



**Owino v West Kenya Sugar Co Ltd (Civil Appeal E029 of 2022)
[2024] KEHC 2051 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2051 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E029 OF 2022
DK KEMEL, J
FEBRUARY 29, 2024**

BETWEEN

STEPHEN RAJWAYI OWINO APPELLANT

AND

WEST KENYA SUGAR CO LTD RESPONDENT

(Being an appeal against the judgement/decree of the Principal Magistrate's Court at Sirisia (Hon. Wattimah-SRM) delivered on 2nd March 2022 in Bungoma PMCC No. 41 of 2018)

JUDGMENT

1. The Appeal herein is against the judgement of Hon Wattimah (SRM) in Sirisia Senior Resident Magistrate's Court Civil Case No. 41 of 2018 dated 2nd March, 2022 wherein she dismissed the Appellant's case. The learned trial magistrate held that had the Appellant proved his case, then she would have apportioned liability in the ratio of 70% to 30% in favour of the Appellant and that she would have awarded general damages of Kshs 400,000/ as general damages for pain, suffering and loss of amenities.
2. Aggrieved by the said judgement, the Appellant lodged an amended Memorandum of Appeal dated 28th March, 2022 wherein he raised the following grounds of appeal:
 - a. That the trial magistrate erred in reaching a finding that was against the weight of the evidence adduced.
 - b. That the trial magistrate erred in law and in fact in finding that the Appellant was not an employee of the Respondent.
 - c. That the learned trial magistrate erred in her assessment of facts and evidence on record and consequently failed to apply the correct principles in determining that the Appellant did not prove the injuries sustained on occurrence of the accident.



- d. That the learned trial magistrate failed to appreciate, consider and/or address the salient and pertinent features of the Appellant’s case and/or pleadings and thereby abandoned her judicial mandate and/or responsibility, albeit without any lawful cause and/or basis.
- e. That the learned trial magistrate having heard the case by and/or on behalf of the Appellant, same failed to render herself fully, on all the aspects of the case. Consequently, the judgement and resultant decree of the learned magistrate is not only inconclusive, nut same is omnibus and has therefore occasioned a miscarriage of justice.
- f. That the learned trial magistrate failed to cumulatively and/or exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before her and thus arrived at an erroneous conclusion contrary to and in contradiction of the uncontroverted evidence.
- g. The learned trial magistrate erred in dismissing the Appellant’s case and failed to apply the principles applicable in determining that the Appellant sustained injuries which were proved.
- h. That the learned trial magistrate erred in law in holding that the Appellant had failed to prove the case on a balance of probability.
 - i. That the judgement and/or decision is nullity ab initio and a mockery of the due process of the law and hence ought to be set aside Ex-Debito Justiciae.

The Appellant therefore prayed that the impugned judgement delivered on 2nd March, 2022 be reviewed and/or be set aside and that the costs of the appeal be borne by the Respondent.

3. From the foregoing grounds of appeal, it is clear that the appeal challenges the trial magistrate’s judgment on liability and quantum. Having said so, it is noted that the lower court delivered its decision on 2nd March, 2022 wherein it established that at the time of the accident involving tractor KTCB 166M/ZC 8859, the Appellant was not under the Respondent’s employ, that the Appellant failed to substantiate his claims that an accident did occur causing his injuries on balance of probability as alleged. The learned trial magistrate dismissed the Appellant’s suit with no order as to costs as each party had contributed to the accident to some degree.
4. The appeal was canvassed by way of written submissions. It is only the Appellant who filed submissions dated 21st November, 2023.
5. I have considered the record of the lower court and the submissions tendered. The main issue for determination in this appeal is whether or not the trial magistrate erred on matters of fact or law, or whether she was entitled to arrive at the conclusion she did. It is worth noting that this Court as an appellate Court will not normally interfere with a trial court judgment on a finding of fact unless the same is founded on wrong principles of fact or law as was held by the Court of Appeal in *Selle & another – vs – Associated motor Boat Co. Ltd & Another* [1968] EA 123:-

“A Court of 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 conclusions”
6. From the above decision which echoes section 78 of the *Civil Procedure Act*, it is clear that this Court is not bound to follow the trial Court’s findings if it appears that either the trial Court failed to consider particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.



7. Evaluating the evidence as a whole, PW1, the Appellant herein, testified on oath that he was employed by the Respondent herein as a loader and that he was involved in an accident. During cross-examination, he stated that he did not have evidence to show that he worked for the Respondent herein and that he lacked a loader number as he was paid as a casual. He also stated that he worked for a cane farmer and that he did not work for the Respondent. The entire evidence of the Appellant revealed that he was shaky and that the learned trial magistrate made some observations on his demeanor such as being evasive, difficulty in answering questions and not answering questions directly etc.
8. DW1 testified on oath that he was employed by the Respondent as a driver. According to him, the accident occurred on 21st March 2018 and that the two injured people were unlawful passengers on the tractor. He told the Court that he had two loaders on that day as he had gone with them to arrange the sugar cane and that the farmer was one of them. He told the Court that he did not know the Appellant herein and that they do not carry people due to company policy.
9. From the foregoing, it is not disputed that the Appellant was not an employee of the Respondent and that he was injured while not being on duty at the Respondent's premises. What is in dispute is whether the appellant was injured while in the course of his duties as an employee of the Respondent and whether the accident is attributed to the negligence of the Respondent.
10. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the [Evidence Act](#). The Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the [Evidence Act](#), (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

11. The duty of proving the averments contained in the plaint lay squarely upon the Appellant.



12. In the present instance, it is not in dispute that an accident occurred on the material day involving the subject motor vehicle being driven by the Respondent's driver. Subject to the evidence as availed by DW1, it is against company policy for him to carry passengers that are not employees of the Respondent. The Appellant alleged that he was the employee of the Respondent at the time of the accident but failed to avail evidence to substantiate his claim, not even the loaders gate pass, muster roll, accident register and/or payment sheet for the month of February 2018. In view of the foregoing, I am in agreement with the trial Court that the Appellant failed to prove on a balance of probability that he was an employee of the Respondent at the time of the accident on 21st March 2018 and was thus owed a duty of care by the Respondent. This thus leads me to come to the finding that the Appellant failed to prove liability against the Respondent. However, had he proved negligence against the Respondent then I would have apportioned liability in the ratio of 70% to 30% in favour of the Appellant since the Respondent's driver ought to be careful while driving and or controlling the tractor and that the Appellant was also expected to board the tractor in a careful manner. He was also expected to appreciate the fact that riding on an open automobile such as a tractor is fraught with risks.
13. On the issue of quantum, the trial Court held that the Appellant alleged that he sustained injuries as per the treatment notes but failed to avail the treatment notes from the hospitals he received treatment for the sustained injuries. The Court further noted that the P3 form availed was incomplete and thus could not ascertain which injuries were sustained and that the only document on record was a medical report by PW2, DR. Charles Andai, dated 4th June 2018 which was prepared three months post the accident. A perusal of the evidence presented by the Appellant left no doubt that he was unable to prove his case on a balance of probabilities.
14. I concur with the holding of the lower Court on the importance of treatment notes in determining whether the Appellant was indeed injured. No reason was given as to why the treatment notes were not produced yet it is upon the same treatment notes that Dr. Charles Andai prepared the Medical Report three months later. The Appellant herein did not convince the trial court on his claims. It is clear that this Court is not convinced by the Appellant that he sustained injuries as stated on a balance of probability (see Civil Appeal No. 5 of 2011, Migoro vs Valley Bakery Ltd and Eastern Produce K. Ltd -vs- James Kipketer Ngetali (2005) KLR)
15. If the Appellant would have succeeded in proving his case on a balance of probability, i would also have made an award of Kshs. 400,000/= in general damages as the lower Court which would attract contribution of 30% liability. It is noted that the injuries alleged to have been sustained a fracture of right clavicle. The issue of inflation and the period it has taken to date is also taken into consideration.
16. On the whole, it is clear that the Appellant failed to prove his case on a balance of probabilities. The finding by the learned trial magistrate both on liability and quantum was sound and i see no need to interfere with the same. The learned trial magistrate did not take into consideration irrelevant factors while analyzing the case placed before her and arriving at he decision that she did.
17. In the result, it is my finding that the appeal lacks merit. The same is dismissed. Each party to bear their own costs

It is hereby ordered.

DATED AND DELIVERED AT BUNGOMA THIS 29TH DAY

OF FEBRUARY 2024.

D. KEMEI

JUDGE



In the presence of:

No appearance Namatsi for Appellant

No appearance O & M Law LLP for Respondent

Kizito Court Assistant

