



REPUBLIC OF KENYA
IN THE HIGH COURT
AT KISUMU
CIVIL APPEAL NO. 120 OF 2013
CONSOLIDATED WITH
CIVIL APPEALS NOS. 121 & 122 OF 2013

BETWEEN

ERICK JUMA.....1ST APPELLANT

DAVID JUMA.....2ND APPELLANT

JESCA OMALA.....3RD APPELLANT

AND

FREDRICK GACHERU.....1ST RESPONDENT

BILHA NYAMBURA CHEGE T/A GACHERU

HOMEBEST TRANSPORTERS.....2ND RESPONDENT

(Being an appeals from the Judgments and Decrees of Hon. A.R. Kithinji,

Ag SPM at Principal Magistrates Court at Maseno in Civil Cases

No. 255, 260 & 256 of 2009 dated 21st November 2013 respectively)

JUDGMENT

1. This is a first appeal from the judgment of the subordinate court. The duty of the first appellate court is now established. It was elucidated in the case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 where Sir Clement De Lestang stated:

This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally.

2. These appeals were consolidated as they arise from the same accident. The appellants challenge the respective judgment of the trial court dismissing their claims for damages for injuries sustained in a road accident that took place on 4th April 2009 while travelling aboard motor vehicle registration number KAW 673B along Busia- Kisumu road belonging to the 2nd respondent and driven by the 1st respondent.

3. In their respective testimonies, the appellants stated that on the material day they were travelling aboard the 2nd respondent's bus when it overturned at Ebuyangu. Both Eric and Jesca testified that they were taken by the police in an ambulance to Yala Hospital. The appellants were treated at Yala Hospital and were issued with treatment chits which were marked for identification but were ultimately not produced as the makers were not called. The P3 forms were filled by Dr Okombo who produced them in evidence. The police abstracts issued at Luanda Police station were produced by PC Zacharia Kipruto. He confirmed that the accident took place and that several people were injured.

4. The respondents denied that the appellants were injured in the accident. In their amended defence, the respondents averred that the appellants' claim was based on fraud and misrepresentation as the appellants were not involved any accident involving the 2nd respondent's bus.

5. The respondent called Evalyne Odhuno (DW 1), a Clinical Officer at Yala Hospital, told the Court that the appellants were never treated at Yala. She explained to the court that once a patient is received at the hospital's customer care desk, he/she is issued with a customer book and his/her name recorded on the register book. It is only after a patient's name is entered in the register, that the patient is issued with a customer book bearing an outpatient number confirming that the patient attended the hospital. DW 1 testified that the appellants' names did not appear in register and as such they could not have been treated at the hospital.

6. DW 1 recalled that she received an inquiry from Directline Insurance Company to confirm whether some patients were treated at the hospital on 4th April 2009. She checked the register and confirmed that the names of the appellants were missing from the register. She also told the court that Dr Okombo, who filled in the P3 form for the appellants, did not work at the hospital. On cross-examination DW 1 stated that, *"In an accident when people are many we treat them and refer them to get the outpatient number later. Am not in the records offices"*.

7. The trial magistrate reviewed the evidence and concluded that DW 1's evidence raised serious doubt that the respondents were treated at Yala Hospital. The magistrate held that in view of the serious allegations of fraud and misrepresentation and the failure by the appellants to call the makers of the treatment notes meant that they did not prove their case as they did not show that they were injured in the accident.

8. In their respective memoranda of appeal, the appellants raised several grounds of appeal. They were aggrieved by the fact that the trial magistrate failed to find the respondents liable for the accident in which they suffered injuries. They contended that the trial magistrate erred in finding that there were no medical documents produced by the appellants in support of their case. The appellants were aggrieved that the trial magistrate failed to consider the evidence presented before by the appellants and the respondents and conclude that the appellants had proved their case.

9. Mr Awino, counsel for the appellants, submitted that the fact that the appellants' names did not appear in the Yala Hospital treatment register did not mean that they were not treated there. He was of the view that lack of their names in the register was a failure on the hospital's administration system and the same should not have been used against the appellants.

10. Mr Rotich, counsel for the respondents, opposed the appeal and submitted that the judgment of the lower court was sound and was based on the facts of the case and it is the appellants who were not

diligent in prosecuting their case. They failed to call the maker of the treatment notes produced in court as a witness and the P3 report produced by Dr Okombo was based on the disputed treatment notes. Counsel argued that the respondents proved their case through the evidence of DW 1 who testified that the appellants were never treated at Yala Hospital.

11. The resolution of this appeal depends largely on the issue of the burden and standard of proof. Under **section 107** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. **Sections 108 and 109** of the *Act* further provide that the evidential burden that is cast upon any party with the burden of proving a particular fact which he desires the court to believe in its existence.

12. It is well established that the standard of proof in civil claims is on the balance of *probabilities*. This means that the Court will assess all the evidence advanced by each party and decide which case is more probable (see *Palace Investments Ltd v Geoffrey Kariuki Mwenda and Another NRB CA Civil Appeal No. 127 of 2007 [2007]eKLR*). The respondent pleaded fraud and misrepresentation on the part of the appellants. Where fraud is pleaded the standard of proof is much higher. I would do no better than quote *Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others NAI Civil Appeal No. 215 of 1996(UR)* where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;

The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case.

Likewise in *Rosemary Wanjiku Murithi v George Maina Ndinwa NYR Civil Appeal No. 9 of 2014 [2014]eKLR*, the Court of Appeal held that;

Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud.

13. There is no dispute that an accident took place on 4th April 2009 and the evidence clearly points to negligence by the 1st respondent. The main issue for consideration is whether the appellants were involved in the accident and whether they were injured as alleged.

14. Regarding the issue of involvement in the accident, the appellants testified on oath that they were passengers and were injured because of the accident and that they were taken to the Yala Hospital for treatment by police in an ambulance. They were issued with Police Abstracts produced by PC Kipruto and P3 forms which were stamped by the Highway Traffic Unit, Luanda. Nothing was suggested to PC Kipruto (PW 2) that either the police abstracts and the P3 forms were forgeries or based on misrepresentation as pleaded by the respondents.

15. The respondent relied on the testimony of DW 1 to show that the appellants claims were fraudulent and the P3 forms may not have been valid. Although, she stated that Dr Okombo was not one of the doctors who fill P3 forms at the Hospital, there was no evidence that in fact, the P3 form ought to have been filled by a doctor from Yala Hospital or could not be filled by any other doctor other than a doctor from Yala Hospital. The P3 form is a medical report and its purpose is to confirm that the persons named therein sustained injuries. That is why the doctor examines the patient and looks at the patient's history reflected in treatment notes and gives his professional assessment and opinion as to the nature and extent of the injuries.

16. It is also the respondents case that the doctor's report was also useless as it was based on the treatment notes which were not admitted as evidence. It is true that treatment notes are part of the evidence of the involvement in the accident and injury. I however reject the argument that without treatment notes one cannot prove involvement in an accident or injury. The duty of the court is to examine the entire evidence and make a finding whether the facts alleged are proved on the balance of probabilities. The existence of treatment notes would assist establishing consistency and corroborating the other evidence but are not

necessarily decisive. I agree with the position taken by Aburili J., in ***Mwanzani Mwakitu v Chandaria Industries Co. Ltd*** NRB HCCA No. 156 of 2007[2015] eKLR where she stated:

I am satisfied therefore that the respondent was injured in an industrial accident while at work. Absence of the treatment notes was not fatal to the appellant's case and that there was no firm ground upon which the trial magistrate dismissed Dr Okere's medical examination report on the appellant which confirmed the appellant's injuries and which injuries were consistent with what was recorded in the accident report form filled by the respondent and produced in evidence.

17. Fraud and misrepresentation are affirmative defences and must be proved to the requisite standard. The respondents did not call any witnesses to show that the appellants made false reports to Luanda Police Station or that they fraudulently obtained treatment notes, or that they recorded false statements with the police or that they instructed advocates to file false claims or that they lied in court. DW 1's testimony was insufficient to prove that there was fraud or misrepresentation. In cross-examination, she admitted that it was possible for a patient to be treated without first being entered in the register in certain cases such as when there was an accident and the patients were many. In short, the respondents failed to prove the particulars of fraud and misrepresentation pleaded. I also hold that the fact that the appellants did not file a reply to defence was immaterial to determination of the claim as there was joinder of issue of fraud and misrepresentation and not an admission (see Court of Appeal in ***Joash M. Nyabicha v Kenya Tea Development Authority*** KSM CA No. 302 of 2010 [2013]eKLR).

18. After evaluating the evidence, I find and hold that the appellants proved that on the balance of probabilities that they were involved in the accident and sustained injuries. The respondents did not discharge the burden of proving that the appellants committed fraud or misrepresentation as pleaded in the respective statements of defence.

19. Having found that the appellants were involved in the accident, I now turn to the issue of quantum of damages. It is trite law that the trial court was under duty to assess the general damages payable to the plaintiff even after dismissing the suit (see ***Selle v Associated Motor Boat Company (Supra)***). The trial magistrate assessed damages for David Juma and Jesca Omala but failed to do so for Eric Juma. As this is an appeal on the issue of quantum the general principle is that the appellate court will only interfere where the trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see ***Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another*** [1982-88] 1 KAR 727).

20. The evidence of injuries was as follows. Eric Juma testified that he sustained injuries on the chest, shoulder and knee. Dr Okombo examined him and noted that there were residual scars measuring 2cm on the left and right knees and that he was suffering from headache and chest pain. After dismissing the claim, the learned magistrate did not assess general damages. David Juma told the court that he was injured on the head, legs and chest and that he still had headache and chest pain. Dr Okombo noted that he had a 2cm scar on his left knee and had not fully recovered when he was examined on 29th May 2009. The learned magistrate assessed general damages at Kshs. 70,000.00. Jesca Omala complained of a headache and chest pain. She had a scar on the scalp, left temporal region and a 1 cm scar on the left when he examined her on 29th May 2009. The learned magistrate assessed general damages at Kshs. 70,000.00.

21. Before the trial court, the appellants submitted that the sum of Kshs, 180,000.00 was sufficient for compensation while the respondents contended that the Kshs. 50,000.00 was reasonable in the circumstances. The appellant cited the case of ***Elijah Mwangi Kanoga v Socfinaf Co., Ltd*** NBI HCCC No. 307 of 2001(UR) where the plaintiff sustained Kshs. 250,000.00 for what the judge termed as severe injuries. The appellants did not provide an abstract or report for the second case cited; ***James Gaturu Kimani v Kamanga Wairegi*** NBI HCCC No. 4133 of 1991 (UR). The respondent cited the case of ***Sokoro Saw Mills Ltd v Grace Nduta Ndung'u*** NKU HCCA No. 99 of 2003 where the claimant sustained soft tissue injuries and was awarded Kshs. 30,000.00 in 2006.

22. All the appellants sustained minor soft tissue injuries. There was no evidence that they would suffer

long term residual effects from the injuries. Considering the nature of injuries and the element of inflation in respect of the cases cited, I cannot say that the amount of **Kshs. 70,000.00** awarded as general damages was inordinately high or inordinately low as to warrant interference in line with the principle in *Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another (Supra)*. I award Eric Juma **Kshs. 70,000.00** as general damages.

23. In summary, I find that each of the appellants was involved in the accident that took place on 4th April 2009 involving the 2nd respondent's motor vehicle registration No. KAW 673B along Busia-Kisumu Road and that they suffered injuries. I therefore make the following orders;

- a. The appeal be and is hereby allowed with costs to appellant.
- b. Each judgment in the subordinate court is set aside and substituted with judgment for each appellant against the respondents jointly and severally for the sum of **Kshs. 70,000/-** with interest from the date of judgment in the subordinate court.
- c. The respondents shall bear the costs of each suit in the subordinate court.

24. I apologise for the delay in delivery of this judgment which was a result of the fact that once I had reserved judgment it became apparent that part of the proceedings relied upon were in another file which was not before the court and the same had to be located and the supplementary record prepared and filed.

DATED and DELIVERED at KISUMU this 5th day of December 2016.

D.S. MAJANJA

JUDGE

Mr Awino instructed by Ngala Awino and Company Advocates for the appellant.

Mr Rotich instructed by Kairu and McCourt Advocates for the respondent.