



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA
CIVIL APPEAL NO. 39 “A” OF 2011
GODFREY ODONGO EGESA
FREDRICK CARLOS EKISA.....APPELLANTS
VERSUS
PHILIS DALIZU LUYUI.....RESPONDENT
(Appeal arising from judgment delivered on the 28th June 2011 before
Hon. Mrs. Kidula Chief Magistrate in Bungoma CMCC 584 of 2003)

JUDGMENT

1. At Trial conducted before the Chief Magistrates Court at Bungoma, Philis Dalizu Luyai Alias Madina Abdallah (The Respondent) herein alleged that on 2nd November 2001 she was hit and injured by motor vehicle KAN 655 W as she stood at Shibale Bus Stage waiting to board a motor vehicle. Before that Court, she had pleaded that Godfrey Odongo Egesa (The 1st Appellant) and Fredrick Carlos Ekisa (The 2nd Appellant) were owner and driver respectively of the offending vehicle.
2. Upon receipt of evidence, The Trial Court found in favour of The Respondent and held the Appellants 100% liable. The Court then entered Judgment for the Respondent for Kshs. 400,000/- General damages, Special damages of Kshs. 2,500/- and costs. That Judgment, delivered on 28th June 2011, is the subject of this Appeal.
3. The Respondent commenced the Lower Court Proceedings in the name of Philis Dalizu Luyai. However, on an Application for Leave to Amend granted, on 16th September 2009, she added her alias name being Madina Abdalla. In the Application for Leave, and testimony to Court given on 24th November 2009 after the grant of leave, she explained that her Alias Name was her marriage name and Muslim name after conversion to that religion. The Appellants have stoked up controversy over these two sets of names. The merit of that controversy shall be considered in the body of the Appeal.
4. The Evidence before Court was not involved. On 2nd November 2001 the Respondent was at Shibale Bus Stage along Mumias – Bungoma Road waiting to board a vehicle to Bungoma. She heard some women shout. Suddenly, she was hit and injured. She lost consciousness and found herself at St. Mary’s Hospital, Mumias. She claimed to have suffered a broken left arm and leg. She also sustained cut wounds to her face. She was admitted in the hospital for two months.

5. In support of her contention that the 2nd Appellant was negligent the Respondent produced a Police Abstract in respect to the accident and Court Proceedings in Mumias Court File No.699/2001 Republic vs Fredrick Carlos Ekesa. In the Proceedings, the 2nd Respondent had been charged with the offence of careless driving of a motor vehicle contrary to Section 49(6) of the Traffic Act. The particulars of offence being that:-

On the 2nd day of November, 2001 at about 1.0 p.m. along Mumias-Bungoma road in Butere Mumias District of the Western Province Fredrick Carlos Ekissa being the driver of motor vehicle Reg. No. KAM 655W Toyota Hiace Matatu did drive the said Motor vehicle on the road without due care and attention to other road users thereby causing an accident to three pedestrians causing serious injuries to them.

The 2nd Appellant pleaded guilty to the said offence and condemned to a fine of Kshs. 8000/- or in default to serve a term of 1 year imprisonment.

6. The Defence offered no evidence.

7. In the Amended Memorandum of Appeal filed before this Court gave Directions as to hearing of the Appeal, (Order 42 Rule 13 of the Civil Procedure Rules) and therefore not requiring leave (Order 42 Rule 3(2))the Appellants raised the following grounds....

1. That the Learned Trial Magistrate erred in law and infact in failing to take into account the fact that there was lack of reconciliation of names between Madina Abdallah and Philis Dalizu Luyai both of whom claimed to be the Plaintiff in the lower court suit.

1(a) That the Learned Trial Magistrate erred in law and in fact in not appreciating and finding that there was discrepancy and lack of reconciliation between the two alleged dates of the accident 21.11.2001 as indicated in the demand letter by the Plaintiff's advocate and 2.11.2000, as pleaded in the plaint.

2. That the Learned Trial Magistrate erred in law and in fact by proceedings to enter judgment against the Appellants when there was a clear conflict in discrepancy of the plaintiff

2(a) That the Learned Trial Magistrate erred in law and in fact failing to find that the plaintiff did not make any report at the police station, nor record any statements thereat coupled with the discrepancy of the dates of the accident 2.11.2001 and 12.1.2001, and the names Phylis Dalizu Luyai and Sarah Abdallah Madina the suit as it was constituted and the evidence on record, rendered it unbelievable and unsustainable.

3. That the Learned Trial Magistrate erred in law and in fact in failing to consider the defendants submissions filed in court and dated 24.6.2011; They form part of the Record of Appeal and are on page 107.

4. That the Learned Trial Magistrate erred in law and in fact making a finding in his judmgnet on page 109, line 4 that the plaintiff had "reported to the police..." when in actual fact on page 98 of the Record of Appeal she denied reporting the accident and stated that she did not know who reported the accident..

5. That the Learned Trial Magistrate failed to find and appreciate that ownership of the accident of M/V Reg. No. KAW 655W had not been proved as against the first appellant as no search certificate had been produced in evidence thereof, and there was no reconciliation of the fact that the defendant had introduced evidence to the effect that the accident M/V belonged to Malan Investments as per the Respondents answers to cross-examination on page 98 of the Record of Appeal.

6. That the Learned Trial Magistrate erred in law and in fact in finding for and awarding damages to the Respondent when there was no grounds to sustain the award.

8. These Grounds of Appeal in my understanding, raise the following issues:-

- i. Was there a discrepancy as to the identity of the Respondent?
- ii. Was the Date of the alleged accident proved?
- iii. Was ownership of the offending motor vehicle proved?
- iv. Was the Trial Court justified in making the award?.

In deliberating on these issues, the Court shall re-evaluate the evidence before court as it considers the arguments made for and against the Appeal.

Identify of the Respondent (Plaintiff)

9. Is this really controversial? As alluded to earlier, the Respondent sought and obtained leave to add her Otherwise Name in the application granted on 16th September 2009. Following the Grant of Leave, the Respondent filed an Amended Plaintiff. The simple and reasonable explanation given for the alias Alias Name was that in 1990 the Respondent then carrying a maiden name Philis Dalizu Luyai, celebrated a Muslim marriage with Abdalla Kalande Katabachi. On conversion to Muslim, she acquired the name Madina while Abdalla is her Marriage name. A Certificate of marriage No. 037976 issued at Mumias on 23/6/04 was produced in support of this contention. Certainly there is no merit in the Appellant's argument that the two names are not reconciled. The Respondent gave a plausible and believable explanation.

Date of Accident

10. Both from the pleadings and the testimony of the Respondent, the date of the accident is said to be 2nd November 2001. The P3 form issued to the Respondent and the Police Abstract on the accident support this date. So do the Proceedings in Mumias Traffic case No. 699/2001. However, in the Demand letter dated 4th March 2003 by Counsel for the Respondent to the 1st Appellant there are two dates of accident. In the heading, the date is "21.11.2001" but on the body of the letter it is "2nd day of November 2001"

11. In submissions before Court the Appellants criticize this statement by the Learned Magistrate found in the judgment,

"The plaintiff's claim and evidence has from 2003 has been that on 21/1/2001 she was hit and injured by the 1st Defendant motor vehicle registration No. KAN 655W Driven by the 2nd accused (sic)

This Court has looked at the original record of the Trial Court and confirmed that the Learned trial Magistrate made a finding that the date of accident was 21.1.2001. To that extent the Appellants correctly assail the Trial Court's finding of the date of accident. However from my own evaluation of the evidence, the accident took place on 2nd November 2001. The evidence supported the Pleadings that the accident occurred on 2nd November 2001. In other words the Respondent had, on a balance of probabilities, properly established that she was hit and injured on 2nd November 2001. The error of assessment of her evidence by the Trial Court should not therefore disentitle her.

Ownership of vehicle

12. This, in my view, is a non-issue because of the pleadings before Court. In paragraph 3 of the Amended Plaintiff, The Respondent made this averment:-

At all material times, the 1st Defendant and the 2nd Defendant were owners and drivers of motor vehicle registration No. 655W Toyota respectively.

In paragraph 2 of the Defence the Appellant made this express admission-

The Defendant admit that on 2nd November, 2001 the 1st Defendant's motor vehicle stated in paragraph 3 of the plaint was involved in a road traffic accident on Mumias/Bungoma Road but they deny that the 2nd defendant was in any way negligent or that he caused the said accident.

It is elementary that a fact that is admitted in Pleadings need not be proved. The 1st Appellant admitted ownership of the Accident vehicle and it was needless for the Respondent to prove that fact.

Damages

13. In the last ground of Appeal, the Appellants stated that the award of damages to the Respondent was not merited as there were no grounds to sustain the award. In the arguments at Appeal, the Appellants restricted their attack on the finding of Special Damages. The Appellants submitted:-

The Court also finds that the Plaintiff is entitled to special loss of Kshs. 2,500/- as quoted above; the plaintiff told the Court in her own testimony on page 90,97 and 98 of the record of appeal that she did not have any receipts in proof of special loss; how then could the learned magistrate award special loss where there was no documentary proof?

There is no doubt that Special damages must not only be expressly pleaded but also specifically proved.

14. The Respondent pleaded special Damages of Kshs. 2600/- as follows;

- a. Medical Report – Kshs. 2500/-
- b. Police Abstract - Kshs. 100/-

Were these specifically proved? The Plaintiff testified on three occasions. First on 23rd July 2007, and then on 10th June 2009 when she was recalled. But on the latter occasion there was an agreement by the Counsel for the parties that her earlier testimony be adopted as her evidence in chief. In that way her evidence of 23rd July 2007 was retained as part of her testimony. The third occasion was on 24th July 2009 after the Plaintiff was amended. Upon her recall her earlier evidence was saved. The evidence of the Respondent would therefore be her testimony on all these three occasions namely, 23rd July 2007, 10th June 2009 and 24th July 2009.

15. In respect to Special damages, the evidence of 23rd July 2007 is critical. This is part of the record of that day:-

The driver was convicted in the traffic case. After some time I was again re-examined by Dr. Mulyanga Egesa and he wrote a report which I now have in court.

G. SOGOMO

RM

Court: Medical report marked P Exh 7. I paid Kshs. 2,500/- for the report and I have a receipt in that regard.

G. SOGOMO

RM

Court: Receipt marked P EXH 8.

G. SOGOMO

RM

(my emphasis)

I have looked at the original Court file and found that an original receipt No. 1846 (yellow in colour) and dated 23rd April 2007 issued by Dr. Ekesa in favour of the Respondent was the Plaintiff's Exhibit 8. The payment made for the Medical examination was specifically proved. What was not proved was the payment of Kshs. 100/- for the Police Abstract and the Magistrate never, correctly, made an award for this small sum. This Court finds that the Trial Magistrate was right in awarding Specials of Kshs. 2500/-. This Ground of Appeal, just like the others, is without merit.

16. Although the Appellants also complained that the Trial Court did not consider their submissions of 24th June 2012, this Court was unable to trace those proceedings or receipt in proof that they were paid for in the original Court file. That said, the submissions would not have changed the result of the Respondent's claim. The submissions (contained on page 108) of the Record of Appeal raise two issues only;

- i. The identity of the Plaintiff
- ii. Proof of ownership of the motor vehicle.

Through a re-evaluation of the evidence before the Trial Court, this Court has dealt with these two issues and reached a conclusion that the outcome of the Lower Court proceedings was correct.

17. In conclusion I need to say this. This Appeal arises from the Chief Magistrate's Court at Bungoma. This Appeal ought therefore to have been filed before the High Court at Bungoma (See The Practice directions contained in Gazette Notice No. 1756/2009). When this came to my attention, I requested Counsel for the Parties to appear before me on 15th March 2016 on a day I indicated my reluctance to hear the Appeal. Both sides, however, beseeched me to complete the Appeal as it had been pending at the High Court at Busia from 2011. I acceded to this request by the parties only because a transfer of the matter to Bungoma would cause further delay in the conclusion of the old matter and therefore hardship to parties. Further in accepting to hear and determine the matter I was obviously conscious of the Countrywide Jurisdiction of the High Court.

18. The Result, the Appeal is without merit and is dismissed in its entirety. Costs to the Respondent.

Dated, signed and delivered at Busia this 11TH day of May 2016.

F. TUIYOTT

J U D G E

In the presence of :-

Orwasa C/Assistant

Juma instructed by Ashioya & Co. Advocates for the Appellants

Otanga instructed by Sichangi & Co. Advocates for the Respondent.

