Muiruki & another v Musyimi (Civil Appeal 7 of 2018)
[2024] KEHC 16649 (KLR) (17 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16649 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL APPEAL 7 OF 2018

JL TAMAR, J

DECEMBER 17, 2024

BETWEEN

JAMES MUIRUKI ..... 1ST APPELLANT

DANIEL MURIUKI ..... 2ND APPELLANT

AND

SAMSON MUSYIMI ..... RESPONDENT

(Being an appeal from the judgement and Decree of Hon. M. Chesang RM dated 13th day of February 2018 at Chief Magistrate court at Kajiado in civil case no 497 of 2016)

JUDGMENT

Background

1. In a plaint filed on 6th September 2016, the appellants were sued for general damages and special damages arising from a road traffic accident that occurred on or about 20th December 2015. It is stated that the respondent was lawfully travelling as a passenger in motor vehicle registration number KBW 242U along Isinya Road when the 2nd Defendant so negligently, recklessly and carelessly drove the said motor vehicle that he caused it to veer off its correct lane and violently collide/ram onto another motor vehicle extensively damaging it and also causing the Respondent to sustain severe bodily injuries,, pain and as a result has suffered loss and damages in the magistrate case. The particulars of negligence attributed to the appellants were set out in paragraph four of the plaint. As a result of the said accident, the Respondent suffered a fracture of the left tibia/ fibular-Distal 1/3 and had swollen tender left leg. The respondent then filed his statement dated 2nd September 2016 reiterating the averment as contained in the statement of claim (plaint). Further the Respondent filed ten (10) list of documents to be relied upon during trial to establish the case against the appellants.

2. The appellants filed their defence, denied liability and in turn blaming the respondent for the accident and injuries sustained. The particulars of negligence on the part of the respondent were set out in paragraph 4 of the defence. The appellant also listed the driver of the said motor vehicle as a witness and filed his statement.

3. On 31st October 2017, parties recorded a consent by which liability was apportioned in the ratio of 75%: 25 % in favour of the Respondent leaving out the assessment of quantum to the court. The matter was then fixed for hearing on 5th December 2017. On the date the matter was scheduled for hearing, it is recorded in the proceedings that;

> "By consent of parties, parties to file submissions on the issue of quantum. Medical Report by Dr. G.K Mwaura and P.M Wambugu be produced by consent and the same be attached to each party's respective submission mention on 16th/1 2018"

4. On 16th January 2018 when the matter came up for mention, the learned magistrate reserved a judgement date for 13th February which was duly delivered wherein the court made an award of 1,200,000 in favour of the Respondent and special damages as pleaded. In the said judgement, the learned magistrate referred to the injuries allegedly sustained by the Respondent and the medical documents "produced" by the respondent such as discharge summary, x-ray request form and p3 to prove the injuries suffered as examined by Dr.G. K Mwaura. The magistrate also notes that the appellant counsel did not file any submissions nor produce any list of documents. This is disputed by counsel in submissions.

5. The procedure of hearing of suits and examination of witnesses is provided for in Order 18 of the Civil Procedure Rules (2010), Cap 21 Laws of Kenya. The said order is very comprehensive on how a trial should proceed in court including the recording and production of evidence. Of importance to this court is Order 18 Rules 1 and 2 which provide as follows: -

    1. The plaintiff shall have the right to begin unless the court otherwise orders.

    2. Unless the court otherwise orders—

        (1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

        (2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.

        (3) After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited.

6. In the instant case, although the matter had been set down for hearing on 15th December 2017, the matter did not take off but a procedure unknown in law was adopted by the court where parties were allowed by consent to file their written submissions on quantum and attach the medical documents thereto before the witnesses could testify. The plaintiff did not tender viva voce evidence nor had his written statement adopted as his evidence in chief. There was no observation by the court of

the Respondent physical injuries if any or the identity of the party that brought the suit against the appellants.

7. Even where the documents relied upon by the Respondent and/or the appellants were not objected to, such documents must be produced by a party and exhibited for it to have any evidential value. In the present case none of the documents were marked or produced at all as exhibits.

8. The court of appeal in the case of Kenneth Nyaga Mwige vs Austin Kiguta and 2 others [2015] eKLR had this to say on production of documents.

> The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case" Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved? First, when the documents are filed, the documents though on the court file does not become part of the judicial record.
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> Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document.
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> Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the reference and veracity of the contents. This is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the documents when called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone, but would take into consideration all facts and evidence on record.

The Court of Appeal further stated: -

> Once a document has been marked for identification it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for is authenticity and relevance to the facts of the case. Once the foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit; it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an authenticated account.

9. In the case before the trial court, the Respondent was not called to testify and adopt his written statement as his evidence in chief as is the practice. The Respondent was also not called to produce the documents referred to in the list of documents. The court directed the parties to attach the documents to their submissions. Parties submissions do not constitute evidence. They are arguments to persuade the court in favour of their respective stand points.

10. Order 18 of the Civil Procedure Rules is clear on how a hearing should proceed and how evidence should be recorded and produced. In this case, parties and the court substantially ignored the laid down procedure. This court is alive to the provisions of Order 11 and in particular Rule (7) which gives the court the discretion to order admission of statements without calling the makers as witnesses where, appropriate. This however does not override the need to test and interrogate the veracity of the

evidence contained in such statements and documents. It is curious that in this case witnesses recorded statements but were not called to adopt or authenticate their written statement.

11. It is my further considered view that the discretion given to the court in Order 11 Rule (7) is not absolute but only limited and that explains the use of the words "where appropriate". That discretion cannot be taken to override the provisions of Order 18 on the recording and production of evidence

12. In the circumstances of this case and there having been no witness who testified and spoke to and/or produced the documents listed, and referred to in the list of documents learned magistrate, fell into error and the whole trial was rendered a nullity. There was no trial at all as contemplated by the law.

13. In the premises, and for reasons explained in this judgement above, the appeal succeeds, the judgment in Kajiado Civil Suit No 497 of 2016 is hereby set aside in its entirety.

14. The matter being fairly old, is hereby remitted to the Magistrate court differently constituted for hearing and determination on priority basis in strict compliance with the procedure as laid down in the Civil Procedure Rules.

15. Each party should bear its own costs of the appeal.

DELIVERED, DATED AND SIGNED VIRTUALLY AT KAJIADO THIS 17TH DAY OF DECEMBER 2024.

JOHN T LOLWATAN

JUDGE