REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO.83 OF 2019

(CONSOLIDATED WITH HCCA NO. 84/2019 & 85 / 2019)

ALEX KYALO NGIMA..... 1ST APPELLANT

LUCIA NZULA KITAKA.....2ND APPELLANT

CHARLES M. MUSEMBI.....3RD APPELLANT

-VERSUS-

KISAU GIRLS SECONDARY SCHOOL (*Sued through Chairman Board of Governors*

KISAU GIRLS SECONDARY SCHOOL.....RESPONDENT

(From the judgment in Tawa SRMCC No.s 2 of 2019, 1 of 2019 and 3 of 2019 delivered on 2/10/2019 by M.K Mutegi Senior Resident Magistrate Tawa).

JUDGMENT

1. The three appeals herein were consolidated and heard together and it was agreed also that appeal file No. 83 of 2019 will be the lead file because Tawa SRMCC No. 2 of 2019 from which it arose, was by consent of the parties, determined by the trial court as the test case in the three cases, which arose from the same accident involving motor vehicle Registration Number KAR 535L, whose beneficial owner was KISAU GIRLS SECONDARY SCHOOL.

2. In the judgment recorded as delivered on 2nd October 2010 (should be 2020) the magistrate's court in Tawa SRMCC No. 2 of 2019 concluded as follows –

> ***"It is not in dispute that the plaintiff was in the bus, what's in question is whether the plaintiff was injured in the said accident. The treatment notes were produced by non- existent medical institution having failed to call the maker of such document to testify this court cannot ascertain the validity of such medical documents and the same is hereby disregarded by this court.***
>
> ***I find that even though the plaintiff herein was in the said bus at the time of the accident he has failed to prove that he sustained any injuries.***
>
> ***As such, and since this is a claim for compensation, the plaintiff is therefore not entitled to any compensation. Each party to bear own costs. Judgment to also apply to civil cases No. 1 and 3 both of 2019."***

3. From the above judgment of the trial court dismissing the plaintiff's cases, the three appeals herein which were later consolidated, were filed through counsel Anne Thiongo & Company relying on twenty grounds as follows –

> ***1) The learned magistrate erred in law and in fact by holding that the appellant was never injured.***
>
> ***2) The learned magistrate erred in law and fact in failing to make a determination on the issue of liability and quantum against the defendant.***
>
> ***3) The learned magistrate erred in law and in fact in holding that the defendants had proved fraud and mispresentation despite the same not having been specifically pleaded in the defendant's statement of defence.***

4) The learned trial magistrate erred in law and in fact by holding that the defendant had proved fraud and misrepresentation as required by law.

5) The learned trial magistrate erred in law and in fact by holding that fraud and misrepresentation could be remedied by the production of an investigation report, despite it not having been pleaded as required by law.

6) The learned trial magistrate erred in law and in fact in considering evidence that was never on record and issuing judgment on presumptions and issues not established in evidence.

7) The learned trial magistrate erred in law and fact holding that the plaintiff ought to have called the makers of the treatment notes and medical report yet there was no objection to their production by the defendant nor was there any allegations of fraud and misrepresentation presented or even alluded to as at the time of their production.

8) The learned magistrate erred in law and fact by holding that the treatment notes were fraudulent despite no particulars of fraud being pleaded and or established.

9) The learned trial magistrate erred in law and in fact by holding that the treatment notes produced by the plaintiff were from non-existent medical institutions.

10) The learned trial magistrate erred in law and in fact by holding that the defendant adequately proved that the said medical clinic did not exist and that the plaintiff was not treated there disregarding the plaintiff's evidence regarding its location.

11) That the learned magistrate erred in law and fact by holding that the plaintiff did not sustain injuries from the said accident because she was treated at Joy Medical Clinic.

12) The learned trial magistrate erred in law and fact by disregarding the testimony by the plaintiff who had no control and/or for registration of Joy Medical Clinic.

13) That the learned trial magistrate erred in law and fact by shifting the burden of proof to the plaintiff who had no control and or responsibility for the registration of Joy Medical Clinic.

14) The learned magistrate erred in law and fact by holding that the defendant had proved fraud beyond reasonable doubt.

15) The learned trial magistrate erred in law and in fact by allowing trial by ambush to the prejudice and detriment of the plaintiff and granting leave to the defendant to introduce new evidence file investigation report after the close of the plaintiff's case and did disregarding the opposition by the plaintiff.

16) The learned trial magistrate erred in law and fact by allowing the defendant to introduce new evidence after the close of the plaintiff's case, and failing to grant the plaintiff's opportunity to present evidence to rebut the same.

17) The learned trial magistrate erred in law and in fact by basing his whole judgment on documents that were introduced after the close of the plaintiff's case.

18) The learned trial magistrate erred in law and fact by failing to properly interpret mandatory provisions of the law.

19) The learned trial magistrate erred in law and infact by completely disregarding plaintiff's submissions.

20) The learned trial magistrate's judgment was thus unjust against the weight of evidence, submissions and authorities relied upon by the plaintiff and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

4. Relying on the above grounds of appeal, the appellants have requested that the appeals be allowed, judgment of the trial court be set aside or substituted with an award on liability at 100% against the respondent and quantum in favour of the appellant, together with costs of appeal and the trial court.

5. The appeal was canvassed through filing of written submissions. I have perused and considered the submissions of both the appellants counsel Ann Thiongo & Company and counsel for the respondent M/s Archer & Wilcock.

6. This being a first appeal, I am expected to revisit the trial court's record and evaluate the evidence afresh and arrive at my own independent conclusions – see **Selle –vs- Associated Motor Boat Company Ltd (1968) E.A 132.**

7. The appellants have raised several grounds of appeal. In their submissions they list most grounds as relating to the trial court misdirected itself by admitting additional evidence irregularly and on the court's determination regarding the proof of the case by the appellants.

8. I will start by stating that the burden was on the plaintiffs/appellants to prove their case or allegations. On this I rely on section 107 and 108 of the Evidence Act, which states as follows -

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of fact 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 in that person.

108. The proof a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

9. From the evidence on record, the appellants called one witness Pw1Alex Kyalo Ngima. His evidence was that he was a passenger in the school bus KAR 535L and the driver was over speeding when the bus overturned. He was ferried by a good Samaritan with Charles Musembi and Lucia Kitaka to a hospital in Machakos which is Joy Medical Clinic for treatment. He produced treatment notes, P3 form, and Police abstract as exhibits. He was cross-examined and re-examined on the

medical facilities and the makers of medical reports like Dr. Kimunya. The defence on its part called Dw1 Thomas Odhiambo Nduku whose evidence was that he conducted private investigations and found that Joy Medical Clinic was neither registered nor did it exist at Machakos town. He was cross-examined on his investigation.

10. Counsel for the appellants has correctly listed grounds 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16 and 17 as relating to the issue of fraud wherein the trial court is said to have erred in basing its decision on an issue which was not pleaded – which is the defence allegation of non-existence of Joy Medical Clinic at Machakos. The respondent counsel does not appear to have addressed this issue in their submissions.

11. I have perused the defence of the respondent, and it was a denial of negligence, and alternatively, a plea of contributory negligence on the part of the appellants. There was no averment of fraud or any other wrong doing by the appellants. I note that the defence was a response to a plaint wherein Joy Medical Clinic was actually mentioned and its existence was not challenged.

12. Courts have held, over and over again, that parties are bound by their pleadings. See the case of **Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Anor (2000) eKLR Civil Appeal No. 106 of 2000** wherein Tunoi J.A (as he then was) stated as follows –

"It is well established that a fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The alleged to be fraudulent acts must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved".

13. In addition to the above, Order 11 of the Civil Procedure Rules has put in place a comprehensive legal framework for closing pleadings, wherein the court can give any other directions on documents, their amendments and witnesses to be used at the trial, one of which purposes being the closure of pleadings and avoidance of or preventing trial by ambush.

14. Thus though the trial court could, if the justice of the case requires, admit additional documents or reports that had not been filed and exchanged at direction stage, that would require that such documents be served before they are used in court, witness statements for those to testify be also filed and served, and if the same have the effect of amending the pleadings, then the pleadings, be amended, even if by consent of the parties.

15. This was not done in the present case where the trial court allowed a hidden investigation report to be used in evidence after the closure of the plaintiffs evidence. Thus in my view, the trial court herein erred in allowing admission of an investigation report and the respondent witness testimony, which did satisfy the legal requirements, and to anchor the court's decision on the same. The said investigation report and the evidence of the defence witness were invalid and worthless, and the trial court should not have relied on the same.

16. I now turn to the issue on whether the appellants proved their case against the respondent on the balance of probabilities, based on their witnesses evidence on record and without considering the defence evidence. It seems to be admitted that the accident involved a lot of people who were passengers in the subject accident bus, and that some of the passengers had filed suits earlier, and thus these three cases were later cases.

17. The standard of proof in civil cases is on the balance of probabilities which means that the appellants had a duty to present evidence to persuade a reasonable court to find that what they alleged was more likely to have happened, than not, since the respondent denied their allegations in their defences and also cross examined their witness.

18. The appellants called only one witness Pw1 Alex Kyalo Ngima in their test case No. 2 of 2019 – SRMCC Tawa. With regard to injuries suffered, they relied on treatment notes from Joy Medical Clinic which had been filed and exchanged before hearing. From the record, I note that though the file came up for pre-trial directions in court on 30/5/2019, there is no record that any of the documents was admitted by consent. Thus the documents relied upon had to be produced in court in such a way that they will not be hearsay evidence, as the rule on hearsay evidence also applies to documents. In this I rely on section 64 of the Evidence Act (cap.80) regarding production of primary documentary evidence, and the case of **Kenneth Nyaga Mwige –vs- Austin Kituga & 2 Others (2015) eKLR** wherein the Court of Appeal held that even documents marked for identification have to be produced in evidence as exhibits.

19. Thus in my view, the appellants should have called at least one person to testify on the medical documents, even if it was the medical practitioner who ultimately filled the P3 form, in order to avoid the pitfall of relying on hearsay evidence.

20. As it is, the appellants did not call any medical practitioner who dealt with the medical records, to support any of the medical reports relied upon. Such default rendered the medical reports they relied upon to be hearsay evidence, even though the same were produced as exhibits by Pw1. Since these documents were challenged even in cross examination, this greatly weakened the appellants' case.

21. In my view therefore, on the totality of the evidence on record, the appellants did not prove on the balance of probabilities that they suffered injuries in the accident herein, even assuming that they were passengers in the accident bus KAR 535L. On that account, the appeals will not succeed.

22. Turning now to the failure of the trial court to assess quantum of damages, in my view, the trial court should have made an assessment of damages, even after dismissing the cases. However, since the appeals are for dismissal due to failure of the appellants to prove their claims on the balance of probabilities, I will say no more on that.

23. Consequently, I dismiss the three appeals herein. Each party will bear own costs of appeal.

DELIVERED, SIGNED & DATED THIS 9TH DAY OF DECEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE