



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL DIVISION

CIVIL APPEAL NO. 145 OF 2014

MJI (Suing through father

and guardian ad litem) LIS.....APPELLANT

VERSUS

STEPHEN NDUNG'U.....RESPONDENT

(Being an Appeal from the judgment and Decree of Honourable C.M. Wattimah

Resident Magistrate in Kapsabet PMCC No. 113 of 2010 delivered on the 21st November 2014)

JUDGMENT

The Appellant, MJI, was the Plaintiff in **Kapsabet Principal Magistrate's Civil Case No. 113 of 2010**. The said suit was instituted and conducted by the Appellant's father, LI as next friend and guardian ad litem as the Appellant was a minor. In the suit, the Appellant sought general and special damages arising from injuries allegedly sustained by her in an accident involving motorcycle registration number KBF 335C on which she was a pillion passenger and motor vehicle registration number KAU 516K Nissan Lorry driven by the Respondent. The Appellant attributed the occurrence of the said accident to the negligence of the Respondent. The Appellant relied *inter alia*, on the doctrines of *res ipsa loquitur* and vicarious liability. The Respondent neither entered appearance nor filed a defence to the Appellant's claim. As such, interlocutory judgment was entered against the Respondent on 5th July 2011 and trial proceeded by way of formal proof. Upon analyzing the evidence tendered by the Appellant's witness, LI, the trial magistrate found that the Appellant did not prove her case on the issue of liability. However, the trial magistrate assessed the damages she would have awarded the Appellant, had she proved her case, at Kshs.800,000/-. The Appellant was aggrieved by that decision and filed an Appeal to this Court.

In her memorandum of appeal, the Appellant raised four grounds of Appeal challenging the trial magistrate's decision. The Appellant was aggrieved that the trial magistrate dismissed the suit despite the fact that interlocutory judgment had already been entered. In her view, the trial magistrate was only obliged to assess the quantum of damages. The Appellant was further aggrieved that the trial magistrate dismissed the suit when judgment on liability had already been entered against the Respondent. She therefore faulted the trial magistrate for failing to enter judgment on liability in her favour. The Appellant finally took issue with the trial magistrate revisiting the issue of liability since in her view, the court had no jurisdiction to do so. In the circumstances, the Appellant urged the court to set aside the judgment on liability and enter judgment in her favour against the Respondent at 100%.

During the hearing of the Appeal, Mr. Kamau, counsel for the Appellant presented oral submissions in support of the Appellant's Appeal. He submitted that the issue of liability was settled when the interlocutory judgment was entered against the Respondent in default of appearance and defence. In support of the said submissions, he relied on the case of **Felix Mathenge -vs- Kenya Power & Lighting Company Ltd [2008] eKLR** in which the Court of Appeal held that once an interlocutory judgment is regularly obtained, the same is final as regards liability and the court's role upon formal proof is only limited to assessing damages.

The learned counsel however did not take issue with the trial magistrate's assessment of damages. He submitted that the Appellant was in agreement with the same. He therefore urged the court to set aside the trial court's judgment on liability and enter judgment against the Respondent at 100%. On the other hand, the Respondent did not attend Court for the hearing of the Appeal despite having been duly served with a hearing notice to that effect. The Court will therefore only consider the oral submissions made on behalf of the Appellant and the authority cited in support of the same.

It is not in dispute that an accident occurred on 21st August 2009 along Kapsabet –Eldoret Road near Marcles Academy. It is also not disputed that the accident involved motorcycle registration number KBF 335C on which the Appellant was a pillion passenger and motor vehicle registration number KAU 516K Nissan Lorry driven by the Respondent. In the Complaint, the Plaintiff attributed the accident to the negligence of the Defendant who was the lorry driver. It was pleaded that the defendant negligently drove and managed the said motor

vehicle causing it to violently collide with the motorcycle. This caused an accident in which the Plaintiff suffered injuries. The injuries were particularized as swollen and tender scalp with a deep cut wound, swollen and tender forehead with bruises and a cut wound and a swollen and tender forearm with bruises.

On the question of liability, the Plaintiff's witness and father (PW1), LIK, testified that the Plaintiff was on board a motorcycle when they were knocked down by a lorry whose registration number was indicated on the police abstract produced as **exhibit 1**. He testified that the Plaintiff sustained a fracture on the right hand and was taken to Kapsabet District Hospital. He testified that upon being treated and discharged, he took the Plaintiff to Moi Teaching and Referral Hospital and produced a treatment chit together with a clinic attendance card from the hospital as **Exhibit 2**. It was further his testimony that he was issued with a P3 form at Kapsabet Police Station which he produced as **Exhibit 3**. He also produced a report from Nandi District Hospital as well as a medical report from a Dr. Aluda who examined the Plaintiff as **Exhibits 4** and **5**. PW1 finally testified that the Defendant was to blame for the accident since he hit the motorcycle carrying his daughter. The Plaintiff did not call any other witness to support her claim.

According to the trial court's record, it is evident that the Respondent never entered appearance nor filed a defence to the Appellant's claim. This led to an interlocutory judgment being entered against the Respondent on 5th July 2011 upon a request for judgment being made by the Appellant. It is also clear from the record that the Respondent did not apply for the interlocutory judgment to be set aside. Further, the record shows that the Respondent did not participate in the formal proof hearing despite being given an opportunity to attend court.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. See (**Selle -vs- Associated Motor Boat Ltd & Others [1968] EA 123**). Further, this court will only interfere with the trial court's decision if the same is founded on wrong principles of the law or if the findings of facts are at variance with the evidence adduced. The Court is guided by the Court of Appeal in the case of **Nkube -vs- Nyamiro [1983] eKLR 403** where it was stated that:

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

In the present appeal therefore, the sole issue for determination is whether the trial magistrate erred by determining the issue of liability when an interlocutory judgment had already been entered against the Respondent.

It is well settled that interlocutory judgment can only be entered where a defendant fails to enter appearance in a suit involving a liquidated claim or a liquidated claim together with another claim or in a suit for detention of goods. However, where there is no liquidated claim, a final judgment can only be entered upon considering the evidence adduced during formal proof. **Order 10 Rules 4, 5 and 6 of the Civil Procedure Rules, 2010** provides as follows in that regard:

“4. (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

5. Where the plaintiff makes a liquidated demand with or without some other claim, and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against any defendant failing to appear in accordance with rule 4, and execution may issue upon such judgment and decree without prejudice to the plaintiff's right to proceed with the action against such as have appeared.

6. Where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.”

In **Kenga Mwaduna Mwambire & Another -vs- National Bank of Kenya Ltd [2006] eKLR** the Court stated as follows:

“The request for judgment dated and filed on 26th September, 2005 was based on the fact that the defendant had failed to enter appearance within the prescribed time, thereby bringing the application within the provisions of Order 9A of the Civil Procedure Rules. The relevant rules under this order empowers the court to enter judgment where the defendant has failed to appear in a suit of a liquidated claim, or a liquidated claim together with some other claim, or in a suit for detention of goods.

Rule 8 specifically provides that where the claim is not in any of above three categories, the plaintiff can only set down the case for hearing if pleadings have been closed and the defendant, who may have appeared, given notice of the hearing. See Andrew W. Njenga v Co-operative Merchant Bank Ltd, HCCC No.1095 of 2002. In Mint Holdings Ltd & Samson N. Keengu v Trust Bank, Civil Appeal No.249 of 1999, the Court of Appeal stated the law as follows;

“As pointed out, there was no liquidated demand. Judgment could only have been entered upon a formal proof. The entry of such interlocutory judgment was irregular as Order IXA of the Civil Procedure Rules does not cater for entering of an interlocutory judgment when the nature of reliefs sought requires formal proof”.

In the above case the plaintiffs’ claim against the defendant was specific, namely;

“Declaratory order that the charges dated 9th March, 1998 made against the suit premises are null and void, the defendant’s exercise of its statutory power of sale is illegal, the interest charged is unconsonable (sic) and illegal”.

This claim, not being a liquidated demand, the plaintiff’s recourse was in **Rule 8**, which was to set the case down for hearing to determine both the question of liability and assessment of damages.

In the Plaintiff, the Plaintiff sought judgment against the Defendant for general and special damages, costs and interest only. General and special damages are pecuniary claims which require evidence and are therefore unliquidated demands. As such, it is clear that the interlocutory judgment was only entered in default of appearance and defence. It was not a final judgment and that is why the same proceeded for formal proof. The case of **Felix Mathenge (supra)** relied on by the Appellant in her submissions before this court is distinguishable in the sense that the case involved a liquidated claim and not one for pecuniary damages. The Appellant in the said case had made a liquidated claim together with other claims in the trial court. That is why the court held that the issue of liability could not be reopened. This is not the case in the current matter. As such, the trial magistrate did not err by making a determination on the issue of liability upon evaluating the evidence adduced.

Further, in the judgment delivered on 21st November 2014, the trial court found the motorcycle rider liable for the accident. This was in view of the police abstract produced in evidence which faulted the rider for the accident. The same clearly indicates that the motorcycle rider, Nobert Alosiona, was charged with the offence of careless riding and riding without a licence. The trial magistrate took issue with the Plaintiff’s failure to enjoin the rider in the suit. In the trial court’s view, enjoining the rider would have enabled the court to determine the extent of liability of both the rider and the Defendant. This court has re-evaluated the evidence on record and established that indeed the motor cycle rider was neither enjoined as party to this suit nor called to testify in support of the Appellant’s claim. The rider would have been a crucial witness if at all the Appellant did not deem it fit to enjoin him as a party to the suit. This is in view of the fact he was in control of the motorcycle and was therefore better placed to testify as to what exactly happened as opposed to PW1 alone who was not even an eye witness.

This court cannot therefore fault the trial court’s finding that the rider of the motorcycle was liable for causing the accident or substantially contributed to the accident based on the evidence placed before it. Indeed, it would have been improper and unfair to find the Respondent fully liable for the accident in the face of such clear and uncontroverted evidence. The Court is guided by the decision in the case of **Phanice Nyabate Oyiengo -vs- Geoffrey Kiplagat Korir & 2 Others [2017] eKLR** where Chemitei J. stated that:

“More significantly also the said rider was charged with the offence of riding a motorcycle without a license. Although this was downplayed by the respondent, the same in my view is significant as it goes to demonstrate that there was every probability that he was not duly authorized and the reason why he carried two passengers. Be that as it may, there was no reason why the appellant failed to enjoin him as a party.....the apportionment of liability by the trial court even in the absence of the said motorcycle rider was factual as it appears that he had some responsibility to shoulder and I do not think it would have been proper to have the respondent shoulder the blame alone.”

Taking into consideration the entire circumstances of this case and on reevaluation of the evidence adduced before the trial court, this court finds that the Appellant’s appeal is not merited. The same is hereby dismissed with no orders as to costs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF NOVEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF DECEMBER 2018

OLGA SEWE

JUDGE