Kariuki v Kimando (Civil Appeal 269 of 2013)
[2024] KEHC 2111 (KLR) (28 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2111 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CIVIL APPEAL 269 OF 2013

CW GITHUA, J

FEBRUARY 28, 2024

BETWEEN

HANNAH WAMBUI KARIUKI ..... APPELLANT

AND

FRANCIS KIMANDO ..... RESPONDENT

(Being an appeal from the judgement and decree of Hon. J . Wekesa, Ag. SRM dated 1st of November 2013 in Murang'a PMCC NO. 52 of 2006)

JUDGMENT

1. This appeal arises from the decision of the lower court which dismissed the appellant's suit with no orders as to costs.

2. By plaint dated 27th February 2006, the appellant had sued the respondent claiming general and special damages following personal injuries allegedly sustained in a road traffic accident involving Motor Vehicle Reg,No. KAC 909 in which she was riding as a passenger. The appellant blamed occurrence of the accident on the respondent's negligence.

3. In her Memorandum of Appeal filed on the 13th of August 2014, the appellant advanced a total of five (5) grounds of appeal in which she principally complained that the learned trial magistrate erred in law and in fact by : concluding that the accident did not occur; failing to analyse the evidence tendered by both parties and disregarding their submissions thus arriving at the erroneous conclusion that the appellant had failed to prove her case; and, dismissing the appellant's injury as too remote to warrant an award.

4. Pursuant to directions issued by the court on 11th of June 2018, the appeal was prosecuted by way of written submissions. The appellant's submissions were filed on 5th of October 2022 by her advocates

on record Ms. J.N Mbuthia & Company Advocates while those of the respondent were filed on 21st of November, 2022

Mr. T.M Njoroge Advocate. The submissions were highlighted orally before me on 28th September 2023.

5. It was submitted on behalf of the appellant that the evidence presented before the trial court proved occurrence of the accident due to over speeding by the respondent and that this amounted to prove of negligence; that it was not disputed that the appellant sustained injuries as a result of the accident and the trial court therefore erred when it failed to award damages to the appellant dismissing the injuries as too remote. According to the appellant, there was nothing in law known as remote injuries.

6. The respondent on his part supported the lower courts decision to dismiss the appellant's suit. His learned counsel submitted that the learned trial magistrate's decision was sound in law as it was based on the evidence on record which did not prove the appellant's case on a balance of probabilities; that the suit was properly dismissed. He invited this court to dismiss the appeal with costs.

7. This being a first appeal, it is the duty of this court to re-analyse, reconsider and re-evaluate the evidence placed before the trial court and arrive at its own independent conclusion bearing in mind that unlike the trial court, I neither saw nor heard the witnesses.

   See: Gitobu Imanyara & 2 others v Attorney General [2016] eKLR;

8. Briefly, the appellants case in the lower court was that on 26th June 2005, she was among a group of 30 youth members of Ikindu ACK church who boarded a Mitsubishi canter, Reg.NO. KAC 909K at Muguruki. They were travelling to Saba Saba for a get together.

   She recalled that before reaching their destination, the vehicle overturned and before this happened, she had a feeling that the driver was over speeding. She was hit by one of the vehicle's metal bars and the impact threw her out of the vehicle. She sustained a slight dislocation on her elbow joint.

9. Her other two witnesses were a Medical Officer (PW2) and a Clinical Officer (PW3) who testified that they examined the appellant on different dates and she gave them a history of having been involved in a road accident. They confirmed that in completing the medical documents they presented before the court, they relied on treatment notes which showed that the appellant had sustained a soft tissue injury on her right elbow joint.

10. On his part, the respondent testified to counter the appellant's claim but did not call an additional witness. He admitted having been the driver of lorry Reg. No. KCK 909 K (subject vehicle) at the material time but denied that he was its owner. He also admitted having offered a lift to some young people in the subject vehicle when it developed a mechanical problem, veered off the road and landed in a ditch. He denied the appellant's allegation that the vehicle veered off the road because he was over speeding.

11. I have carefully considered the grounds of appeal, the rival submissions made on behalf of the parties and the evidence on record. Needless to state, I have also read and understood the impugned judgement.

12. Having done so, I find that the only issue that emerges for my determination is whether the learned trial magistrate erred in dismissing the appellant's suit on grounds that she had failed to prove her case to the required standard of proof.

13. It is a cardinal principle of the law of evidence as set out in Section 107 to 109 of the *Evidence Act* that whoever asserts a fact has the burden of proving its existence in order to succeed. In other words, he who alleges must prove. In civil cases, the standard of proof is on a balance of probabilities.

14. While discussing the burden of proof in civil cases, the Court of Appeal in Kenya Airports Authority versus Mitu-Bell Welfare Society & 2 others (2016) eKLR; stated as follows:

> " In civil cases, a court makes its findings and determinations on a balance of probabilities. This means that it must be established that the fact in issue more likely than not to have happened; that is, that it is 'quite likely' or 'not improbably' though less likely than not that it happened. (See Davies v. Taylor [1974] A.C. 207; see also In In re A (A Minor) (Care Proceedings) [1993] 1 F.L.R. 824). In Re B (2008) UKHL 35, Lord Hoffman expressed the term balance of probability using a mathematical analogy: "If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

15. In this case, the suit before the trial court was premised on the tort of negligence. The Court of Appeal in Eastern Produce (K) Ltd V Christopher Atiado Osoro [2006] eKLR re-iterated the well settled legal principle that where a claim was based on negligence, the onus lay on the plaintiff to proof some form of negligence against the defendant. The court proceeded to cite with approval its famous decision in Kiema Mutuku V Kenya Cargo Hauling Services Ltd [1991] 2 KAR 258 where it held that;

> " There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

16. Since the appellant's suit was based on negligence, she had both the legal and evidential burden to prove the facts alleged on a balance of probabilities. The question therefore is whether the evidence adduced by the appellant in the trial court was sufficient to discharge this burden.

17. Having analysed the evidence on record, I am unable to agree with the trial court's finding that the appellant failed to prove that the accident in question occurred because as submitted by the appellant, the respondent in his evidence admitted its occurrence but denied that it was occasioned by negligence on his part.

18. The appellant, though claiming that the accident occurred because the respondent was overspeeding failed to adduce any evidence to substantiate this claim or any of the particulars of negligence attributed to the respondent as pleaded in the plaint.

    The police abstract produced in evidence by the appellant did not show that occurrence of the accident was blamed on the respondent's negligent driving.

19. It is also important to note that no evidence was adduced to establish a nexus between the appellant's alleged soft tissue injury and the accident. According to the evidence of PW2 and PW3, at the time they examined the appellant, she did not have any injury or scars showing that she could have sustained an injury at the time alleged. As stated earlier, PW2 and PW3 testified that when completing their

respective reports, they relied on some treatment notes whose author was unfortunately not availed by the appellant to testify in support of her case.

20. In view of the foregoing, am unable to fault the learned trial magistrate's finding that the appellant failed to prove her case to the standard required by the law which is on a balance of probabilities. In the premises, I find that this appeal is devoid of merit and I hereby dismiss it with costs to the respondent.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 28TH DAY OF FEBRUARY 2024.

C.W GITHUA

JUDGE

In the presence of :

Mr. T.M Njoroge for the Respondent

Ms. Susan Waiganjo Court Assistant

No Appearance for the Appellant