



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 80 OF 2017

LAWRENCE MUTURI MBURU.....APPELLANT

-VERSUS-

DALAGO TOURS LIMITED.....RESPONDENT

(Being an Appeal from the Judgment of Hon. Nyakweba (PM) in the Principal Magistrate's Court at Kilungu Civil Case No.72 of 2010, delivered on 10th April 2013).

JUDGMENT

INTRODUCTION

1. The Plaintiff/Appellant lodged suit claiming General and Special Damages arising from injuries he sustained in a road traffic accident on 01/09/2007 along Mombasa – Nairobi road at Kiima area.
2. He claimed to have been a fare paying passenger.
3. The Defendant denied liability via a defense filed.
4. The matter was fully heard by Appellant being the sole witness and defense not having evidence.
5. The Trial Court dismissed the claim on the basis that it was not proved a balance of probabilities.
6. Being aggrieved by the aforesaid verdict, the Appellant lodged instant appeal and set out 5 grounds namely;

a. The Learned Principal Magistrate erred in both law and fact, and indeed ignored the rules of natural justice, in denying the Appellant an opportunity to call two (2) crucial expert witnesses, a doctor and a police officer, and in failing to appreciate the fact that the Appellant had no power to compel the attendance of the aforesaid two (2) witnesses.

b. The Learned Principal Magistrate erred in both law and in fact in failing to issue orders compelling the attendance of the aforesaid two (2) expert witnesses, on whom the court had already issued witness summons.

c. The Learned Principal Magistrate erred in both law and fact in ordering/directing closure of the Appellant's case before the testimony of his (Appellant's) key witnesses, thus breaching the Appellant's right to a fair hearing.

d. The Learned Principal Magistrate erred in both law and in fact in finding and holding that the Defendant (Respondent) was non-suited, YET the Defendant had, in its statement of defense, admitted to being a limited liability company (a legal person), and had NOT adduced any evidence at the trial.

e. The Learned Principal Magistrate erred in both law and in fact in dismissing the Plaintiff's suit without taking crucial evidence from the Appellant's two (2) expert witnesses (a doctor and a police officer), and yet the Appellant had pleaded with the court to give an opportunity for the said witnesses to attend court and testify, and had advanced reasons given by each of those witnesses as to why they did not attend court on 28/02/2013.

7. Parties agreed to canvass appeal via submissions which they filed herein.

APPELLANT SUBMISSIONS

8. The Appellant submitted that, Trial Court noted that the Respondent DID NOT file any list of documents in compliance with Order 11 of the Civil Procedure Rules.

9. It however requested that the Appellant be examined for a second medical report by the Respondent's doctor. This was done, but still, the Defendant DID NOT file the said second medical report in court.

10. It is contended that, the Respondent (Defendant) DID NOT give any notice to the Appellant and/or his Advocates either objecting to any of the documents listed and filed by the Appellant or indicating that they will require the attendance of the makers of such documents produce the same.

11. However, when the suit came up for hearing on 23/02/2012, counsel for the Respondent (Defendant) notified the Appellant's counsel that the defense would object to production of all the documents, and would require the makers thereof.

12. The Appellant submits that the trial magistrate blamed this on the counsel; and fixed the suit for hearing on 10/04/2012. The suit was on this date stood over for hearing on 26/06/2012 as the Appellant had not been examined by the Respondent's doctor as requested by the Respondent's counsel.

13. By 26/06/2012, the Respondent's doctor had NOT examined the Appellant for a second medical report, and both counsel agreed to have the matter taken out and given another hearing date to allow the Respondent's doctor to examine the Appellant for a second medical report.

14. After examination of the Appellant for a second medical report and taking out of witness summons for service on the Traffic Base Commander (Salama Police Station) the suit came up for hearing on 28/03/2013, but although the Appellant (the plaintiff) was in court and ready for the hearing, his two expert/crucial witnesses (the Traffic Base Commander and the doctor – Dr. Susan Musyoka) were NOT in court due to the following reasons:-

1) The said doctor (who had joined politics) was in the campaign trail for the 2013 general elections scheduled for August of the same year (2013), and was NOT in court.

2) The said Traffic Base Commander, though served with witness summons, said he had NOT yet traced the relevant police file as the police officer who had investigated the accident was deceased, and as such he (the Base Commander) need time to trace the police file.

15. The Trial Magistrate directed the Appellant to proceed with the case, and refused to adjourn the matter to enable the Appellant to call the aforesaid two (2) expert witnesses.

16. He the (Trial Magistrate) forced the Appellant to close his case. The Appellant's case was thus closed without the evidence of the doctor and police officer, and without the police abstract form and medical report on record.

17. The Appellant's argues that, the claim being one for damages arising from bodily injuries sustained by the Appellant in a Road Traffic Accident, the doctor's evidence was pivotal and central to the Appellant's case, and there is NO way the Appellant's claim could succeed without the same.

18. In the interest of both justice and fair play, the Appellant submits that the trial magistrate should have allowed an adjournment to enable him (Appellant) to avail the doctor for purposes of giving evidence, he erred in refusing to adjourn the matter. He in effect condemned the Appellant without full hearing his case.

19. The Appellant further submits that the Trial Magistrate erred in failing to note that he (Appellant) was NOT to blame for the Traffic Base Commander's failure to attend court.

20. It is the Appellant's submission that the court failed to consider the his submission that the Traffic Base Commander, though served by the him with witness summons, had requested for more time to trace the police investigation file, without which he could not testify. The trial court declined to adjourn the matter.

RESPONDENT SUBMISSIONS

21. Appellant submits that, it is trite law that who alleges must prove hence it was incumbent upon the Appellant to prove particulars of negligence leveled against the Respondent's driver and also that he sustained injuries during the alleged accident the subject matter of this appeal.

22. It is submitted that the Trial Court's decision in dismissing the Appellant's case with costs was right as the aforementioned had not been proved on a balance of probabilities to the required standards.

23. The proceedings and Judgment in the Trial Court is crystal clear in this regard which appears at pages 22-30 and 31-33 of record of appeal respectively.

24. It was incumbent upon Plaintiff to prove that the sued party was the copy of records/search as the owner of the subject motor vehicle. The Trial Court was legally right in observing that the two names were different.

25. The Defendant's admission in its statement of defense of its description did not settle the issue of ownership of the subject motor vehicle KAT 893E as the same was denied hence it was incumbent upon Plaintiff to tender a copy of records showing ownership of the subject motor vehicle which we submit was not done as the Defendant/Respondent name is different from the one in the search which was tendered by the Appellant as an exhibit as page 28 lines 10-20 of the Record of Appeal.

26. It is clear that the Appellant was given many opportunities to call all witnesses he desired to prove his case but he failed to do so.

27. The alleged said witnesses could be only be compelled by court if the Appellant could prove that he had extracted witness summons and served upon the said witnesses which had not been done on various occasions the matter came up for hearing but nevertheless the court reluctantly allowed the adjournments due to their unavailability.

28. The Appellant cannot use this ground to urge his appeal in view of above.

29. It is clear that the trial court never shut out any of Appellant's witnesses thereby jeopardizing and or prejudicing his case it is clear that their non-inclusion of their testimonies the trial court was not fatal to Appellant's case.

30. The ruling of the Trial Court on 28th February 2013 not to allow another adjournment did not fatally prejudice Appellant's case as he was granted leave and right to appeal if dissatisfied with it before judgment was delivered which he failed to exercise hence this appeal after judgment had long been delivered hence this appeal ought to be dismissed.

31. No specific number of witnesses which are required in a particular case and the Appellant's testimony alone could have proved his case without requiring police and doctor to testify.

32. The Appellant's case had already failed before his evidence was taken due to misdescription of the Respondent, documents showing ownership of the subject motor vehicle discrepancies in their contents and failure of the Appellant to tender initial treatment notes which could have proved that he was actually injured in the complained of accident. It is clear that the Appellant could not tell how the accident occurred yet he had indicated initially that he could see clearly ahead.

33. It is submitted that even if the said witness (police officer) was called, he could not have cured the discrepancies in the Appellant's testimony hence the court would have still have found that particulars of negligence against the Respondent's driver had not been proved. It is clear that the Appellant could not prove even the injuries he allegedly sustained in the said accident.

34. The Respondent argue that, the Plaintiff could not prove he was treated for aforementioned injuries at the said hospital as no attendance cards and or initial treatment notes were tendered as exhibits or an explanation offered for their unavailability.

35. The Appellate Court is urged to dismiss this appeal without costs to Respondent.

DUTY OF FIRST APPELLATE COURT

36. The duty of a first Appellate Court as was held in the cases of **Mwana Sokoni –Vs- Kenya Bus Service Ltd (1985) KLR 931** and **Selle –Vs- Associated Motor Boat company Ltd (1968) EA 123** is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

EVIDENCE

37. After several hiccups, the hearing of this case finally took off on 06/02/2013 when only the Plaintiff testified.

38. In his evidence, he told the court that on 01/09/2007 he was travelling from Mombasa in a vehicle whose registration number he could not remember well. He said that it was KA something, a vehicle for carrying tourists. It was a Toyota Land Cruiser and was carrying many people.

39. At Salama, while this vehicle was over speeding, it collided head-on with an on-coming vehicle. He sustained injuries to the head, both hands and legs. He was treated at Machakos Hospital.

40. After the accident, he reported at the Salama police station and was issued with a P.3 form (M.F.I.2) which was filled and returned. He was then issued with a police abstract (M.F.I.1). On 26/11/2008, his Advocate conducted a search at the Registrar of Motor vehicles and obtained a copy of records (P. exhibit 3).

41. Later, he was examined by a doctor who prepared a medical report dated 17/03/2009 (M.F.I.4) upon payment of Kshs.2,000/= vide a receipt dated 01/04/2009 (M.F.I.6).

42. Before the institution of this suit, the Advocate issued a demand notice dated 12/04/2010 (P. exhibit 5). The Defendant did not admit liability hence this suit. He prayed for damages and costs of the suit.

43. In cross-examination, he said that he boarded motor vehicle Reg. No. KAT 893E and sat directly behind the driver from where he could clearly see ahead using the vehicles headlights.

44. He recanted later and said that from where he was seated, he did not have a very clear view of the road. This was after saying that the vehicle he was travelling in was at the middle of the road astride both lanes when the collision occurred. He also said that the other on-coming vehicle was not keeping its lane. In re-examination, he said that the two vehicles collided at the middle of the road.

ISSUES ANALYSIS & DETERMINATION

45. After going through the evidence on record and the submissions on record, I find the issues were:-

a. Was denial of Adjournment justified?

b. Was claim proved beyond reasonable doubt?

c. What was the order as to costs?

46. On the first issue, the Appellant appears on record to have applied for adjournment which was denied. The Appellant intimated that he was to appeal against the ruling denying him adjournment but however abandoned the idea. The Appellant case was therefore closed without calling crucial evidence thereof.

47. The issue of fair hearing/trial has now been raised and the court will have to interrogate the same on the threshold of the same doctrine.

48. **Article 50.** Fair hearing

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

49. Fundamental Rights and freedoms that may not be limited vide Art 25 which provides;

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—Such rights are; the right to a fair trial..”

50. The Trial Court noted that the Respondent DID NOT file any list of documents in compliance with Order 11 of the Civil Procedure Rules.

51. It however requested that the Appellant be examined for a second medical report by the Respondent’s doctor. This was done, but still, the Defendant DID NOT file the said second medical report in court.

52. The Respondent (Defendant) DID NOT give any notice to the Appellant and/or his Advocates either objecting to any of the documents listed and filed by the Appellant or indicating that they will require the attendance of the makers of such documents produce the same.

53. However, when the suit came up for hearing on 23/02/2012, counsel for the Respondent (Defendant) notified the Appellant’s counsel that the defense would object to production of all the documents, and would require the makers thereof.

54. The Appellant submits that the trial magistrate blamed this on the counsel; and fixed the suit for hearing on 10/04/2012. The suit was on this date stood over for hearing on 26/06/2012 as the Appellant had not been examined by the Respondent’s doctor as requested by the Respondent’s counsel.

55. By 26/06/2012, the Respondent’s doctor had NOT examined the Appellant for a second medical report, and both counsel agreed to have the matter taken out and given another hearing date to allow the Respondent’s doctor to examine the Appellant for a second medical report.

56. After examination of the Appellant for a second medical report and taking out of witness summons for service on the Traffic Base Commander (Salama Police Station) the suit came up for hearing on 28/03/2013, but although the Appellant (the plaintiff) was in court and ready for the hearing, his two expert/crucial witnesses (the Traffic Base Commander and the doctor – Dr. Susan Musyoka) were NOT in court due to the following reasons:-

a. The said doctor (who had joined politics) was in the campaign trail for the 2013 general elections scheduled for August of the same year (2013), and was NOT in court.

b. The said Traffic Base Commander, though served with witness summons, said he had NOT yet traced the relevant police file as the police officer who had investigated the accident was deceased, and as such he (the Base Commander) need time to trace the police file.

57. The Trial Magistrate directed the Appellant to proceed with the case, and refused to adjourn the matter to enable the Appellant to call the aforesaid two (2) expert witnesses.

58. He the (Trial Magistrate) forced the Appellant to close his case. The Appellant’s case was thus closed without the evidence of the doctor and police officer, and without the police abstract form and medical report on record.

59. The Appellant's claim being one for damages arising from bodily injuries sustained by the Appellant in a Road Traffic Accident, the doctor's evidence was pivotal and central to the Appellant's case, and there is NO way the Appellant's claim could succeed without the same.

60. The court find that in the circumstances of this case, the fair hearing thresholds were not met and refusal to grant an adjournment in the circumstances was unfair.

61. The denial of Adjournment was not justified. The net effect is that the Appellant was condemned without full hearing of his case. The first ground thus succeeds and court does not have to deal with other grounds.

62. In the interest of both justice and fair play, the court finds that the verdict and proceedings of the Trial Court cannot stand and thus same is set aside with the court making the following orders:-

i. The appeal is allowed to the extent that the matter shall be heard de-novo in Kilungu law courts by any other magistrate other than H Nyakwemba PM as he then was.

ii. No orders as to costs.

DATED, DELIVERED, SIGNED THIS 13TH DAY OF FEBRUARY 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE