



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL NO. 26 OF 2018

ANDREW W. WAFUBWA.....1ST APPELLANT

JOSEPH NANJALA.....2ND APPELLANT

VERSUS

MARY ATIENO OBUNGU.....RESPONDENT

(Being an appeal from the Judgement and Decree of Hon. J.M Mwangi, S.P.M in

Webuye S.P.M.C.C No. 320/2009 delivered on 27th April, 2018)

JUDGEMENT

The respondent (plaintiff in the subordinate court) sued the appellants over a road traffic accident which occurred on 19/5/2009 at Matisi Area along the Bungoma-Webuye highway wherein the respondent sustained injuries and therefore sought general damages, Kshs 3, 708/= in special damages, costs and interest.

The appellants filed their statement of defence denying liability and attributed the occurrence of the accident to the respondent's negligence. They also attributed the occurrence of the accident to the driver of Motor vehicle registration number KBG 319E which they alleged had blocked the road.

In support of her case, the respondent testified as PW-1 stating that she was a passenger in Motor Vehicle registration number KAP 332Q driven by the 2nd appellant and upon reaching Matisi area, the vehicle while being driven fast, plunged into the river. She lost consciousness and found herself at Webuye District Hospital. She was taken to Lugulu Mission Hospital the following day. That she sustained injuries to the chest, eyes and shoulders.

PW-2 was P.C Omar Khamesa who testified on behalf of the investigating officer who had since been transferred. He confirmed the occurrence of the accident and that the driver of motor vehicle registration number KAP 332Q was not to blame for the accident but the driver of another Motor Vehicle which had blocked the road.

PW-3 Dr. Oliver Mamati from Lugulu Mission Hospital stated that the respondent came to their facility on 19/5/2009 and on 26/5/2009. That the respondent had sustained fracture of right collar bone and dislocation of right shoulder. That the treatment notes were written by Harry Wasike who had passed on while the medical report was done by Dr. Hillary Shivaki.

The appellants on their part called one witness Dr. Mutoro from Webuye County Hospital who stated that the hospital held no records of the respondent having been treated at the facility.

In its judgement, the court awarded Kshs 350,000/= in general damages and Kshs 1,178/= in special damages. The appellants dissatisfied, preferred the instant appeal which is anchored on the following grounds;

1. That the learned trial magistrate erred in law and in fact in failing to consider the appellants'/defendants' defence and evidence which confirmed on a balance of probability that the plaintiff's injuries and treatment notes tendered as proof thereof had been fabricated.

2. That the learned trial magistrate erred in law and in fact in finding and holding that the respondent/plaintiff had proved her case and the injuries sustained on a balance of probability notwithstanding the treatment notes having been revoked by the makers.

3. ***That the learned trial magistrate erred in fact and in law in finding in favour of the respondent/plaintiff notwithstanding the appellants/defendants having established overwhelming evidence challenging the respondent's case.***
4. ***That the learned trial magistrate erred in fact and in law in failing to consider the appellants/defendants written submissions on the twin issue of liability and quantum awardable thereof.***
5. ***That the learned trial magistrate erred in fact and in law in disregarding the appellants/defendants exhibits and evidence on record disproving the respondent's/plaintiff's case.***
6. ***That the learned trial magistrate erred in law and in fact in relying on hearsay evidence.***

The appeal was disposed of by way of written submissions. The appellants filed theirs while the respondent did not despite orders of the court.

The appellants raised the following issues as germane in this appeal;-

- a. Whether the appellant should be held 100% liable for the accident.
- b. What kind of injuries did the respondent suffer and how much damages should be awarded?
- c. Whether the injuries the respondent testified on were as a result of the suit accident.

On the first issue, it is submitted that the learned trial magistrate did not enlist the individual acts or omissions of the driver of the motor vehicle to establish the causative potency in the process of apportioning relative blameworthiness, the magistrate did not establish what would amount to recklessness or carelessness and relied entirely on the doctrine of *res ipsa liquitor* while disregarding the evidence of PW2 who stated that the driver of KAP 332Q was not to blame for the accident.

On the second issue, counsel submits that treatment notes from Lugulu Hospital shows the injuries were soft tissue as confirmed by PW3 and that the nature of treatment received is not indicated in the treatment notes, that the P3 form was filled 40 days after the accident where the state of the patient showed she had arthritis of the right shoulder. Reliance has been placed in the case of ***Fadna Issa Omar vs Maine Sirengo Chipo & 3 others (2016)eKLR***

The appellants submit that the respondent did not suffer any fracture or dislocation hence the award of Kshs 350,000/= in general damages was excessive. On this issue counsel urges this court to award Kshs 90,000/= as was awarded in ***Godwin Ireri Vs Franklin Gitonga (2018)eKLR***.

On the third issue, it is submitted that the contradictory nature of the respondent's testimony shows that she was never involved in the accident or injured as alleged. That the evidence in chief and in cross examination are contradictory and even the hospital where she was treated is not clear.

Counsel submits that the initial treatment notes from Webuye District Hospital for 19/5/2009 were never produced. The defence did call a Dr. Muhoro from Webuye District Hospital who confirmed that the alleged treatment notes did not emanate from the facility.

Counsel submits by failing to call the maker of the initial treatment notes from Webuye District Hospital, the respondent failed to satisfy the conditions under Section 35 of the Evidence Act. For this proposition, counsel cites the case of ***Eastern Produce (K) Limited Vs James Kipketer Ngetich (2005)eKLR***.

For the proposition that the claim is fraudulent and rested on falsified documents that were never produced as exhibits, counsel cites the authority in ***Timsales Ltd Vs Wilson Libuywa (2008)eKLR***.

This being a first appeal, the court is guided by the holding in ***Abok James Odera t/a A.J Odera & Associates Vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR***, where the court stated the duty thus;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

Upon careful scrutiny of the evidence on record and the parties submissions filed herein, the court is of the view that the issues raised in this appeal are; whether the respondent proved her case on a balance of probability and secondly; whether the award of damages was justified in the circumstances.

The appellants' major contention on the first issue is that the documents founding the respondent's claim were forged as the maker of the documents was never called to testify. It is argued that the failure to call the maker of the document was fatal to the respondent's case and goes afoul the provisions of Section 35 of the Evidence Act which requires the production of the document by the maker.

From the record, it is not disputed that an accident did occur on the date. PW-2 in his testimony confirmed the occurrence but could not blame the driver of the motor vehicle carrying the respondent. The trial magistrate however in his judgement held that liability accrued to the appellant on the doctrine of *res ipsa liquitor*.

The dispute relates to the injuries sustained. In support of her case, the respondent produced the medical report, P3 form filled at Lugulu Mission hospital, treatment notes and police abstract. The treatment notes shows that she was treated at the facility on 26/5/2009 while the medical report shows that she was attended to at the same facility on 19/5/2009. Her evidence in chief was as follows;

...on 19/05/2009, I was from Bungoma to Webuye. I did not reach, I got an accident at Matisi near the river. The driver of the motor vehicle was driving fast and it plunged into the river. I lost consciousness. I found myself at Webuye Hospital, I was given first aid. My husband took me home. The following day, I was taken to Lugulu Hospital as an outpatient.

I was injured to the chest, eyes and shoulders. I did an X-ray while at Lugulu. Doctor indicated right shoulder was dislocated. I went back to Lugulu in 2014.....

This fact was dispelled by DW-1, Dr. Mutoro, and a medical Officer from Webuye County Hospital who stated that the respondent's names do not appear in their records. That the patient is not listed as a patient. He produced a letter Dexh-1 dated 17/1/2012 in proof.

There also is an uncertainty as to when the respondent was treated at Lugulu Hospital. In her evidence, she stated that she was taken to Lugulu Hospital as an outpatient the following day; that is 20/5/2009. The treatment notes however is dated 26/5/2020.

The medical report produced as Pexh 6 indicates that the respondent sustained right clavicular fracture. However when PW-3 testified, she stated that from the report, she could not infer whether there was a fracture since the respondent had not been referred for a X-ray.

It is now settled that the burden of proof lies on he who alleges the existence of certain facts. This is captured in Section 107 of the evidence Act which provides;

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

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The standard of proof is on a balance of probability. The question then is; given the set of facts as stated above, is the court justified in arriving at the finding that the respondent sustained the injuries mentioned?

Having noted the discrepancies as pointed out above, the court is unable to find that the discrepancies noted were human errors devoid of mischief. The fact that the police could find no fault in the driver, the discrepancies in the dates on when the respondent was treated casts doubt on when exactly the respondent was treated as well as the facility that treated her. The respondent did not prove that she sustained the injuries stated.

Having found as such, the court finds merit in the appeal. The judgement of trial court is set aside entirely and substituted with a finding that the entire suit is dismissed with costs to the appellant.

DATED AT BUNGOMA THIS 9TH DAY OF NOVEMBER, 2021

S. N. RIECHI

JUDGE