



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.23 OF 2016

BETWEEN

SIMON NYONGESA EFUMBI APPELLANT

AND

STEPHEN OCHIENG ONYANGO 1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY 2ND RESPONDENT

(Being an Appeal from the judgment and decree in Busia Chief Magistrate's Court Civil Case No. 307 of 2008 by Hon. Washika Wachira-Senior Resident Magistrate).

JUDGMENT

1. The appellant herein, was the plaintiff in the Busia Chief Magistrate's Court Civil Case Number 307 of 2008. The appellant had sought special and general damages following injuries that arose out of a road traffic accident with motor vehicle KVC 589 Bedford lorry. He blamed the respondents for the accident. On 17th August 2016, the learned trial magistrate delivered a judgment that dismissed the claim.

2. The appellant was aggrieved by the judgment and filed this appeal. The appellant was represented by the firm of Nandwa & Company, Advocates. He raised the following grounds:

- a) That the learned magistrate erred in law and in fact in holding that the appellant was stealing a ride when the abstract produced indicated that the matter was pending under investigations.
- b) That the learned magistrate erred in law and in fact in dismissing the appellant's case when there was no evidence produced by the defendants to challenge the plaintiff's evidence.
- c) That the learned magistrate erred in law and in fact by failing to quantify the appellant's claim.
- d) That the actions of the learned magistrate have resulted in a miscarriage of justice.
- e) That the learned trial magistrate's findings were against the weight of evidence adduced by the appellant and have led to a miscarriage of justice.

3. The first respondent was represented by the firm of Ashioya & Company Advocates, while the second respondent was represented by the firm of Otieno, Ragot & Company Advocates. The second respondent did not file any grounds of opposition or submissions. The first respondent opposed the appeal and prayed that it be dismissed.

4. On 30th January 2020, the parties herein sought to canvass the appeal by way of written submissions. The same was allowed. The appellant and the first respondent filed their submissions but the second respondent did not do so.

5. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

6. The learned trial magistrate reached her conclusion that the appellant was stealing a ride from the evidence of Nelson Mwangi (PW2) the Busia Traffic Base commander. At the time of his evidence, this witness was in Busia for one year. This therefore means he was only adducing documented evidence. He only produced one police abstract which is dated 3rd April 2018. In this document, the victim of the accident is indicated to have been a pedestrian. Nowhere on this document is it indicated that he was stealing a ride. His averment that the appellant was stealing a ride is not supported by any documentary evidence.

7. The first respondent in his statement of defence attributed the following actions to the appellant:

- a) Staggering into the path of travel of the defendant's vehicle when it was unsafe.
- b) Darting across the road without first ascertaining that it was safe and thereby knocking himself on the defendant M/V.
- c) Walking haphazardly and without due care and attention.
- d) Failing to take any or reasonable precaution for his personal safety whilst crossing the highway.
- e) Failing to heed warning as hooting and lights by the defendant.
- f) Being careless and negligent whilst walking and crossing the road.
- g) Failing to keep any or any proper look out.
- h) Walking on or near the said road without any regard to his own safety.
- i) Attempting to cross the road in face of the traffic on the road without any or any due regard to the traffic on the road.
- j) Exposing himself to risk or danger which he knew or ought to have known by his rush and negligent running.
- k) Jumping from a moving M/V.
- l) Causing the accident.

8. The second respondent's statement of defence blamed the appellant for the accident in the following manner:

- a) Standing on the wrong side of the road.
- b) Running into the path of motor vehicle registration number KVC589.
- c) Standing carelessly and without due regard to his safety.
- d) Failing to heed the presence of motor vehicle registration number KVC589 on the road.
- e) Otherwise causing the accident.

It is trite law that parties are bound by their pleadings. The Court of Appeal in the case **Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR** cited with approval the decision in **Adetoun Oladeji (NIG) LTD vs. Nigeria Breweries PLC S.C. 91/2002**, where Judge Pius Aderemi J.S.C. expressed himself as follows;

...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

On the same case, Judge Christopher Mitchell J.S.C. expressed himself as follows:

In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

I therefore find that the learned trial magistrate erred in allowing what was not pleaded to influence her decision.

9. Going through the pleadings and the evidence that was adduced it is not clear who caused the accident. When such a scenario manifest itself, liability is shared equally. The Court of Appeal decision in **Hussein Omar Farah vs. Lento Agencies Civil Appeal 34 of 2005[2006] eKLR** stated that:

In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to

blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.

In the instant case I would apportion liability as between the appellant and the respondents at 50:50.

10. The learned trial magistrate did not indicate what award she could have given, had the claim succeeded. The appellant had proposed Kshs. 2,000,000/= and had relied on the case of **Mwaura Muiruri vs. Suera Flowers Limited & another [2014] eKLR. In this case the plaintiff had sustained the following injuries:**

- (a) Multiple lacerations on the face;
- (b) Soft tissue injuries on the chest cage (mainly left submaxillary area);
- (c) Comminuted fractures of the right humerus upper and lower thirds of the tibia; and
- (d) Compound double fractures of the right leg upper and lower 1/3rd tibia fibula.

11. At the time of trial, the plaintiff had the following complaints:

- a) Inability to use the right arm;
- b) Pain in the right upper arm;
- c) Inability to walk without support; and
- d) Occasional pain in the right knee especially at night.

He was awarded Kshs.1, 450,000/= for pain and suffering on 28th February 2014.

12. The second respondent on other hand proposed an award of Kshs.450, 000/= for pain and suffering and relied on **Francis Ouma Oranja vs. Harun Murithi Waweru & another [2012] eKLR** where an award of Kshs.450, 000/= was given. The appellant had sustained the following injuries:

- a) Tenderness in the chin, left cheek and both thighs.
- b) Scars on the above named regions.
- c) Fracture of the right femur.

13. In the instant case, the appellant sustained the following injuries:

Fracture of the right femur

14. At the time of examination, the following were observed:

- a. He had shortening of the right lower limb by 5cm.
- b. He had 2 small scars left behind by Steinman's pin used in the Russel's traction on the upper region of the right shin.
- c. Fracture of the right femur was found to have clinically united.

15. The prognosis was as follows:

This man suffered serious skeletal (hard tissue) injury to this right lower limb i.e. a closed fracture of his right femur lower 1/3. This fracture has clinically reunited but it is still undergoing consolidation. There is already shortening of the right lower limb by 5cm. This a permanent defect which can only be corrected by wearing special shoes. Complete recovery is expected within one year from now but he now has permanent physical disability of 15% by workman compensation scale.

16. Doing the best I can, factoring the gravity of injuries sustained and the time that has passed since the decisions cited were made, I am persuaded to award Kshs. 1,800,000/= for pain and suffering and Kshs.13525/= special damages pleaded and proved. This will be subject to contribution.

17. Since both parties share liability, the appellant will be entitle to half costs in this court and the lower court.

DELIVERED and SIGNED at BUSIA this 3rd day of June, 2020

KIARIE WAWERU KIARIE

JUDGE