



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 547 OF 2013**

**MARY EMASE.....1<sup>ST</sup> APPELLANT**

**JULIUS NJERU.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**THE SOCIETY OF MARY (MARIANISTS)**

**REGISTERED TRUSTEES.....RESPONDENT**

***(Being an appeal against the judgment and decree of Honourable M. C. Chepseba (Mrs.) (Senior Principal Magistrate) delivered on 23<sup>rd</sup> September, 2013 in Milimani CMCC No. 8736 of 2005)***

**JUDGEMENT**

1. At the onset, the respondent herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated 9<sup>th</sup> August, 2005 and sought for reliefs against the 1<sup>st</sup> and 2<sup>nd</sup> appellants jointly and severally in the nature of special damages in the sum of Kshs.461,599/ together with costs of the suit and interest thereon.
2. The respondent averred in its plaint that it was at all material times the registered owner of motor vehicle registration number KAN 887P ("the first motor vehicle") while the 1<sup>st</sup> appellant was at all material times the registered owner of motor vehicle registration number KAM 955R Toyota Corolla ("the second motor vehicle") being driven by the 2<sup>nd</sup> appellant at all material times.
3. The respondent further pleaded in its plaint that sometime on or about 4<sup>th</sup> October, 2003 an accident took place along Langata Road involving the first and second motor vehicles, and attributed the accident to negligence on the part of the appellants by setting out its particulars in the plaint.
4. It was the averment of the respondent that the first motor vehicle was extensively damaged as a result of the accident and set out the particulars of loss/damage under paragraph 7 of the plaint, totaling a sum of Kshs.461,599/.
5. Upon service of summons, the appellants entered appearance and put in their joint statement of defence and counterclaim dated 27<sup>th</sup> January, 2006 to deny the respondent's claim.
6. In their defence, the appellants denied occurrence of the accident as well as the particulars of negligence and damage laid out in the plaint.
7. The appellants pleaded in their amended counterclaim that without prejudice to the foregoing, the accident involving the first and second motor vehicles was purely the result of negligence on the part of the respondent through its driver and further pleaded that consequently, the 2<sup>nd</sup> appellant sustained serious injuries which were particularized in the counterclaim.
8. It was the averment of the appellants that in addition to the injuries suffered by the 2<sup>nd</sup> appellant, the second motor vehicle was damaged.
9. Consequently, the appellants sought for separate reliefs on the counterclaim: the 1<sup>st</sup> appellant sought for special damages for damage to the second motor vehicle in the sum of Kshs.180,000/ together with general damages and costs of the suit plus interest. On his part, the 2<sup>nd</sup> appellant sought for general damages for pain and suffering, special damages in the sum of Kshs.424,857/ and costs of the suit together with interest.
10. At the hearing of the suit, the respondent called one (1) witness while the appellants relied on the testimonies of two (2) witnesses

including the 2<sup>nd</sup> appellant.

11. Upon considering the evidence and the written submissions filed by the parties, the trial court dismissed both the respondent's claim and the appellants' counterclaim.

12. Being aggrieved by the above decision, the appellants sought to challenge the same by way of an appeal. Through their memorandum of appeal dated 15<sup>th</sup> October, 2013 the appellants put in the following grounds:

*i. THAT the learned trial magistrate erred in law and in fact in finding that the 1<sup>st</sup> appellant did not prove her case against the respondent.*

*ii. THAT the learned trial magistrate erred in law and in fact in finding that the 2<sup>nd</sup> appellant did not prove his case against the respondent.*

*iii. THAT the learned trial magistrate erred in law and in fact in holding that the appellants never filed a defence and counterclaim when they had filed one on 30<sup>th</sup> January, 2006.*

*iv. THAT the learned trial magistrate erred in law and in fact in dismissing the appellants' counterclaim.*

*v. THAT the learned trial magistrate erred in law and in fact in failing to find that the appellants were entitled to costs of the suit and of the counterclaim.*

13. This court issued directions to the parties to file written submissions on the appeal. In their submissions dated 15<sup>th</sup> November, 2019 the appellants argued that the trial court erred in dismissing their counterclaim on the ground that the 2<sup>nd</sup> appellant's witness statement was unsigned yet the same bore his signature.

14. The appellants also faulted the trial court for dismissing the medical evidence which was tendered before it yet the same confirmed the injuries sustained by the 2<sup>nd</sup> appellant while the 2<sup>nd</sup> appellant had tendered additional evidence to show the medical expenses incurred.

15. It is the contention of the appellants that notwithstanding the fact that the second motor vehicle had suffered damage resulting from the accident, the trial court erroneously held that the special damages sought for the damage were never itemized.

16. In a summary, the appellants are of the view that the trial court dismissed their counterclaim on insubstantial grounds and without taking into account the provisions of Article 159 (2) ((d) of the Constitution that courts should not place undue reliance on procedural technicalities.

17. On its part, the respondent submits that the trial court was correct in finding that the appellants had not filed an amended defence and counterclaim for the reason that following adoption of a consent order granting their application to amend their counterclaim, the appellants did not file the same. The respondent adds that the original defence and counterclaim was not accompanied by a verifying affidavit as required under the provisions of Order 7, Rule 5 (a) of the Civil Procedure Rules.

18. The respondent further submits that the trial court's finding that the witness statement of the 2<sup>nd</sup> appellant was unsigned was true since the unsigned statement contravened the provisions of Order 7, Rule 5 (c) of the Civil Procedure Rules which require written statements to be signed.

19. It is the contention of the respondent that notwithstanding the above position, the trial court went ahead to consider the said witness statement and further analyzed the oral evidence of the 2<sup>nd</sup> appellant.

20. According to the respondent, the trial court's decision that the appellants had not proved their case was well founded since they had not brought sufficient evidence to support their pleadings, thereby not satisfying the burden of proof in accordance with the provisions of Sections 107 and 109 of the Evidence Act which prescribe that any party who pleads certain facts must bring forth evidence to support those facts for judgment to be entered in his or her favour.

21. The respondent also submits that the trial court correctly found that the injuries alleged to have been suffered by the 2<sup>nd</sup> appellant were not pleaded in the defence and counterclaim, and cited the reasoning by the Court of Appeal in the case of **Caltex Oil (Kenya) Limited v Rono Limited [2016] eKLR** that any prayer for damages must be specifically pleaded and particularized for it to be considered, as well as the following analysis by the court in the case of **Treadsetters Tyres Ltd v John Wekesa Wepukhulu [2010] eKLR**:

***“One must plead the nature and extent of injuries suffers. This is a mandatory requirement of the law. His omission cannot be cured by principle of equity or the principles envisaged in Section 1A, 1B and 3A of the Civil Procedure Rules.”***

22. It is the argument of the respondent that the appellants did not bring any evidence to show that the accident was caused by the driver of the respondent hence the trial court's decision to dismiss their counterclaim was correct and reasonable.

23. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the evidence placed before the trial court. It is clear that the appeal lies principally against the trial court's decision to dismiss the appellants' counterclaim and its consequential determination on the issue of costs. I will therefore deal with the appeal under the two (2) limbs.

24. Under the first limb, the appellants raised three (3) key instances in which the learned trial magistrate erred.
25. The first has to do with the finding that there was no defence and counterclaim on record. In her judgment, the learned trial magistrate indicated that following adoption of a consent allowing the appellants leave to file their amended defence and counterclaim, the appellants did not comply, and that in any event, the counterclaim was not accompanied by a verifying affidavit hence the original defence and counterclaim ought to be struck out on those grounds.
26. Upon re-evaluating the documents constituting the record of appeal, I note that after filing the original defence and counterclaim, the appellants sought leave of the court to amend the counterclaim vide the Notice of Motion dated 30<sup>th</sup> August, 2012 and annexed a copy of the draft amended defence and counterclaim thereto.
27. Going by the trial court proceedings, the parties subsequently entered into a consent to allow the application, which consent was adopted. However, there is no record of the appellants' compliance by filing an amended defence and counterclaim.
28. In the circumstances and as the learned trial magistrate correctly held, **Order 8, Rule 6** of the **Civil Procedure Rules** would come into play since it provides that where a party fails to amend his or her pleadings within the stipulated timelines, the relevant order shall cease to have effect.
29. Further to the foregoing, I looked at both the original and draft amended defence and counterclaim, and established that the respective counterclaims were not accompanied by a verifying affidavit, as is the requirement under the proviso of **Order 7, Rule 5(a)** of the **Civil Procedure Rules**. I therefore agree with the reasoning of the learned trial magistrate that the appellants essentially did not have a proper defence and counterclaim on record.
30. As concerns the second subject on whether the 2<sup>nd</sup> appellant's witness statement was signed, I turn to the reasoning of the learned trial magistrate in her judgment, where she indicated that the witness statement bore no signature as required under the provisions of **Order 3, Rule 2(c)** of the **Civil Procedure Rules**.
31. I made reference to the above proviso as well as **Order 7, Rule 5(c)** of the **Civil Procedure Rules** which reiterates that a defence and counterclaim shall be accompanied by signed witness statements, with the exception of expert witnesses.
32. I re-evaluated the witness statement of the 2<sup>nd</sup> appellant constituting the supplementary record of appeal dated 13<sup>th</sup> January, 2020 and I note that the same is unsigned, though I also note a similar witness statement found on page 45 of the record of appeal which is signed.
33. Be that as it may, it is apparent that the learned trial magistrate still went ahead to consider its contents.
34. In my view, the above provisions are couched in mandatory terms hence the appellants were required to comply. Suffice it to say that I note that the learned trial magistrate still went ahead to consider the merits of the case before her. I am therefore satisfied that she reasonably applied her mind to the law.
35. The third subject under this limb addresses the issue on whether the learned trial magistrate was correct in finding that the appellants had not proved their respective cases.
36. For the respondent, Boniface Mutweri who was PW1 adopted his witness statement and testified that he was an Executive Officer in the Claims Department of the respondent's Insurer, Heritage Insurance Company.
37. In cross examination, the witness gave evidence that investigations were carried out by the police and a police abstract was issued. The witness added that he is unaware of the details of the accident but testified that the appellants were culpable for the accident going by investigation report prepared by Windscope Loss Assessors Limited though the report did not specifically state who was to blame.
38. In his evidence as DW2 the 2<sup>nd</sup> appellant stated that he was driving the second motor vehicle on the material day on the left side of the road when the first motor vehicle approached from the opposite side with full headlights and at a high speed before colliding with the second motor vehicle.
39. The 2<sup>nd</sup> appellant produced a police abstract as D. Exh 4 and stated that the matter was pending under investigation at the time of giving his testimony.
40. It was the evidence of the 2<sup>nd</sup> appellant that he sustained bodily injuries and was hospitalized at Aga Khan Hospital for 14 days and that repairs on the second motor vehicle were done at a cost of Kshs.180,000/.
41. In cross examination, the 2<sup>nd</sup> appellant denied any form of negligence on his part and stated that he drove carefully at all material times preceding the accident.
42. In re-examination, it was the testimony of the 2<sup>nd</sup> appellant that the 1<sup>st</sup> appellant paid for repairs on the second motor vehicle.
43. In writing her judgment, the learned trial magistrate held that there was nothing conclusive to show who was to blame for the accident in the absence of a testimony from the investigating officer or any information from the police abstract. She went ahead to find that if the appellants had proved their case, she would have entered liability in the ratio of 80:20 in favour of the 2<sup>nd</sup> appellant.

44. The learned trial magistrate also held that the prayer for Kshs.180,000/ on special damages ought to have been broken down in the pleadings but was not. Nonetheless, the learned trial magistrate indicated that had the appellants succeeded on their case, she would have awarded the above sum to the 1<sup>st</sup> appellant in addition to awarding general damages to the 2<sup>nd</sup> appellant in the sum of Kshs.1,200,000/.

45. From my re-evaluation of the evidence which was tendered before the trial court, I established that the police abstract tendered before the trial court did not provide any information on what could have resulted in the accident or who was to blame. The police abstract further indicated that the matter was pending under investigations, the results of which were not disclosed to the learned trial magistrate.

46. Further to the foregoing, none of the parties called the investigation police officer as a witness to shed light on occurrence of the accident, neither did they summon any witnesses to the accident. It therefore follows that there was no credible evidence to direct the learned trial magistrate on blameworthiness arising out of the material accident.

47. In the premises and in view of the principle that he who alleges must prove, I am satisfied that the learned trial magistrate was correct in finding that the appellants, like the respondent, had not proved their case on a balance of probabilities.

48. The second limb touches on the award on costs at trial since the learned trial magistrate ordered each party to bear its own costs. It is trite law that costs in a matter follow the event. In the present circumstances, I find that the learned trial magistrate correctly and reasonably applied her discretion in making the order as she did and I see no reason to interfere with such order.

49. Consequently, the appeal is found to be without merit and is dismissed. In considering the nature of this appeal, I hereby order the parties to cater for their own costs of the appeal.

**Dated, Signed and Delivered virtually via Microsoft Teams at Nairobi this 3<sup>rd</sup> day of July, 2020.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants

..... for the Respondent