



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CIVIL APPEAL NO.66 OF 2017

HNM (Suing as next friend to HK -MINOR).....APPELLANT

=VERSUS=

MARY NZISA MUTHINI

ELIZABETH KATUMBI MUTHINI

MALKIA TRANSPORTERS.....RESPONDENTS

(Being an appeal from the judgement and decree of the Honorable Y.A. Shikanda

in Machakos CMCC149 of 2016 delivered on 27.4.2016)

BETWEEN

HNM (Suing as next friend to HK -MINOR).....PLAINTIFF

=VERSUS=

MARY NZISA MUTHINI.....1ST DEFENDANT

ELIZABETH KATUMBI MUTHINI.....2ND DEFENDANT

MALKIA TRANSPORTERS.....3RD DEFENDANT

JUDGEMENT

1. According to a plaint filed in the subordinate court on 15th March, 2016 by the appellant as next friend of the minor, the minor was a passenger in a Motor Vehicle registration number KBA 241N when while he was travelling on 11.7.2015 along Nairobi- Mombasa Road the said vehicle KBA 241N registered in the names of the Alex Muthini now deceased forming part of his estate and beneficially owned by the 3rd respondent, rolled on its side causing the accident and resulted in serious injuries to the appellant. The appellant pleaded vicarious liability and also pleaded negligence as particularized in Paragraph 6 of the Plaint and special damages of Kshs4,050/-. The appellant sought special and general damages for pain, suffering, interest and costs of the suit.

2. In their joint defence, the respondents denied the accident; denied ownership of the suit vehicle and denied negligence as well as the doctrine of vicarious liability. They denied the injuries, their particulars and special damages and pleaded that the accident was caused by the negligence of the plaintiff as particularized in paragraph 6 of the joint defence. It was pleaded that the accident occurred as a result of inevitable accident and prayed that the suit be dismissed with costs. It was pleaded that the appellant's claims were fatally defective and that they would seek to strike out the claims.

3. The hearing of the matter commenced on 14.11.2016 with HNM testifying as Pw1. She told the court that the minor was her son who was injured on both legs and chest. She testified that the matter was reported to Machakos police station where she was issued with a P3 form that was filled by a doctor and she paid Kshs 1,550/- and that she was issued with an abstract by the police. She testified that her son was examined by a doctor and she tendered the medical report as well as a receipt for payment of the same. She tendered a grant showing that the 1st and 2nd defendants were administrators of the estate of the deceased registered owner of the suit vehicle. It was her testimony that the minor had healed but still complained of headaches. On cross examination, she testified that she did not witness the accident but was told

about how it had happened. She testified that the minor would explain how the accident occurred. On reexamination, she testified that the abstract indicated that the minor was injured.

4. The appellant closed their case and so did the respondents without calling any witnesses. The learned magistrate in his judgement found that the abstract was not prima facie evidence of liability. Reliance was placed on Section 63 of the Evidence Act and it was found that the evidence of Pw1 was mere hearsay and therefore could not be relied upon. It was found that there was no tangible evidence of an accident save only that the respondents were the owners of the suit vehicle. In placing reliance on the case of **MbiloNzekiMunyasa & Another v Malde Transporters Ltd & 2 Others (2015) eKLR and Lakamshi v A.G. (1971) EA 118**, it was found that negligence had not been proven and thus the appellant's suit was dismissed. On the issue of quantum, in placing reliance on the case of **Gladys WanjiruNjaramba v Globe Pharmacy & Another (2014) eKLR**, it was found that had the claim succeeded, an award of general damages of Kshs140,000/- and special damages of Kshs3550/- would have been adequate which decision has precipitated this appeal.

5. This appeal is against the finding of the trial court on proof of the appellant's case. The contents of the appellant's appeal are set out in the memorandum of appeal filed on 10.5.2017. Counsel prayed that the appeal be allowed, the judgement of the trial court be set aside; that this court make a finding of 100% liability for the appellant against the respondent and an assessment of damages payable as per the lower court.

6. Counsel for the appellants submitted that in terms of Order 32 Rule 1 of the Civil Procedure Rules, there was no provision for the minor having filed the suit to attend court to testify in the matter. Reliance was placed on the case of **Gitahi & Another v Moboko Distributors Ltd & Another (2005) 1 EALR 65** that was to the effect that a case is to be decided on the evidence before it and on the law and that judgement would flow from the issues raised in the pleadings. Learned counsel assailed the trial court for failing to invoke Article 159(2)(d) of the Constitution in failing to call for the minor if his attendance was necessary. Counsel submitted that the trial magistrate ignored the contents of the abstract and yet its authenticity was never challenged by the respondents. Counsel prayed that the appeal be allowed as prayed.

7. Counsel for the Respondent made no submissions.

8. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that reach so as to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.

9. Having considered the pleadings and the rival submission of the parties as well as the evidence in the trial court, the singular issue for determination is whether the appellant proved her case to the required standard.

10. Sections 107, 108 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya places the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. The learned author **WVH Rodgers, Winfield and Jolowicz on tort 17th Edition Sweet and Maxwell, 2006 at 132** as well as case law stated that the elements of negligence remains this:

(a) there is a duty of care owed by the defendant -

(i) the defendant would foresee the reasonable possibility of his conduct injuring another and causing him loss; **Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd or Wagon Mound (No. 1) (1961) 1 All ER 404** and

(ii) the defendant would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.

In assessing whether the appellant took reasonable steps, the court will consider:

(i) The degree or extent of the risk created by the actor's conduct;

(ii) The gravity of the possible consequences if the risk of harm materializes;

(ii) The utility of the actor's conduct; and

(iv) The burden of eliminating the risk of harm. See **Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The "Wagon Mound" (No 2)) [1967] 1 AC 617**

(c) The failure to take steps resulted in injury to the plaintiff.

11. The appellant wants the court to find that in the absence of uncontroverted evidence, the accident that was caused was as a result of negligence on the part of the respondents. This position is in agreement with the circumstances in the case of **Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another [2015] eKLR**, where the court observed that:

The evidence of the plaintiff on the occurrence of the accident attributed negligence to the 2nd respondent in that he was over speeding and driving without due care and attention causing the vehicle to lose control. This evidence was not controverted since the defendant chose not to tender any evidence. The 2nd defendant was charged with a traffic offence. The plaintiff therefore

proved negligence on the part of the 2nd respondent.”

12. The circumstances in the above case were different from the instant case where there was no evidence of how the accident occurred. This brings into play the issue of admissibility of evidence. Pw1 told the court that she was informed of how the accident occurred and that she did not witness the same. As counsel for the appellants rightly put it, in the adversarial system, it is the parties who control the witnesses who testify and the appellant had every right to call his witnesses and therefore it was incorrect for her to blame the trial court for failing to call the minor. The trial magistrate simply sat as an umpire and relied on what evidence was put before him to make a finding.

13. It is trite law that evidence other than that by the person who saw, felt, heard or touched shall be considered hearsay evidence. (See **Section 63 (1) and (2) of the Evidence Act**. In the **12th edition of Phipson on Evidence**, the following statement is given: “Former oral or written statements by any person, whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted”. (para. 625 (12th ed. 1976)) Thus, in a trial for negligence, a guardian cannot give evidence of what a victim told him. Nor could a written statement by the victim to the same effect be adduced.

14. It is important to note that there are exceptions to the Rule against hearsay. In **Cullen v. Clarke [1963] I.R. 368, 378**, Kingsmill Moore J. gave his opinion on the same:

“In view of some of the arguments addressed to the Court, it is necessary to emphasize that there is no general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There is a general rule subject to many exceptions that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert; This is the rule known as the rule against hearsay. If the fact that the words were spoken rather than their truth is what it is sought to prove, a statement is admissible.”

15. Material to this appeal, under the doctrine of *res gestae* contemporaneous spontaneous statements about a fact in issue or as to the state of mind of the maker at any relevant time are admissible as evidence of the truth of their contents. Similarly public documents, i.e. entries made by authorized agents of the public relating to facts of public interest or notoriety are generally admissible at common law. Evidence given in previous proceedings between the same parties may be read at a subsequent trial provided the issues are the same, the witness who made the statement is unavailable and the other side had the opportunity of cross-examination in the previous proceedings. See Section 33, 38, 45, 68 and 79 of the Evidence Act. In my view the court rightly addressed itself as to the probative value of the evidence of Pw1 and correctly rejected it as proof of the appellant’s case.

16. Whereas it can be argued that indeed an accident occurred, this is not in itself proof of negligence in the absence of other sufficient evidence. See Section 106 of the Evidence Act. I therefore agree with the trial court that there was no proof of negligence on the part of the appellant and the dismissal of the suit was proper.

17. According to section 175 of The Evidence Act, the improper admission or rejection of evidence is not to be ground of itself for a new trial, **or reversal of any decision in any case**, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. Having satisfied myself that the trial court was justified in making the finding that it did, I find that whether or not the abstract was accepted as evidence, it still would not have proved the appellant’s case on a preponderance of probabilities. Consequently I find that the appellant did not discharge the burden of proof on liability against the respondent.

18. Even though the issue of liability has not been proved against the appellant this court is mandated to deal with the question of quantum of damages suitable to the appellant had her suit succeeded. The medical report by Dr.Kimuyu indicates that the appellant suffered soft tissue injuries to the head, chest, right knee and left knee. The trial court had assessed quantum of general damages of Kshs 140,000/-. I find the said sum would have been sufficient to cater for pain, suffering and loss of amenities. In any case the victim of the accident was a minor who was likely to heal quickly unlike an adult. It is noted that the said victim had been an outpatient and no evidence was tendered to show that other hospital visits were made.

19. In the result it is my finding that the appeal is devoid of merit. The same is dismissed with costs.

Orders accordingly.

Dated and delivered at Machakosthis 5thday of May, 2020.

D.K.Kemei

Judge