REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NUMBER 135 OF 2018

BETWEEN

SOCFINAF COMPANY LIMITED.....APPELLANT

AND

PETER MBUGUA NJOKI.....RESPONDENT

(Being an appeal from the original judgment and decree of Hon. C. Kutwa, Principal Magistrate delivered on 20th September 2018 in Githunguri Civil Case No. 158 of 2008)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. The appellant, having been dissatisfied with the decision of the trial court aforementioned lodged this appeal on 19th October 2018 seeking *inter alia* that the appeal herein be allowed with costs and that the trial court's decision be set aside and be substituted with an order dismissing the suit against the appellant based on the following grounds as set out in the amended memorandum of appeal:

> **a) The learned magistrate erred in law and fact in assessing general damages on the basis of unproved allegations as to injuries in the plaint.**
>
> **b) The learned magistrate erred in law and fact in treating the pleadings as medical reports for purposes of assessing damages.**
>
> **c) The learned magistrate acted in excess of jurisdiction in making an award for general damages which had not been proved to the required standard.**
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> **d) The learned magistrate erred in law and fact in disregarding the submissions filed by the appellant.**
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> **e) The learned magistrate erred in law and fact in failing to interrogate the claim for general damages in the same way it interrogated that of special damages.**
>
> **f) Consequent to the foregoing, the learned judge erred in law and fact in failing to dismiss the suit against the appellant.**

2. The appellant prayed for orders:-

> **i. THAT this appeal be allowed.**
>
> **ii. THAT the judgment of the trial court be set aside and be substituted thereof with an order dismissing the suit against the appellant with costs.**
>
> **iii. THAT the costs of the appeal be borne by the respondent.**

iv. THAT this honorable court makes such further orders that will meet the ends of justice.

Background

3. The respondent filed a suit by way of a plaint in the lower court against the appellant where he sought *inter alia* general damages together with costs of the suit and interest on the same arising out of an accident that occurred on or about the 8th day of December, 2007 involving the respondent, who was a passenger/loader in the appellant's motor vehicle registration number KAD 352D. The respondent claimed that the accident occurred along Ruiru-Kwa Maiko Road, where the appellant's authorized driver, agent and or servant negligently and/or recklessly drove the said motor vehicle that it veered off from its lane and caused it to ram into and or collide with motor vehicle registration number KWK 506 and resulted in the respondent sustaining serious injuries. The respondent held that the appellant was liable and/ or vicariously liable in negligence.

4. The suit was defended by the appellant who filed a statement of defence dated 18th March 2008 denying the contents of the amended plaint therein and blaming the owner, driver and/or authorized agent of the driver of motor vehicle registration number KWK 506 for being negligent and solely causing and/or substantially contributing to the accident.

5. A consent on the issue of liability was entered in the ratio of 50:50 between the parties and the court ordered that the issue of quantum be canvassed by way of written submissions. At the conclusion of the trial, the learned trial magistrate entered judgment for the respondent against the appellant by awarding Kshs. 400,000/- as general damages together with costs of the suit and interest thereon.

6. It is the said judgment that forms the basis of the instant appeal. The appellant filed an application dated 29th October 2019 seeking *inter alia* an interim stay of the lower court's judgment which was granted by the court on 1st November 2018 on condition that the appellant deposits Kshs. 200,000/- within seven days of the ruling thereof. The appeal was disposed by way of written submissions which are on record and were highlighted by both parties.

Duty of this Court

7. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis bearing in mind the fact that this court did not have an opportunity to hear the witnesses first hand. This is captured by ***Section 78 of the Civil Procedure Act*** which espouses the role of a first appellate court which is to: ***'…… re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'*** This provision was buttressed by the Court of Appeal in the case of ***Peter M. Kariuki v Attorney General [2014] eKLR*** where it was held that:

> ***"We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See* NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No. 38 of 2002 *(unreported)."***

The appellant's submissions

8. The appellant submitted that for a personal injury claim to succeed, the respondent ought to prove that the appellant was liable in negligence for the accident and that the respondent sustained the injuries pleaded. The appellant further stated that the consent on liability only amounted to an admission that there was an accident that occurred for which the appellant was partly to blame but not that the respondent sustained the injuries pleaded. The appellant submitted that the burden remained upon the respondent to adduce evidence that as a result of the accident he sustained the injuries pleaded for which he was seeking compensation The appellant added that the respondent failed to discharge the burden of proof as no evidence at all was produced to substantiate the injuries pleaded in the plaint which therefore remained mere allegations. The appellant stated that in the absence of a medical report, there was no basis upon which the trial court could determine the question of quantum.

9. The appellant also submitted that the learned trial magistrate erred in treating the pleadings as evidence of the injuries sustained when the appellant had denied the particulars of injuries and put the respondent to strict proof. The appellant contented that treatment notes, hospital discharge summary or a medical report would have provided evidence of the injuries sustained but not the plaint itself. The appellant added that the trial court ought to have interrogated the claim for general damages as it did special damages which it found to not have been proved.

10. The appellant finally submitted that having failed to produce evidence in support of the averments in the plaint, the pleadings remained mere allegations which respondent failed to prove, including the allegation of injuries sustained.

The respondent's submissions

11. The respondent submitted that he pleaded and particularized the injuries in the plaint which were supported and relied upon by the medical report of Dr. Jane Ikonya which confirmed the injuries sustained by the respondent and that it was on the basis of this report that the trial court proceeded to assess damages. The respondent stated that the standard of proof was one on a balance of probabilities and that from the evaluation of the evidence on record, the respondent discharged his duty of proving injuries he sustained therein.

Legal Analysis and Determination

12. Having gone through the record and written submissions together with the authorities cited therein by both parties and from my deduction, the following are the issues for determination:

a) Whether the respondent proved the injuries sustained.

b) Whether the trial court erred in awarding the respondent Kshs. 400,000/- as general damages.

Whether the respondent proved the injuries sustained

13. In the case of ***East Africa Portland Cement, CFC Stanbic Limited & another v Peter Ividah Muliro [2019] eKLR*** **G.V Odunga J** held as follows:

> ***"3. It is clear that before the trial court, apart from the consent on liability, no hearing took place. Nor did the parties agree to produce any document by consent. It would seem that the court relied on the plaint and the plaintiff's list of documents which were filed in the said suit.***
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> ***4. That averments in pleadings are not evidence was appreciated in Francis Otile vs. Uganda Motors Kampala HCCS No. 210 of 1989 where it was held that the court cannot be guided by pleadings since pleadings are not evidence and nor can they be a substitute therefor. Before that the then East African Court of Appeal held in Mohammed & Another vs. Haidara [1972] E.A 166 that the contents of a plaint are only allegations, not evidence. According to Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997, where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:***
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> ***"Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth."***
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> ***5. What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002, Lesiit, J citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 appreciated that:***
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> ***"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail".***
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> ***6. Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.***
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> ***7. No documents were produced either by consent or otherwise. The receipts were annexed to the submissions instead. It would seem that the parties believed having recorded a consent on liability each party was at liberty to annex the documents in support of the quantum. It was not stated that the said documents were to be produced in evidence because the consent did not deal with the calling of witness.***
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> ***8. I have had occasion to lament about the increasingly common practice by parties after recording a consent on liability to proceed with submissions based on their list of documents as if the said documents are exhibits. To my mind once parties agree on liability they ought to proceed with the process commonly referred to as formal proof under which the plaintiff formally proves the loss suffered particularly as regards special damages which must not only be specifically pleaded but must be strictly proved….***
>
> **……..**
>
> ***12. In this case, however, instead of producing the exhibits by consent or otherwise, the parties proceeded to file submissions instead. No exhibits were produced before the trial court. The law is clear on how exhibits are to be produced. Even in a full-fledged trial, if documents are simply referred to by witnesses but not formally produced they do not acquire the status of exhibits in the case. This was the position in Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR …"***

14. The aforementioned case is very similar to what transpired in the trial court in the instant case. After consent on liability was entered, no hearing took place, no *formal proof* was conducted for the respondent to prove his case by way of evidence and production of exhibits and no consent was entered for the production of any documents as exhibits. The trial court ordered that the parties canvass the issue of quantum by way of written submissions. The Court of Appeal, in the case of ***Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR*** held that submissions can never take the place of evidence and do not constitute evidence. The appellate court added that submissions are generally parties' *"marketing language"* with each side endeavouring to convince the court that its case is the better one. The record indicates that the learned trial magistrate considered the parties' submissions and pleadings in determining the case. The Court of Appeal in ***Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997*** held that no judgment can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the *Civil Procedure Rules (now Order 18 rule 2 of the* ***Civil Procedure Rules****).* The Court of Appeal in ***Muchami Mugeni vs. Elizabeth***

Wanjugu Mungara & Another Civil Appeal No. 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence deplorable.

15. It follows therefore that in the absence of any documents being produced as evidence or any witnesses testifying to the purported injuries sustained by respondent, the averments in the respondent's pleadings remained statements of facts which were unsubstantiated. I have perused the record and I cannot find any 'medical report by Dr. Jane Ikonya' as submitted by the respondent and even if I was to find it, the said report was not produced as evidence meaning it did not form part of the judicial and evidential record (See the Court of Appeal in ***Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR supra.)***

16. To this end, I find that the averments pleaded in the respondent's plaint on the injuries he sustained were not proved by oral evidence and thus remained unsubstantiated.

Whether the trial court erred in awarding the respondent Kshs. 400,000/- as general damages.

17. My finding on the first issue leads to me to conclude in the affirmative on this issue. The award of Kshs. 400,000/- as general damages in favour of the respondent as granted by the trial court was an error as it was not based on any evidence.

18. ***Order 18 rule 2 of the Civil Procedure Rules****,2010* reads as follows:

"2. Unless the court otherwise orders—

> ***(1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.***
>
> ***(2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case.***
>
> ***(3) The party beginning may then reply."***

19. From the above, it is clear that whichever way one looks at it, it is a requirement that evidence be produced in support of the issues in contention whether at the hearing or by consent. The decision of the trial court to not conduct a hearing or call for the production of evidence and instead order the parties to canvass the issue of quantum by way of written submissions was a fatal error and rendered the whole trial a nullity. There was in fact no trial at all as contemplated by the law. In ***Mumias Agricultural Transport vs. Sony Agricultural Ltd. Civil Appeal No. 201 of 1997***, the Court of Appeal held that where no trial is carried out as known to law the matter is to be remitted back for hearing. In the circumstances, since 50% of liability was admitted by the appellant, it would be in the interests of justice that the issue of quantum be properly canvassed in a hearing and evidence (if any) be produced.

Conclusions

20. In the foregoing, it is my finding that the appeal is merited and ought to be allowed. I hereby allow the appeal and set aside the entire judgment of the trial court. The matter shall be remitted back to the lower court for hearing and determination in accordance with the law but before a magistrate other than Hon. C. Kutwa, on the issue of quantum. Additionally, the consent on liability shall remain undisturbed.

21. As the appeal succeeds, the order of the court dated 1st November 2018 is hereby vacated and the sum of Kshs. 200,000/- that was deposited by the appellant as security be released to them.

22. As regards costs of this appeal, I order that each party bears its own costs.

23. Orders accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned electronically at Kiambu on this 21st day of May 2020

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CHRISTINE W.MEOLI

JUDGE