vehicle registration number KAV 327Y which was being driven at a high speed, after hitting motor vehicle registration number KCK 486Q lost control veered onto the right and off the road, hence knocking down the Appellant. This is confirmed in the proceedings (page 56) where the investigating officer states that the driver confirmed that he hit a pedestrian. He further states that it was the Respondent who took the Appellant to the hospital by using his friend's motor vehicle.

20. There is a high probability that the occurrence of the accident happened as indicated in the Appellant's statement and it was the Respondent himself who took the Appellant to hospital using his friend’s car. The Magistrate hence erred in finding that it wasn’t the Respondent’s car that hit the Appellant and that it wasn’t the Respondent who took the Appellant to hospital.

Analysis And Determination

21. This being a first appeal, this court is reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in Selle & another v Associated Motor Boat Co. Ltd.& others and in Peters v Sunday Post Limited (1968) EA 123. (1958) E.A page 424.

22. In the case of Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that:-

> A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings

supported by reasons, on all the 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 first appellate court had discharged the duty expected of it.

23. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.

24. In view of the above, I have perused and considered evidence adduced before the trial court together with the Appellant's submissions led herein and wish to consider whether the Appellant who was the Plaintiff in the trial court proved her claim against the Respondent on a balance of probabilities. The legal burden of proof in a civil case was discussed in the case of Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR where the court stated as follows: -

> " As a general preposition 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."

25. The question then is what amounts to proof on a balance of probabilities? 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 pleaded 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 opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

26. Further in the case of Palace Investment Ltd vs. Geofrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that: -

> " 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 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 both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

27. In view of the above, the burden of proof at all times lay with the Plaintiff/Claimant to prove the case and not the Defendant. In the instant case, the trial Magistrate in her judgment found that it is not in dispute that an accident did occur on 12th November 2018 between motor vehicles stated above. What is in dispute is whether the Plaintiff was involved in that accident and if yes who is liable to compensate the Plaintiff.

28. In her judgment, the learned Magistrate stated that,

> " On analysis of the evidence in court I find a lot of inconsistencies in the Plaintiff's evidence.
>
> Firstly, whereas the Appellant states that the accident occurred at 3.00pm the OB extract indicates that the accident occurred at 6.30PM.
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> Secondly there is no account of any pedestrian having, been hit in the original report of 12th November 2018.
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> Thirdly on the finding that the fact that the Appellant was involved in the accident having been contested, the Appellant did not take time to explain to the court how the accident occurred for the court to appreciate the circumstances under which she was hit.
>
> Fourthly it is the Appellant's averment in the plaint that the Defendant vehicle hit the other vehicle from the rear and that it is the other vehicle that veered off the road and into a ditch. Was it really the defendant vehicle that hit her?
>
> Fifthly it was her evidence that the Defendant took her to hospital while it was the Investigating Officer's evidence that the Plaintiff was taken to hospital by a friend of the Defendant.
>
> Sixthly it was the Plaintiff's testament that she reported the accident on the following day which would have been the 13th November 2018and not 14th November 2018 as averred by the investigating officer and supported by the OB extract of the said date.

29. The learned trial Magistrate hereinabove put forth suggests that the account of events as was given by the Appellant was not clear or correct. Having considered the pleadings, the Appellant's witness statement (turned evidence in chief) and the documents, I find the trial Magistrate's statement, being a product of the learned trial Magistrate's failure to consider the evidence and material that was placed before her wholesomely.

30. I have carefully considered the plaint, the witness statement, the oral testimony by the Appellant, I see no account of events that is not unclear save for the time of the accident which I will address in my consideration below.

31. With regard to the first finding on the time of the accident, the record shows that the Appellant in her testimony in court on 9/8/2021 relied and produced her Statement dated 7/12/2020 (page 7 of the record of appeal) at paragraph *3* states that as follows:

> " On 12/11/2018 at about 5.30P.M ....."

The Appellant also produced in evidence a Police Abstract appearing at (page 9 of the record of appeal) which shows the time of the accident as 5.00P.M. The P3 Form which was also produced as an exhibit

by the Appellant shows the time as 5.00P.M. The Plaint at paragraph *5* pleads the time of the accident as 5.00P.M.

It is only in cross examination that the Appellant stated that she could not remember the date of the accident but the time was about 3.00pm and not AT 3.00PM.

According to proceedings (page 52 line 21) the traffic officer indicates that the accident was reported on 12th November 2018 at about 18:30 hours. This was not the time of the accident occurred but the time that the accident was reported at the police station.

32. This court takes notice that the Appellant testified in court after almost a year from when she recorded her statement and most probably, she could have forgotten what she recorded in her statement. It is human nature for one to forget certain things after lapse of time. Be that as it may, I would opine that these times were not far off as the time can be referred to as the being in the evening.

33. This court finds that as far as the time of the accident is concerned, the learned trial Magistrate only took into account, the evidence of the Appellant under cross examination and neglected her pleadings, Appellant's witness statements, documents produced in evidence and submissions. This caused her to arrive at a wrong finding regarding the time of the accident.

34. On the finding that there is no account of any pedestrian having, been hit in the original report of 12th November 2018, this court agrees with the Appellant's submissions that according to the proceedings (page 56) the investigating officer clearly indicates that the Appellant went to the station on 14/11/2018 to report the accident and that she couldn't report earlier as she was undergoing treatment. The investigating officer further indicates that he contacted the driver of KAV 327Y via mobile phone who confirmed to have hit a pedestrian and that it was he himself who took her to the hospital. The investigating officer produced the Occurrence Book dated 14/11/2018 as exhibit 12. This is a further report of what would not have been known in the first report. It detailed that the Appellant who was not captured in the initial report is now accounted for as this information gets to the officer at a later stage. The Magistrate therefore erred in referring to only the earlier Occurrence Book and not the latter, also not taking into account the evidence of the Investigating Officer.

35. On the third finding on the fact that the Appellant was involved in the accident having been contested, the Appellant did not take time to explain to the court how the accident occurred for the court to appreciate the circumstances under which she was hit, the Appellant stated in her witness statement that she was crossing the road heading to Ruringu when she was hit by KAV 327Y 110 TOYOTA SALOON which was coming from Nyeri headed towards Othaya and which was being driven on the left side of the road as you are coming from Nyeri heads towards Othaya . It was being driven at a very high speed and the said motor vehicle veered into the right side of the road and proceeded off the road to where she was knocked down. The Appellant's witness statement was her testimony in chief and having stated all the above on how the accident occurred, the Learned Magistrate erred in finding as she did on this issue.

36. On the fourth finding that it is the Appellant's averment in the plaint that the Defendant vehicle hit the other vehicle from the rear and that it is the other vehicle that veered off the road and into a ditch. Was it really the defendant vehicle that hit her?

This court faults the trial Magistrate in so finding for failure to consider the evidence of the PWI who stated that blame was on the driver of KAV 327 Y according to the Investigating officer and which vehicle the Appellant sued its owner after conducting a search on ownership at the National Transport and Safety Authority (see page 16 of the record of appeal). There was no information to show that the Appellant was negligent.

37. On the fifth finding that it was the Appellant's evidence that the Respondent took her to hospital while it was the Investigating Officer's evidence that the Appellant was taken to hospital by a friend of the Respondent. PW4 the investigating officer did testify that he contacted the driver through mobile phone number and he confirmed to have hit a pedestrian and that his friend's vehicle had taken her to hospital. I notice that the 2nd Defendant's name and mobile number are indicated in the Police Abstract and this information was not controverted at all.

38. Lastly, on the sixth finding that it was the Appellant's testament that she reported the accident on the following day which would have been the 13th November 2018 and not 14th November 2018 as averred by the investigating officer and supported by the OB extract of the said date. The Appellant in her witness statement at paragraph 7 states that she later reported the accident at Nyeri Police Station where she was issued with a Police Abstract. In cross-examination she stated that she reported the accident the following day. Again, on this, the trial Magistrate only took into account, the evidence of the Appellant under cross examination and neglected her witness statement. In any event, its this court's view that the date of reporting the accident did not affect negligence on the part of the Respondents.

39. The Respondents did not place any evidence before the trial court to controvert the Appellant's evidence on the claim. It is trite law that where a party fails to call evidence to disapprove an allegation, the said allegation shall remain uncontroverted. The cases that guidesme in this regard are:

In Kimatu Mbuvi =vs= Benson Ngale (2012) eKLR, where Justice Isaac Lenaola (as he then was) held;

> " Liability cannot be challenged where a party calls no evidence to rebut the allegation of negligence and hardly challenge the circumstances of the accident.

In CMC Aviation Limited =vs= Cruise Air Limited [1978] E.A., 103, Madan J. stated;

> " Pleadings contain averments of those concerned until they are proved or disapproved, or there is admission of them or any of them by the parties they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence."

In Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002, Lesiit, J. citing the case of Autar Singh Bahra And Another Vs. Raju Govindji, HCCC No.548 of 1998 appreciated that:-

'Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.'"

In Edward Mariga through Stanley Mobisa Mariga vs. Nathaniel David Shulter & Another [1979] eKLR it was held:-

"The respondents filed a defence in which they denied the appellant's claim and averred that the accident was caused by the appellant's own negligence in that he suddenly ran across the road and in the process was hit by the motor vehicle. The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother."

40. On the foregoing, I am convinced that the Appellant did prove her case to the requisite standard and that her evidence remains unchallenged thus the Learned trial Magistrate erred in law and in fact in dismissing the Appellant's suit.

41. On quantum, the learned trial Magistrate concluded that had the Appellant established the liability aspect of her case, she would have awarded her general and special damages of Kshs.100,000 and Kshs.3,000 respectively. Those figures are not challenged in any of those grounds forming part of the Appeal herein. Further, an Appellant Court can disturb an award of damages by a trial Court only if certain conditions are demonstrated to be in existence. This is what the Court of Appeal had in mind in the holding in the case of Butt =vs= Khan (1981) KLR 349, thus;

> " An Appellate Court will not disturb an award of damages unless it is so inordinately high or less as to present an entirely erroneous estimate. It must be shown the Judge proceeded on wrong principles, or he misapprehended the evidence in some material respect and so arrived at a figure ...."

42. By reason of the premises hereinabove, I allow the Appellant's Appeal and enter Judgment for her as follows:-

a) The learned trial Magistrate's Judgment on liability is quashed and set aside and in place thereof, this Court enters Judgment on a 100% liability basis made against the Respondents jointly and severally.

b) Judgment on quantum in the sum of Kshs.100,000 general damages, and Kshs.3,000 special damages is entered in favour of the Appellant against the Respondents.

c) Costs of this Appeal, and those for the lower Court suit, shall be in favour of the Appellant.

d) Interest on the award of special damages will be from the date of filing suit while on quantum shall be at court rates from the date this judgement till full payment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 3RD DAY OF OCTOBER, 2024

NOEL I. ADAGI

JUDGE