West Kenya Sugar Company Limited v Simiyu & another (Suing as Administrators and Personal Representatives of the Estate of Victor Masibo Simiyu - Deceased) (Civil Appeal E072 of 2022) [2024] KEHC 15914 (KLR) (22 October 2024) (Judgment)

Neutral citation: [2024] KEHC 15914 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E072 OF 2022

REA OUGO, J

OCTOBER 22, 2024

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED ..... APPELLANT

AND

FRANCIS MASIBO SIMIYU ..... 1ST RESPONDENT

MARY WANJALA MUTORO ..... 2ND RESPONDENT

SUING AS ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF VICTOR MASIBO SIMIYU - DECEASED

(Being an appeal from the ruling/decision by Hon. Gladys Adhiambo Principal Magistrate delivered in Kimilili PMCC No E155 of 2021 on 14th July 2022)

JUDGMENT

1. The respondent filed a claim under the *Law Reform Act* and Fatal Accident Act at the subordinate court seeking damages. He averred that the appellant was responsible for the accident that caused the deceased to sustain fatal injuries. The matter at the subordinate court was at the hearing stage. Francis Masibo Simiyu was testifying for the respondent as Pw1. He sought to produce the deceased's report card and the appellant objected.

2. The appellant argued that documents must be produced by their maker and cited section 35 of the *Evidence Act*. It was argued that the marker of the document was a teacher at Makhonge Primary School within Kimilili.

3. The respondent argued that the deceased's report card was his property and Pw1 his parent. The respondent agreed that indeed the *Evidence Act* provides that documents must be produced by their maker however it also provides for exceptions. First exception is where the maker cannot be traced

while the second is where the maker will not be within the convenience to be traced to produce the document. They argued that the deceased attended a public school and therefore the document is a public record that can be produced by Pw1.

4. The trial magistrate in her ruling stated as follows:

> " It is common knowledge that report cards are not made for teachers but are basically made to report parents and guardians as to the performance of their children. It is evident that the report card is a document which was in custody of the parent at the time of the demise. The defendant will be at liberty to call an administrator of the said school to disapprove the averments in the report card if they do believe that the deceased was not a student. If were to adopt the practice of calling all makers of documents cases might never move just the same way receipts are produced to prove that one bought services or property is just the same as a report card is furnished to the parent to explain the performance of their child. The defence has not explained prejudice that the defendant will suffer if the said report card is produced. Waiting for the teacher to be located in whichever school she is currently in will cause further delay in the matter...I hereby disallow the objection..."

5. The appellant dissatisfied with the decision of the lower court has filed a memorandum dated 15th August 2022 on the following grounds:

1. That the learned trial magistrate erred in law and fact in admitting in evidence the deceased's school assessment report from Makhonge Primary School as Plaintiff Exhibit 9 without calling the maker against the provisions of section 35 of the *Evidence Act*.

2. That the learned trial magistrate erred in law and fact in failing to appreciate and apply the provisions of section 35 of the *Evidence Act* Cap 80 Laws of Kenya hence an erroneous decision on the production of the said document.

3. That the learned trial magistrate erred in law and fact in shifting the burden of proof to the appellant to call the maker of the deceased's School Assessment Report if they so wished against the provisions of the *Evidence Act*.

4. That the learned trial magistrate erred in law and fact in failing to apply the law with regard to production documents by the maker as required by law.

5. That the learned trial magistrate erred in law and fact in ordering the production of the deceased's School Assessment Report by someone who was not the maker, an irregular and unprocedural order.

6. That the learned trial magistrate erred in law and fact in misdirecting herself on the application and provisions of section 35 of the *Evidence Act* hence an erroneous decision and/or finding.

7. That the learned trial magistrate erred in law and fact in failing to appreciate the fact that the appellant has no duty by law to assist the respondent to prosecute their case the legal system in Kenya is adversarial.

8. That the learned trial magistrate erred in law and fact by deviating from the principles of the burden of proof hence unfounded decision on production of documents.

9. That the learned trial magistrate erred in law and fact in disregarding the objection raised by the appellant in line with the law yet the respondent did not state during

the hearing that the maker of the Deceased's School Assessment Report could not be found.

10. That the learned trial magistrate erred in law and fact in failing to take into account that it is the duty of the respondent to avail their witnesses and not the appellant's duty to facilitate the attendance of the respondent's witnesses since it was the respondent's case.

Analysis And Determination

6. Having considered the grounds of appeal I find that the only issue before this court is whether, the trial court erred in having the respondent/plaintiff produce the deceased's School Assessment Report under section 35 of the *Evidence Act*.

7. The appellant submits that the respondent did not advance any plausible reason why he did not call the maker of the School Assessment Report. It relied on the case Emmanuel Otieno Kongili & Another V Jimmy Joseph O. Owuor [2014] eKLR where the court observed:

> " It is common ground that the respondent made two applications to have the receipts sought herein to be introduced as additional evidence to be admitted evidence in the trial court without the makers being called to testify on them and produce them. It is also common ground that the reasons for the applications were that it would have been expensive to secure their attendance alternatively, the respondent contented that their attendance could not have been easy to procure. In objecting to the application, the appellants pointed out that the authenticity of the receipts could only be secured by attendance in court of the makers of the documents and secondly, there had been no attempt to secure the attendance of the said witnesses. The court on each occasion agreed with the appellants. As it is therefore the evidence was readily available and if the respondent had exercised reasonable diligence, he could easily have availed the makers of the documents in court. It was not enough for the respondent to merely stand up in court and orally apply to have the documents admitted in evidence without calling the makers on the grounds that it would be expensive or their attendance could not be easily secured. The respondent had not at all attempted to secure the attendance of these witnesses and failed. He made it appear that, merely because such witnesses were scattered in Eldoret, Kisumu and Nairobi respectively, it would be expensive if not impossible to secure their attendance. What a fallacy. He did not demonstrate any efforts he had undertaken to avail such witnesses like issuance of witnesses summons without success. I do not therefore think that in the circumstances of this case the evidence of these witnesses could not have been secured had the respondent exercised reasonable diligence."

8. The respondent, on the other hand, submitted that the essence of the document was to show the deceased's performance in school. They testified that the deceased died in 2019 and that calling the author of the document would be unreasonable. They also faulted the appellant for not raising the issue at pre-trial.

9. I have carefully considered evidence before the trial court and the rival submissions. Section 35 of the *Evidence Act* provides as follows:

> " 1. 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. If the maker of the statement either—

i. Had personal knowledge of the matters dealt with by the statement; or

ii. Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

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

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

2. In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection

1. Of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—

a. Notwithstanding that the maker of the statement is available but is not called as a witness

b. Notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be."

10. The respondent at the lower court argued that the document can be produced where the maker cannot be traced or where it will be difficult to avail the teacher to produce the document. Section 35 of the *Evidence Act* permits documents to be presented in court by witnesses other than their makers, particularly in cases where the maker is dead or otherwise unavailable. There was no evidence that the teacher could not be traced or that there was difficulty in availing her. The Court of Appeal in

Parkar & another v NQ *& 2 others (Civil Appeal 139 of 2020*) [2023] KECA 908 (KLR) (24 July 2023) (Judgment) held as follows:

> " 31. In Commission of Customs v SK Panachal (1961) EA 303 the East African Court of Appeal interpreted the meaning of the phrase 'a witness cannot be procured without unreasonable expense or delay.' In this case a statement had been made by a witness who was a customs officer who lived in The Hague. The prosecution sought to produce the statement, but the defense objected. In admitting the statement, the Court held that judicial notice should be taken of the distance between Nairobi and The Hague and for a witness to come merely to produce a statement the more so where the statement was made in the course of duty it would be unreasonable. A similar holding was made in Mohammed Taki v R (1961) EA 213.
>
> 32. In the instant case, the learned judge was persuaded that the witnesses could not be procured from South Africa without delay and expenses."

11. In this instant case, the witness was in a school within the locality of the court. There was no evidence by the respondent that the witness could not be procured from the local school to testify. In that regard, I find that the objection raised on the production of the School Assessment Report was merited. The maker of the report shall be called to testify before the trial court, unless the exception circumstances are demonstrated before the trial who will be at liberty to make a decision on the same. The appeal is hereby allowed. Each party to bear its own costs.

DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 22ND DAY OF OCTOBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Miss Kemboi h/b Miss Wahome - For the Appellant

Respondent -Absent

Wilkister -C/A