



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 243 OF 2015

EDWARD KIIRU.....1ST APPELLANT

SOLEL BOND INTERNATIONAL HOLDINGS.....2ND APPELLANT

VERSUS

BLACKWOOD HODGE (K) LIMITED.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the judgement of the **Resident Magistrate Court in Civil Suit No. 8673 of 2009** delivered on the 23rd May 2014.

2. The respondent instituted a material damage claim against the appellants for compensation for special damages of Kshs. 490,537/= under the doctrine of subrogation as well as costs of the suit and interest which the trial court entered in the respondent's favour.

3. The appellants being dissatisfied with the trial court's decision appealed on 7 grounds that can be summarised as follows;

a. That the learned magistrate erred in law and in fact in its finding of liability against the appellants.

b. That the learned magistrate erred in law and in fact and awarded special damages to the respondent against the weight of evidence adduced.

4. The parties consented to dispose off the matter by way of written submissions.

B. Appellants' Submissions

5. The appellants submitted that the judgement by the trial court was a lesson on "how not to write a judgement" and as such the same ought to be impugned thus relying on the case of **South Nyanza Sugar Co. Ltd v Omwando [2011] eKLR**.

6. On liability, it was submitted that PW1, the police officer produced extracts from the police file, testimony was to the effect that the respondent's driver was liable for the accident and that the respondent's driver was charged in court at Machakos with reckless driving. It was submitted that this was not addressed by the trial magistrate in the judgement leading to an incorrect finding.

7. It was further submitted that the respondent's driver's evidence was ambiguous as it did not disclose any blame against the appellants' driver and that submissions of the respondent were manufactured by his counsel.

8. It was further submitted that the appellants had denied the respondent's claims of ownership of motor vehicle KAM 069 Q which issue the trial magistrate failed to address in its judgement.

9. The appellants further submitted that in view of the discrepancies on the pre-accident value, salvage value and irregularities in disposal and/or sale of salvage, the trial court was not in a position to accurately ascertain the computation of the alleged net loss.

10. It was further submitted that the judgement entered was clearly against the weight of evidence on record.

C. Respondent's Submissions

11. The respondent submitted that the issue of liability was properly adjudicated by the trial court. He further submitted that the assertions that the respondent's driver was charged in court with careless driving was substantiated by the appellant.

12. He further submitted that the appellant opted not to call any witnesses nor produce any documents before the trial court and as such the respondent's evidence remained unchallenged and the appellants defence amounted to mere statement of facts.

13. As such it was the respondent's submission that they had proved their case as required by **Sections 107, 108 and 109 of the Evidence Act** and that the appellants failed to tilt the balance of probability in their favour and thus the trial court was justified in finding liability at 100% against the appellants. He relied on the cases of **Trust Bank Limited v Paramount Universal Bank Limited & 2 Others, Drappery Empire v Attorney General** and **Chrispine Otieno Caleb v The AG**

14. On the quantum of damages awarded, he submitted that the assessment of damages in the judgement was proper as he had proved the special damages as required by law and further that no irregularity had been demonstrated to warrant the court interfere with the same. He relied on the cases of **Omar Shariff Ali & Abdalla Ali v Teita Estate Limited** and **Nkuene Dairy Farmers Co-op Society Ltd & Anor v Ngacha Ndeiya.**

D. Analysis of Law

15. Ordinarily and in law a judgment should deal with issues raised and should not be scanty. A judgment must comply with the mandatory provisions of **Order 21 rule 4 of the Civil Procedure Rules** which provide that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision. In the circumstances of this case, the learned magistrate's judgement fell short of compliance with Order 21 Rule 4.

16. What then should the appellate court do in such circumstances? Section 78 of the **Civil Procedure Act** sets out the powers of an appellate court which will be discussed later in this judgement.

17. As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in **Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123** in the following terms:

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”

18. It is correct as argued by the appellant that the learned magistrate did not set out the points for determination. He made a concise statement of the case and made a decision based on a general statement worded thus: -

“I have considered this and facts on record and I am satisfied that the plaintiff has proved his case in the required standards.”

19. This case was actually heard and decided generally without evaluating the evidence on record. On the submissions and the authorities, the learned magistrate stated: -

“I have considered the submissions and authorities submitted and I hereby enter judgment for the plaintiff against the defendant as prayed in the plaint”.

20. The issue which arises is whether the said judgment is valid in the absence of points of determination and reasons for the decision.

21. A magistrate or a judge is under a duty to comply with **Order 21 Rule 6 of the Civil Procedure Rules**. But what happens if he/she does not comply? What should the appeal court do?

22. **Section 78 of the Civil Procedure Act** provides:

1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

23. The powers of an appellate court are therefore to determine the case finally; or remand the case or frame the issues and refer them for trial; or take additional evidence, or require such additional evidence to be taken; or order a new trial.

24. In this situation, this court may consider referring the case back to the magistrate's court for retrial but it is important that other options be explored.

25. However, I wish to seek the wise counsel of the East African Court of Appeal judges in the case of Selle & Another Vs Associated Motor Boat Co. Ltd & Others 1968 E.A. 123 where it was held: -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif -vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270*).”

26. I will therefore proceed to subject the whole evidence to a fresh and exhaustive scrutiny and make my own conclusions.

27. The respondent PW2 testified that he was driving vehicle registration number KAM 169Q along Mombasa road in Nairobi around 7.30pm on 17/12/2007. His vehicle knocked on the left side by a pick-up from the right on the tyre. He reported the matter at Machakos police station.

28. He further testified that his vehicle which was on the main road had the right of way. He blamed the driver of the vehicle that hit him registration no. KAW 566G. He said he was charged in relation to the accident in Machakos court.

29. PW1 police officer from Machakos police station produced the accident file and report I.R. No.289/07-6062 (R/205-045). The report said the case was still pending under investigations. On cross-examination, PW1 said the respondent had been charged in Machakos court and a warrant of arrest had been issued against him.

30. PW4 a claims officer from Jubilee Insurance Co. Ltd said the insurer paid the respondent for the vehicle which was declared a write off despite the fact that he was blamed by the police.

31. It is clear from the evidence that in cross-examination the respondent did not see where the car that hit him came from. He said in cross examination that the car came from a feeder road but pressed further, he admitted that this was not true. He also admitted that he did not include any such information in his statement.

32. PW1 said that the investigating officer found that the respondent was to blame for the accident. At the time of hearing, the respondent had been charged with a traffic offence in Machakos court. In his evidence in chief, the respondent did not blame anyone for the accident until during cross-examination.

33. The appellant did not call any witness. Although the respondent's evidence remained uncontroverted, he did not prove the particulars of negligence against the appellant. The police found him to blame and charged him.

34. The claim in the plaint was for Kshs. 490,537/= being the value of the vehicle (Kshs. 742,625/=) less salvage value of Kshs. 278,000/= PW4 testified that the respondent was paid the full value of his vehicle by the insurance company being Kshs. 725,000/= It was therefore dishonest of him to claim the value of the vehicle unless he was to pass the decretal amount to the insurance company in the event that he was successful.

35. I find that the respondent did not discharge the burden of proof. The magistrate erred in finding that the case had been proved and in entering judgment in favour of the respondent.

36. It is my finding that the appellant has established his grounds of appeal. The judgment of the learned magistrate is hereby set aside and substituted with a finding that the respondent's case stands dismissed with costs. The respondent will meet the costs of the appeal and those of the lower court.

37. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2019.

F. MUCHEMI

JUDGE