REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 3 OF 2019

AMOS KIMEU NGUTU.....APPELLANT

VERSUS

BETA BAKERS COMPANY LIMITED.....1ST RESPONDENT

BAKERS CORNER COMPANY LIMITED.....2ND RESPONDENT

[Being an appeal from the judgment of the Senior Resident Magistrate's Court at Kithimani before Honourable E.W Wambugu- Senior Resident Magistrate delivered on the 6th December, 2018 in Kithimani PMCC No.129 of 2018].

AMOS KIMEU NGUTU.....PLAINTIFF

VERSUS

BETA BAKERS COMPANY LIMITED.....1ST DEFENDANT

BAKERS CORNER COMPANY LIMITED.....2ND DEFENDANT

JUDGEMENT

1. The appellant herein sued the Respondents for damages arising from a road traffic accident which was alleged to have occurred on 14th August, 2016 when the Appellant was a pillion passenger on a motor cycle along Matuu-Kyasioni Road near Beta Bakers Company Limited. It was pleaded that the Defendants' driver so negligently left motor vehicle registration number KAT 210L in the middle of the sad road unattended and without warning signs thus causing the motor cycle on which the Appellant was travelling to collide with the said motor vehicle causing the Appellant serious injuries. The particulars of both negligence, injuries and special damages were pleaded. As a result of the failure by the Respondents, who were the Defendants to appear, a default interlocutory judgement was entered against them on 21st June, 2018 and the matter was then set down for hearing.

2. The Appellant herein relied on his witness statement in which he stated that on 14th August, 2016 he boarded an unknown motor cycle within Matuu along Matuu-Kyasioni Road at 8.pm. On reaching Beta Bakers Company Limited, the said motor cycle hit a stationary motor vehicle reg. no. KAT 210L that was parked in the middle of the road without any indication or sign. After the accident, the Appellant was rushed by good Samaritans and police officers to Matuu District Level 4 Hospital where he was treated and advised to follow up on reviews. As a result, he was found to have sustained injuries on the posterior elbow joint, injuries on the left knee joint and deep cut wound over the left knee. He was issued with both the P3 form and police abstract confirming that the driver of the said vehicle was to blame for the accident. The said abstract also confirmed that the said vehicle belonged to the Respondents which was also the position in the search certificate. The Appellant therefore blamed the driver of the said vehicle for the accident.

3. In his evidence before the Court the Appellant exhibited the treatment notes, the P3 form, police abstract, copy of the records from the registrar of motor vehicles, demand notice and medical report.

4. In her judgement, the learned trial magistrate correctly found that the interlocutory judgement having been entered against the defendants, the issue of liability was settled hence the only issues for determination before her as the quantum of damages awardable and the costs of the

suit. She however found that there were unresolved contradictions in the evidence regarding the injuries sustained by the Appellant hence raising doubts as to the actual injuries that he sustained from the accident. According to the learned magistrate while the appellant's pleadings showed that the accident took place on 14th August, 2016, the initial treatment notes and the prescription were dated 13th August, 2016, a day before the date when the accident allegedly took place. The Court also found that there was inconsistency as regards the time when the accident occurred. She therefore found that the Appellant failed to prove the injuries that she sustained as a result of the accident. She however found that based on the medical report, she would have awarded Kshs 100,000/- as general damages and Kshs 5,500/- as special damages. She however concluded that the Appellant had failed to prove his case on a balance of probabilities and dismissed the case.

5. In this appeal it is submitted that the Appellant having given evidence on oath as regards his injuries, the court ought to rely on the same since the indication in the treatment notes that the accident occurred the previous day was erroneous.

Determination

6. I have considered the foregoing as well as the submissions on record. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

7. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

8. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

9. It was therefore held by the Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

10. In this appeal, it is clear that the determination of this appeal revolves around the question whether the appellant proved his case on the balance of probabilities. That the burden of proof was on the appellant to prove their case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

> **"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."

11. 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."**

12. In **Palace Investment Ltd vs. Geoffrey 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 are 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 loose, because the requisite standard will not have been attained."**

13. Therefore, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondents even if the appellant chose to remain silent. However, in this case, there was an interlocutory judgement against the Respondents who defaulted in entering an appearance and to file their defence. The position as regards liability where an interlocutory judgement has been entered is now clear.

14. In **Charles Ogendo Ayieko vs. Enoch Elisha Mwanyumba Mombasa HCCC No. 1035 of 1983**, the Court held that:

> "Where an ex parte interlocutory judgement has already been entered against the defendant the Court does not have to decide on the question of liability."

15. The reason for that, according to the Court of Appeal in **Makala Mailu Mumende vs. Nyali Gulf & Country Club Civil Appeal No. 16 of 1989 [1991] KLR 13** is that that:

> "Judgement in default of appearance presupposes that there is a cause of action…The judge cannot set aside a Judgement without an application before him, as he has no jurisdiction to do so…Justice though must be done to both parties must be done in accordance with the law…Where judgement is entered in default liability is admitted and the Court must proceed to assess damages.

16. This was echoed in **Julius Murungi Murianki vs. Equitorial Services Ltd. & Another Nairobi HCCC No. 2714 of 1988** where it was held that:

> "The defendants herein filed no defence and they are deemed to have admitted the facts complained of under Order 6 rule 9(1) of the Civil Procedure Rules since failure to file a defence operates as an admission of all the allegations in the plaint except damages."

17. That decision was based on the decision in **Cleaver-Hume vs. British Tutorial College (Africa) Ltd [1975] EA 323** to the effect that:

> "The effect of Order 6 rule 9 (which deems to be admitted pleadings not traversed) is to ensure that the parties are ultimately, but definitely, brought to an issue, and that at the close of the pleadings the issues between the parties are clearly and precisely defined. Thus if no defence is served in answer to the statement of claim or no defence to counterclaim is served in answer to the counterclaim, there is no issue between the parties; the allegations of fact made in the statement of claim or counterclaim are deemed to be admitted and the plaintiff or defendant, as the case may be, may enter, or apply for, judgement in default of pleading…A failure to file a defence must now be regarded, save as to damage, as an admission of each of the allegations in the plaint. This is a far-reaching provision which should reduce in some measure the expense and delays in undefended suits."

18. What these decisions state is that once a default judgement is entered, the issue of liability is also determined and the only issue for determination is quantum of damages, if any. The Court cannot either ignore the fact of the said judgement or purport to *suo moto* set it aside after hearing evidence on quantum and then proceed to dismiss the suit against the defaulting party as the learned trial magistrate respectfully did. Accordingly, as far as the Respondent was concerned liability against them was a foregone conclusion.

19. In this case, it is true that the plaint averred that the accident occurred on 14th August, 2016. The initial treatment notes and the prescription were however, dated 13th August, 2016, a day before the date when the accident as pleaded took place. It is also true that there were contradictions in the evidence regarding the injuries sustained by the Appellant and that there was inconsistency as regards the time when the accident occurred.

20. The question that one has to grapple with is what if at all was the effect of the foregoing in the circumstances of this particular case in

which the Respondents did not defend the suit. In **Kenya Meat Commission vs. Raden [1990] KLR 292; [1988-92] 2 KAR 134**, the Court of Appeal expressed itself as hereunder:

> **"It is the clear duty of a court to arrive at a finding on the facts, however difficult the circumstances may be, if that is at all possible. But that duty does not extend to supplying a theory as to what happens when the inferences from the primary facts do not inevitably point that way…It is a cardinal law of procedure that a plaint, and especially the particulars of negligence, must be framed with a reasonable degree of precision so as to enable the defendant to know the case he has to meet…Fraud at common law has always had a special connotation and the allegation being a serious one, it has been rightly held that such an allegation must be strictly pleaded and proved. Fraudulent conduct must be distinctly proved, and it is not allowable to leave fraud to be inferred from the facts…The Court would hesitate to apply the rigours of the universal rule of pleading regarding fraud to a case of industrial injury which is an action of a wholly different character, involving, as it does, the recollection of witnesses of a rapid series of events in which there is understandably a risk of confusion, especially by the person injured. Again the court would be reluctant to apply rules applicable to a commercial contract to a case of personal injury but when parties agree on an issue, the court should decide the case upon that issue if it is properly framed, and arises out of the pleadings…The object of pleading is to give to the opponent fair notice of the case he has to meet so that he may direct his evidence to that issue…But in this case since the defendants did not object that the evidence was at variance with the pleaded particulars of negligence, they should not wait until the end of the case, or on appeal, and then, as it were, huff the other side for not having led evidence in accordance with the plaint. It would be most unfortunate, in a case of personal injury, if a plaintiff, who has otherwise proved his case, is deprived of his remedy due to the niceties of pleading. It would be unjust to hold the plaintiff to be non-suited because, while the general allegation is correct, the particular way in which the accident happened is at variance with the paragraph, when there are indeed other allegations in the other paragraphs which make it perfectly clear that the accident happened at work in circumstances which established on the balance of probabilities that the defendants failed in the duty of care they owed to the plaintiff."**

21. Similarly, in **Mohamed Farrah vs. Kenya Ports Authority [1988-92] 2 KAR 283; [1990-1994] EA 83** the same Court expressed itself as follows:

> **"The variance between the pleading and the evidence in this case is circumstantial and immaterial. The real test in such matters is whether there was any unfairness as regards the defendants in knowing what case they had to meet…Thus tested the plaint in this case did not in any way seem to mislead or cause injustice or unfairness to the respondent. It would be unfortunate if the plaintiff, who has otherwise proved his case, is deprived of his remedy due to the niceties of pleading."**

22. The function of pleadings, according to the above case, is to give fair notice of the case, which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. This is so because to condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. However, in this case where the case was undefended, I associate myself with the position adopted in the above cases that it would be most unfortunate, in a case of personal injury, if a plaintiff, who has otherwise proved his case, is deprived of his remedy due to the niceties of pleading and that the real test in such matters is whether there was any unfairness as regards the defendants in knowing what case they had to meet.

23. I therefore find that the learned trial magistrate, in dismissing the suit on the basis that she was unable to arrive at the injuries sustained by the Appellant based on the inconsistencies between the pleadings and the evidence was an error since as stated above, it is the clear duty of a court to arrive at a finding on the facts, however difficult the circumstances may be, if that is at all possible.

24. It is therefore my view and I hold that the learned trial magistrate erred in dismissing the Appellant's suit. As regards her view on the assessment of damages, I agree with her opinion.

25. In the premises, this appeal succeeds, the decision dismissing the case is hereby set aside. Judgement is hereby entered jointly against the 1st and 2nd Respondents and I award the Appellant Kshs 100,000.00 general damages and Kshs 5,500.00 special damages. The said award will accrue interest at court rates from the date of the judgement in the trial court till payment in full. Since the decision of the trial court was based on the state of the pleadings filed by the Appellant there will be no order as to the costs of this appeal. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 8th day of November, 2021.

G V ODUNGA

JUDGE

Delivered the absence of the parties.

CA Susan