Musuke v Aria Trading & Construction Co Ltd & another (Civil Appeal 99 of 2017) [2024] KEHC 16760 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEHC 16760 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 99 OF 2017

NIO ADAGI, J

NOVEMBER 21, 2024

BETWEEN

DAVID MUSAU MUSUKE ..... APPELLANT

AND

ARIA TRADING & CONSTRUCTION CO LTD ..... 1ST RESPONDENT

ZAMA DISTRIBUTORS LTD ..... 2ND RESPONDENT

(Being an appeal from the judgment of the Hon. I.M. Kahuya (SRM) in Machakos CMCC NO. 78 of 2012 at Machakos delivered on 22nd June 2017)

JUDGMENT

Background

1. The Appellant instituted in the Lower Court via a Plaint dated 9th February 2012 claiming the following: -

    a) General Damages for pain, suffering and loss of amenities

    b) Special Damages for Ksh.4,700/=

    c) Future Medical Expenses

    d) Future Earning

    e) Cost of the suit and interest.

2. Upon hearing of the case on merits judgment was delivered on 22/6/2017 wherein the Appellant's suit was dismissed with costs.

3. Being aggrieved by the said judgment, the Appellant lodged this appeal vide a Memorandum of appeal dated 20/6/2017 raising 9 grounds which challenge both liability and quantum.

4. Parties were directed to file written submissions to canvas the appeal. The Appellant's submissions undated submissions were filed on 19/9/2023 whereas the 2nd Respondent's submissions dated 19/6/2024 were filed on 200/6/2024. There are no submissions by the 1st Respondent.

5. I have perused the Record of Appeal, considered and weighed the evidence that was adduced and rival submissions on the appeal and I now proceed to determine the appeal herein.

6. This being a first appeal, I am 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) EA page 424

7. 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.

8. 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.

9. Before I proceed further, my attention has been drawn to a preliminary issue raised in the 2nd Respondent's submissions that the Appellant's suit at the trial court was time barred. This is a critical issue that goes to the jurisdiction of the trial court and of this court in determining the suit and I have to deal with it in the first instance. The cause of action arose out of a Road Traffic Accident that occurred on 22/7/2008 and this can be verified from the Plaint at paragraph *5*, the Police Abstract which was produced as PExbt.5 and the P3 Form produced as PExbt.6. The suit was filed in court on 9/2/2012 almost 3years and 7 months later. I would agree with the 2nd Respondent that the suit ought to have been instituted within 3 years of the occurrence of the accident as it is premised on tort of negligence. The suit ought to have been filed by 22/7/2011. For the Appellant to file the suit out of the statutory three (3) years timeline, he ought to have sought the leave of the court to do so. There is no evidence of the order of the court granting leave to the Plaintiff/Appellant to do so.

10. The filing of the matter without leave of the court to do the same out of time was contrary and offending the provision of Section 4(2) of the Limitation of Action Act (Cap 22 of the Laws of Kenya) which provides that:-

> " An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:"'

11. It is my finding that the cause of action accrued in 2008 and that is the time that time started running. As per section 4 of the *Limitation of Actions Act* the causes of action founded on Tort have time limit of 3 years, time having begun to run in 2008, naturally it would mean it lapsed in 2011. Had the trial court keenly considered the 2nd Respondent's submissions on the suit, it would have noticed this critical issue which was raised at pages 147 -148 of the Record of Appeal. In the circumstances, the Appellant's claim was statute barred as per Section 4 (1) of the *Limitation of Actions Act* and the trial court did not have jurisdiction to hear and determine it.

12. Having so held, it, therefore, follows that the hearing and determination of the suit by the trial court was in error. The suit ought to have been struck out in the first instance.

13. The 2nd Respondent has also submitted that the Record of Appeal lacks a Decree which is a crucial document for the same and this renders the appeal defective. The 2nd Respondent has cited Order 42 Rule 13 (4) of the Civil Procedure Rules and Clause 14 of the Practice Direction to Standardise Practice and Procedure in the High Court.

14. Section 2 of the *Civil Procedure Act* defines a decree as:

> " decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within Section 34 or section 91, but does not include—
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> a. any adjudication from which an appeal lies as an appeal from an order; or
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> b. any order of dismissal for default:
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> Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

15. It is quite evident from the proviso to definition of decree that it includes a judgment. The proviso goes on to provide that a judgment shall be appealable regardless of whether a decree has been drawn up, or is capable of being drawn up or not.

16. Order 42 Rule 13 stipulates the documents that must be on record before an appeal is admitted to hearing. Rule (13)(f) provides:

> " Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—(f)the judgment, order OR decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.

17. An appellant is required to include in the record of appeal, the judgment, order or decree appealed from. The use of the word "or" is indicative of a disjunctive intent of the requirement. Accordingly, for purposes of an appeal, the filing of the judgment, ruling, order or decree is sufficient.

18. Further where an Appellant may not have filed a decree or order appealed against with the memorandum of appeal, the law gives such an Appellant the leeway to do so as soon as possible or within the time allowed by the Court. Order 42 Rule (2) provides:

> " Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed.

19. Failure to file a certified order or decree appealed against is a technicality which can be corrected pursuant to Order 42 Rule (2) of the Civil Procedure Rules. The provision accords with the Constitutional imperative in Article 159(2)(d) of *the Constitution*, that justice shall be administered without undue regard to procedural technicalities. Prescriptions of procedure and form should therefore not trump over the primary object of dispensing substantive justice. This also goes to protecting the right to a fair trial as guaranteed under Article 50 of *the Constitution*.

20. A look at the record herein will show that the record of appeal does not contain the decree. However, a certified copy of the judgment appealed against is included in the Record of Appeal at pages 151-154.

21. Does the omission of the decree render the record of appeal defective as argued by the 2nd Respondent?

22. The omission of a decree from the record of appeal has been the subject of many a judicial decision. In the case of Emmanuel Ngade Nyoka v Kitheka Mutisya Ngata [2017] eKLR, the Court of Appeal considered the issued and stated:-

> " Starting with the first issue, it is true that the record of appeal before the first appellate court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of Order 42 rule 2 of the Civil Procedure Rules which provides interlia :
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> "Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the act until such certified copy is filed."

23. Duly guided by the holding of the Court of Appeal in the above cited decision, I find and hold that the omission of the decree in the record of appeal herein is not fatal and the certified copy of judgment is adequate for the purpose of the appeal. Further the said omission will occasion the 2nd Respondent no prejudice at all.

24. Notwithstanding the above findings on the two issues, I will nonetheless examine the merits of the appeal by considering whether the Appellant discharged his burden of proof for the Respondents to be held liable for the accident., and if so, the payable damages.

25. The Appellant submits that the gravamen of this appeal is whether he was the owner of motor vehicle registration number KAR 943D and if not, whether liability for the accident should be attached to him. The Appellant produced as Exhibit.1 a copy of the records dated 6/2/2012 from the Registrar of Motor Vehicles which show that the 1st Respondent was the registered owner of the subject accident vehicle. However, the 1st Respondent denied ownership of the motor vehicle at the time of the

accident and contented that they had sold it to the Third Party vide a sale agreement dated 16/07/2008. The 1st respondent further contented that the Third Party took possession of the motor vehicle on the same date of 16/07/2008 thereby taking over all operations of the motor vehicle.

26. The Appellant submits that the 1st Defendant did not in any manner controvert the Appellant's assertions and testimony that they remained culpable as the registered owners and in particular the 1st Respondent of motor vehicle in issue. The evidence on record is that the accident occurred on 22/7/2008 and as at the said date the record was clear that the 1st Defendant/Respondent was the registered owner of the motor vehicle. Any subsequent arrangement would not negotiate the underlying fact captured by the copy of records.

27. In his judgment, the Learned Magistrate in dismissing the Appellant's suit stated that:-

> " Starting with the issue of ownership of motor vehicle registration number KBA 467G; there was in my view conclusive evidence as reflected in the Copy of Records dated 29/1/2015 (DExh.3a) that the said vehicle belonged to the Third Party as at 22/7/2008; the accident date herein. This was despite the fact that the Plaintiff adduced a Copy of Records that placed ownership of the subject vehicle on the Defendant as at 6th February 2012. That was the correct position because the Defendants bought the said vehicle from the Third Party on 16/12/2009 as per the Motor Vehicle Sale Agreement (DExh.4). On this basis alone, the Plaintiff's case against the Defendant must fail hence the same is dismissed with costs.
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> This therefore leaves us with the Plaintiff and Third Party as the remaining parties to the suit. According to the Plaintiff, a different vehicle had fallen on the road thus blocking one of the lanes. Then as he drove by, the Third Party's vehicle drove on his lane leading to a head on collision. He further stated that he could not have swerved because the road was under construction. He produced the police abstract as evidence and a look at it showed that the case was pending under investigations. Similarly, the police officer was not called as a witness to the case hence we have no independent evidence of how the accident occurred. The fact that the Third Party did not call any witnesses did not in my view imply that they were automatically liable keeping in mind that the accident occurred eight years ago hence their difficulties in tracing any.
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> As regards an action in negligence it is stated in Halsbury's Laws of England, 4th Edition at paragraph 662at page 476 as follows with respect to what is required to be proved in an action such as the Plaintiff's:
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> "The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which a casual connection must be established."
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> Thus, it was the Plaintiff's duty to show that he was injured by a negligent act or omission for which the Third Party was in law responsible. It was my view that there was no evidence of how the Third Party's driver was allegedly negligent. We would not for certain know whether the Plaintiff was actually hit on his lane unless we had the evidence of the Police Officer or another independent witness at the scene.
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> As submitted by the Third Party, the mere fact that there was a collision of their vehicle with the Plaintiff's did not connote that the former's driver had been negligent. If that was the case, then the same reasoning would have applied had the Third Party filed this suit first as

the Plaintiff. None of the particulars of negligence as pleaded was proven hence the doctrine of res ipsa loquitor would not apply because the facts did not speak for themselves. In a nutshell I find that liability had not been proven thus the suit is dismissed with costs.

28. I have thoroughly read through the judgment of the trial magistrate, and I find and agree that the Learned Magistrate was categorical that the Appellant did not discharge his burden of proof of any of the allegations of negligence against the 2nd Respondent.

29. Section 8 of the *Traffic Act*, Cap 403 of the Laws of Kenya provides that:-

> " the person in whose name a vehicle is registered shall unless the contrary is proved, be deemed to be the owner of the vehicle"

30. On the issue of ownership of motor vehicle registration number KBA 467G; there was conclusive evidence as reflected in the Copy of Records dated 29/1/2015 (DExh.3a) that the said vehicle belonged to the Third Party/2nd Respondent as at 22/7/2008; the accident date herein. This was despite the fact that the Plaintiff adduced a Copy of Records that placed ownership of the subject vehicle on the Defendant/1st Respondent as at 6th February 2012. That was the correct position because the Defendant/1st Respondent bought the said vehicle from the Third Party/2nd Respondent on 16/12/2009 as per the Motor Vehicle Sale Agreement (DExh.4). The sale agreement proved to the contrary that the subject motor vehicle herein was not owned by the Defendant/1st Respondent.

31. On the issue of liability, the Appellant just stated that the motor vehicle he was driving collided with the one belonging to the 2nd Respondent. The Appellant could not swerve to the left as the road was under construction. The Police Abstract indicated that the matter was pending under investigations (PUI). The Appellant did not call a traffic police officer or eye witness to come to court and explain the circumstances under which the accident occurred. It was hard for the trial court to discern who between the Appellant and 2nd Respondent was to blame for the accident.

32. Just because the Police Abstract indicated that an accident occurred, the same did not mean the 2nd Respondent's driver was to blame for the accident. The trial magistrate was clear that if this reasoning was to be followed, then the same would have applied had the 2nd Respondent filed the suit as the Appellant. The Police Abstract is only supposed to confirm that an accident occurred. It is not a proof of negligence and independent evidence must be adduced to prove negligence. I agree with the position held by Hon. G.V. Odunga in his judgment dated 15th March 2021 in the case of Florence Mutheu Musembi and Geoffrey Mutunga Kimiti v Francis Karenge [2021] eKLR cited by the 2nd Respondent where he stated that:-

> " 36. A police abstract is merely evidence that a report of an accident has been made to the police. Unless it contains information regarding the investigations and their outcome, such evidence cannot without more be evidence of negligence. The Police Abstract Report which was produced before the trial court did not contain any other information apart from the date, of the accident, the particulars of the vehicle involved, its ownership, the insurance company that covered the vehicle, the victim and the name of the investigating officer. There was no information regarding the outcome of the investigations which was indicated to have been still pending. That document could not therefore be the basis of finding liability on the part of the Respondents."

33. In the same said case the court held that:-

> " 35. Therefore, as a general rule, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the Respondent chose to remain silent."

34. Further in the case of Kibichi v Mathai (Civil Appeal E003 of 2023) [2024] KEHC 4065 (KLR) (25 April 2024) (Judgment) in the judgment dated 25th April 2024, Hon. Justice Rachel Ngetich stated that:-

> "
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> " 38. In the case of Z O S & C A O (Suing as the Legal Representatives in the Estate of S A O (Deceased) v Amollo Stephen [2019] eKLR the court expressed itself in respect to police abstract as follows:
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> "The Police Abstract form of the material accident was also produced as an exhibit. However, a police abstract is not and cannot be proof of occurrence of an accident but proof of the fact that following an accident, the occurrence thereof was reported to the police who took cognizance of that accident. It is therefore the police, having received information or a report of occurrence of an accident, would investigate and establish circumstances under which such an accident occurred. The police abstract produced as PEx. 3 dated 21/8/2018 only provides particulars of the reported accident; the owner of the subject motor vehicle involved, the injured person being the deceased, the insurance company and particulars thereof.....That being the case, it was incumbent upon the appellant, at the time of hearing, to either call an eye witness who saw the accident take place to prove any of the listed particulars of negligence attributed to the Respondent, or to call the police from Bondo Police Station, who investigated the accident to shed light on the results of the investigations; and as to who was to blame for the subject accident wherein the deceased lost his life."

35. From the foregoing, it is clear that the Appellant could not use the Police Abstract only to blame the 2nd Respondent for the accident even if the 2nd Respondent opted not to rebut.

36. It cannot be gainsaid that in civil proceedings the standard of proof is one on a balance of probabilities as emphasized in the case of Kanyungu Njogu Vs Daniel Kimani Mwangi [2000] eKLR where it was held that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

37. The principle, 'He who alleges, must prove' places the burden on a party to prove his or her case. In addition, the *Evidence Act* Cap 80 Laws of Kenya under Section 107 provides that:-,

> 'Whoever desires any court to give judgment to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist'.

38. Section 109 further provides that:-

> '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.'

39. Under the provisions of Section 107of the *Evidence Act* Cap 80 Laws of Kenya, it was incumbent upon the Appellant to prove that the facts he alleged existed. The Appellant did not discharge both

his legal burden and evidential burden of proof as provided in sections 107 and 109 of the *Evidence Act* respectively. He did not prove on a balance of probabilities any of the allegations levelled against the 2nd Respondent.

40. The above two provisions were dealt with in the case of Anne Wambui Ndiritu -vs-Joseph Kiprono Ropkoi & Another [2005] 1 EA 334 (quoted with approval in the case of Kyalo Elly Joy v Samuel Gitahi Kanyeri [2021] eKLR) in which the Court of Appeal held that:

> 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 case 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."

41. These two burdens of proof never shifted to the 2nd Respondent and all through the trial it was incumbent upon the Appellant to prove his allegations to the required standard which he failed to do.

42. It is clear that the 2nd Respondent could not be held liable for the accident as there is no evidence provided by the Appellant to that effect. Therefore, the trial court rightly dismissed the suit as the Appellant had not proved liability against the 2nd Respondent.

43. In the circumstances, the Appellant did not prove his case on a balance of probabilities. Guided by the decisions in Kanyungu Njogu Vs Daniel Kimani Mwangi (supra), this court finds no reason at all to disturb the trial court's finding on the issue of liability.

44. Had this court reversed the trial court's finding on liability, it would have upheld the proposed award on general and special damages.

45. It is my finding that the appeal lacks merit. It is consequently dismissed with no order as to costs.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 21ST NOVEMBER 2024

NOEL I. ADAGI

JUDGE