



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 12 OF 2018

GEORGE KIRIMI RINGERA.....APPELLANT

VERSUS

BOARD OF TRUSTEE

DIOCESE OF MERU IRUMA PARISH.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

(Being an appeal arising from the judgment/decree of Honourable Ms Njoki Kahara - Resident Magistrate in Chuka PMCC No.92 of 2015 delivered on 10th May 2018)

J U D G E M E N T

1. This is an appeal that arose from the decision of **Hon. Njoki Kahara, Resident Magistrate in Chuka PMCC No. 92 of 2015**. That decision was in respect of a suit brought by the Appellant against the Respondents for tort of negligence out of a road traffic accident which occurred along Chuka Meru Road on 10th October 2014 involving 3 vehicles.

2. As per the pleadings in the Subordinate Court, the Appellant was driving his motor vehicle Registration No.KBC J along Chuka- Meru road when at around Keria Bridge, the 1st Respondent's motor vehicle Registration No. KBU 947 L was negligently driven that it collided with the Appellant's motor vehicle and caused the Appellant injuries and the attendant loss and damage. The Appellant prayed for special damages and general damages for pain suffering and loss of amenities.

3. The 1st Respondent denied causing the accident and instead blamed the Appellant for substantially contributing to the accident and further shifted the blame to the 3rd parties (the 2nd and 3rd respondents herein.) At the trial, the 1st Respondent's case was that he was driving ahead of the Appellant's motor vehicle when the 3rd Party's motor vehicle veered off its lane and drove into 1st Respondent lane before hitting both its vehicle and the Appellant's vehicle. This fact was, partly confirmed by the Appellant's driver during trial because he confirmed that the motor vehicle that hit him was the 3rd party vehicle but blamed the 1st Respondent's driver for carelessness which saw his car leave its lane and veered towards oncoming 3rd party vehicle's lane and collided with it making it loose control before hitting the Appellant's vehicle.

4. The trial court found that the 3rd party (2nd and 3rd Respondent) were to blame because of failing to enter appearance and defend themselves despite being served. The trial court further found that the suit against the 1st Respondent had not been proved and dismissed the suit.

5. The Appellant felt aggrieved and filed this appeal raising the following six grounds namely:-

i) ***That the Honourable Magistrate erred in law and fact by finding that the Appellant failed to prove his case against the 1st Respondent.***

ii) ***That the magistrate erred in law and fact by failing to give reasons why she did not believe the Appellant's evidence.***

iii) ***That the honourable magistrate erred by failing to appreciate that she was under a judicial duty to assess damages whether or not the Plaintiff's case succeeded.***

iv) ***That the honourable magistrate erred by not appreciating that once directions were taken under order I Rule 22 of the Civil***

Procedure Rules the question of liability is tried in the main suit then the 3rd parties are parties to the litigation.

v) **That the learned trial magistrate erred in fact and law in failing to appreciate that once she found the 3rd party liable, then the third party ought to pay the 1st Respondent's costs and not the Appellant.**

vi) **That the honourable court erred in finding that the defendant's evidence was unchallenged when the Appellant had called two witnesses who controverted their evidence.**

vii) **That the trial court never appreciated the Appellant's case.**

6. The Appellant perhaps due to some inadvertence from his counsel inadvertently filed his written submissions on 30th May 2019 but never signed or dated the same thereby rendering them incompetent and an infringement of **Order 42 (1)** of the **Civil Procedure Rule**. The position of law is now well settled that unsigned pleadings has no validity in law because the signature in the pleadings authenticate the same and signifies ownership. Without signature, a party cannot rely on it because unsigned pleadings have no weight. They are unreliable and to that extent unuseful to the party filing it them.

In the case of **Cheraik Management Ltd -vs- National Social Security Fund Board of Trustees and Another [2012] eKLR** states that;

"In my view therefore, documents signed by an unqualified person are in the same position as documents signed by a layman, in so far as their legality is concerned. Since the said documents are executed by a person whose signature is not legally recognized, they are, in my view, in the same position as unsigned documents. What then are the consequences of failure by a person to sign documents especially the plaint? In Regina Kavenya Mutuku & 3 Others vs. United Insurance Company Limited Nairobi (Milimani) HCCC No. 1994 of 2000 [2002] 1 KLR 250 Ringera, J (as he then was) held that:

"An unsigned pleading has no validity in law as it is the signature of the appropriate person on the pleading which authenticates the same and an unauthenticated document is not a pleading of anybody. It is a nullity". See also Onyango Otieno, J's decisions (as he then was) in National Industrial Credit Bank Limited vs. Albert Gacheru Kiarie Nairobi (Milimani) HCCC No. 1863 of 1999 and Jane W Kamau vs. Kenya Ports Authority Nairobi (Milimani) HCCC No. 1575 of 1999.

In Atulkumar Maganlal Shah vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 13 of 2001 consolidated with Vipin Maganlal Shah Vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 19 of 2001 [2001] 1 EA 274; [2001] KLR 190 the Court of Appeal was of the following view:

"Where a pleading is not signed the same would be struck out rather than being dismissed...A pleading must be signed either by the advocate or the party himself where he sues or defends in person or by his recognised agent and this is meant to be a voucher that the case is not a mere fiction...The failure to sign the service copy of the statement of claim if the original is signed is not fatal.....The position in England is that a pleading must be signed either by counsel or the party in person or the party's recognised agent.....In Kenya where a record of appeal is signed by a suspended advocate who is an unqualified person is incurably defective and struck out...The position in India is that the failure to sign a plaint is merely a matter of procedure and the Court may allow a plaintiff to amend the plaint by signing the same...The object of the legislature in requiring that a plaint be signed by either the counsel or the party suing is to make the party suing or filing any other pleading take ownership and responsibility for the contents of the plaint or the pleading...In Kenya a party who files an unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law".

7. From the above decisions it is clear that the position in Kenya in regard to unsigned pleadings is that the same are either liable for striking out or disregarded. This court takes the latter position and disregards the written submissions filed by the Appellant herein for the aforesaid reasons.

8. It is also clear that from the record that parties had agreed to canvass this appeal through written submissions and since none has filed any valid submissions I will in the interest of justice determine this appeal on the basis of the petition of appeal and the ground thereof.

9. This court has gone through the record of proceedings from the lower court and the main issues for determination are;

a) *Whether the Appellant's case was proved to the required standard*

b) *Whether the trial court erred by failing to assess damages.*

c) *Whether failure of 3rd party (2nd and 3rd Respondent) failure to enter appearance and defence rendered the 1st Respondent's case unchallenged.*

(d) *Whether the Appellant's case was proved to the required standard in law.*

10. The Appellant's case in the subordinate court was that the 1st Respondent motor vehicle was being driven in a zig zag manner and that as a result it veered off its lane and collided with the 2nd Respondent's motor vehicle which in turn lost control and hit the Appellant's car. I have re-evaluated the evidence tendered as am required to do as a first Appellate court. The Appellant stated in his evidence at the trial;

" On 10th October 2014 at 7 pm I was heading to Meru. On reaching Keria Bridge I was driving motor vehicle Registration No.KBC 015 J in front of my vehicle was motor vehicle Registration No. KBU 947 L Toyota Saloon. The Saloon car was zig zaging on the road. I saw an oncoming lorry. The Saloon car went and collided with the lorry on the opposite direction heading to Chuka Town. The Saloon car left its lane and went into the lane of G.K. Lorry..... the lorry lost control and came into my lane. We collided head on my driver's side"(sic).

11. The above evidence corroborated the evidence of PC Stella Nasimiyu (PW1) a police officer attached to Chuka Police Station Traffic Base who told the trial court that the driver of Saloon car KBU 947 L was heading to Meru from Chuka direction being followed by Appellant's motor vehicle Registration No.KBC 015J and that KBU 947L suddenly lost control and hit G.K. lorry which was coming from the opposite direction of Meru headed to Chuka According to her the G.K. lorry lost control and hit the Matatu KBC 015J. She informed the trial court that the driver of the Saloon care KBU 947 L was charged with careless driving and that the case was pending for hearing at the time she testified.

12. The driver of the saloon car KBU 947L was Father Gerald Mugendi who testified at the trial and stated that the G.K. Lorry was driving from the opposite direction with its full lights on and that there was sharp bend on the bridge and in his view the body of the lorry veered to his lane and hit his car before hitting a matatu KBC 015 J behind him.

13. The trial court found that the matatu vehicle KBJ 015 J belonging to the Appellant did not collide with the Salon car KBU 947L belonging to the 1st Respondent and the Appellant's evidence was controverted by the 1st Respondent. However looking at the evidence before me, a degree of negligence was established against the 1st Respondent to the required standard which is a balance of probabilities. The police went to the scene and established that the Saloon car left its lane and veered off towards the lane of the oncoming vehicles. That is the evidence tendered by PW1 and that evidence was corroborated by the Appellant. It is also evident that the driver of KBU 947 L was charged with careless driving as per P. Exhibit 3. So while it could be true that some part of negligence could be attributed to the 3rd party driver (G.K. Lorry), due to perhaps use of full lights which could have made the driver of KBU 947L disoriented in regard to his position on the road, the main culprit in my view was the driver of motor vehicle Registration No. KBU 947 L. The evidence tendered by the 1st Respondent's driver did not rebut the Plaintiff's case and the trial court fell into error when it found so.

14. The third party did not tender any evidence in rebuttal of what the 1st Respondent stated which was using full lights on an oncoming vehicle and to that extent, the trial court was right in finding fault on his part but finding that he was 100% liable was erroneous in my view given the evidence tendered by both PW1 and PW2.

15. There is no dispute that the Appellant was at no fault at all because his motor vehicle was just hit because of collusion of motor vehicle Registration No.KBU 947 L and G.K. Lorry. In the foregoing, I find that he proved his case to the required standard that he suffered due to negligence attributable to the 1st Respondent and 2nd Respondent and the only question that the court should or ought to have determined is the contributory negligence of the 3rd party (2nd and 3rd Respondent). It was erroneous to make a finding that the 2nd Respondent was 100% to blame for the accident and proceed to dismiss the Plaintiff's case instead of embarking on quantification of damages payable. So the answer to the 2nd issue for determination in this appeal is in the positive. The trial court erred by failing to assess damages even after finding that the 3rd party was to blame for the accident. The finding of 100% liability was erroneous in my view because it was not supported by facts (evidence) tendered during trial in court.

12. Taking everything into consideration this court finds that the 1st Respondent was 80% liable to the accident while the other 20% was attributable to the 2nd and 3rd Respondent.

17. On the 3rd issue that is whether failure by the 3rd party to enter appearance and defence rendered the 1st Respondent's defence unchallenged, is that this court has already found that the 1st Respondent was to a large degree to blame for the accident. The 20% liability attributed to the 2nd and 3rd Respondent is on account that they neither entered defence or tendered any evidence in rebuttal. Failure by the 3rd party to enter defence or appearance does not mean that the Plaintiff's case has not been proved. A court of law is required to make a finding on liability based on the evidence tendered. It is not automatic that a plaintiff will always succeed if a defendant fails to enter appearance or defence. He/she is always has the onus of proof and the burden is not necessarily shifted because a defendant fails to enter appearance. That is why certain cases has to go for formal proof in order for the Plaintiff to formally proof his case. That also obtains in regard to a 3rd party. A defendant will not automatically succeed because of failure by the 3rd party to enter appearance and defence. If the Plaintiff successfully establishes his claim against such defendant, he or she is required to offer evidence in rebuttal and show that it is the 3rd party who infact should carry the blame. In the instant case, as I have already found out that was not done and the trial court fell into error when he punished the Appellant for the inaction of the 3rd party. The Appellant was not to blame for the failure of the 3rd party to enter appearance and defend itself.

18. In the foregoing I find that the Appellant did prove his case on liability and the 1st Respondent ought to have been found 80% liable while the 2nd and 3rd Respondent 20% liable.

19. On quantum this court finds as observed above that the trial court should have proceeded to assess damages. It did not and that was erroneous. Consequently this court shall proceed to assess the damages as follows:-

i) Special damages pleaded and proved - Kshs.14,500/-

ii) General damages - The plaintiff had submitted that 400,000/- would be fair compensation for injuries sustained. The defence on its part submitted that Kshs.250,000/- would suffice.

This court guided by the authorities finds that an award of Kshs.300,000/- would be fair and just.

I also award the Appellant costs and interests in both the lower court and in this appeal.

In the end this court for the reasons aforesated hereby allows this appeal and sets aside the Judgment delivered on 10th May 2018. In its place I enter judgment for the Appellant against the 1st Respondent who shall shoulder 80% liability and 2nd and 3rd Respondents who shall shoulder 20% liability. The 1st Appellant is awarded Kshs.14,500/- special damages and Kshs.300,000/- General damages plus costs and interests both in the lower court and in this appeal. The costs are to be agreed upon and/or assessed.

Dated, signed and delivered at Chuka this 10th day of February 2020.

R.K. LIMO

JUDGE

10/2/2020

Judgment dated, signed and delivered in the open court in presence of Ogweno for Appellant and in the absence of Respondents.

R.K. LIMO

JUDGE

10/2/2020