Matulai v Mwikya (Civil Appeal 12 of 2022)
[2024] KEHC 1909 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1909 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CIVIL APPEAL 12 OF 2022

RK LIMO, J

FEBRUARY 22, 2024

BETWEEN

GABRIEL SILLA MATULAI .... APPELLANT

AND

JOSEPH MWIMI MWIKYA .... RESPONDENT

(This is an Appeal from the Judgment of Senior Resident Magistrate, Hon J. W. Wang'anga delivered on 8th June 2022 in Mutomo PMCC NO. E007 OF 2021.)

JUDGMENT

1. This is an Appeal from the Judgment of Senior Resident Magistrate, Hon J. W. Wang'anga delivered on 8th June 2022 in Mutomo PMCC NO. E007 OF 2021.

2. The cause of action arose from a traffic road accident which occurred on 15th April 2018 along Mutomo-Ikutha road at Uvai area involving motor vehicle registration no. KBM 812B in which it is alleged that the Appellant was travelling in as a passenger. The Appellant averred that the Respondent and/or his authorized driver recklessly and carelessly drove the said motor vehicle causing it to hit the rear of motor vehicle registration KCN 074Y and as a consequence he sustained severe injuries. The Appellant particularized the injuries sustained as follows;

   a) Blunt injury to the chest

   a. Blunt injury to the lower back

   b. Blunt injury to the knees

   c. Blunt injury to the hip region.

3. In response, the Respondent filed a Defence dated 6th October 2019 where he denied ownership of motor vehicle registration No. KBM 812B, occurrence of the accident and particulars of negligence attribute to him.

4. The trial court evaluated the evidence tendered and found that the appellant had not 100% proved his case to the required standard and dismissed it. Below is a summary of the evidence tendered at the trial court.

5. Gabriel Sila Mutulai (PW1) adopted his witness statement dated 10/2/2021 and told the court that he was involved in a traffic road accident on 15/4/2018 when travelling from Kitui to Mutomo. He stated that he was seated next to the driver and that he warned him of over speeding but the driver ignored. He proceeded that the driver was chasing another motor vehicle when he overtook from the left side and caused the accident. He stated that their vehicle was hit because of overtaking. He proceeded that he was taken to a government hospital where he was admitted for two days and thereafter went to Mombasa from where he started experiencing pains on his chest, back and left knee and went to hospital on 17th April 2018. He stated that he reported the matter at Mutomo Police Station. He tendered documents as follows; treatment chit, P3 Form, Police Abstract, NTSC invoice, NTSA motor vehicle copy of records, medical report and referral letter from the police as P ex1 to 7 respectively.

6. The Respondent on his part presented no witness in his defence.

7. The trial court as observed above found that the appellant had not proved his case and that the medical document tendered were suspicious and dismissed the case with costs to the respondent.

8. The appellant felt aggrieved and filed this appeal raising the following grounds namely;

   i. The Learned Magistrate erred in fact and in law in dismissing the Appellant's suit.

   ii. The Learned Magistrate erred in fact and in law in finding that the Appellant has not proved his case against the Respondent on a balance of probabilities.

   iii. The Learned Magistrate erred in fact and in law in finding that the Appellant had not proved his case against the Respondent on a balance of probabilities.

   iv. The Learned Magistrate erred in fact and in law in failing to consider the plaintiff's documents on record more so the treatment records.

   v. The Learned Magistrate erred in fact and in law by recording proceedings which was not the Appellant's testimony more so on the issue of medication being sought at a Mombasa hospital.

9. The appellant seeks to set aside the dismissal order and have asked the court to award damages.

10. The appellant submits that the trial court fell into error in its decision because his case was not challenged during trial. He maintains that the respondent was vicariously liable for the negligent acts of his driver.

11. Counsel for the appellant cited the case of Counsel has cited the case of Motex Knitwear Mills Limited vs Gopitex Knitwear Mills Limited [2009] eKLR where the court referred to the case of A*utar Singh & Anor versus Raju Govindji* HCC 548 of 1990 where it was found that failure to call evidence renders a party's pleadings as mere statements and renders evidence adduced by a plaintiff as uncontroverted evidence. Similar finding was arrived at in the case of *Dorcas Wangithi Nderi vs Samuel Kiburu Mwaura & Anor* (2015) Eklr.

12. On the award for general damages, the Appellant submits that an award of Kshs 400,000/- would be sufficient and prayed for an award of Kshs 3,550/- as Special damages.

13. This appeal is unopposed but that notwithstanding, the primary role of this court being a first appeal is to reconsider the evidence tendered and draw own conclusions.

14. On liability, the burden of proof is always on the plaintiff. The trial court was not persuaded that the appellant discharged that burden because it found the appellants case “sketch, shaky and lacking in detail on how the accident occurred”. The trial court found that it was not enough to produce a police abstract to prove negligence on the part of the respondent. While it is true that the burden of proof lies on whoever alleges, it should not be lost that the standard of proof required is on a balance of probabilities.

15. The Court of Appeal’s position in *Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another* [2014] eKLR espouses the correct legal position that:

> “It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”

16. The burden of proof in this matter was on the Appellant and his pleadings and oral testimony in court was that he was aboard a public service vehicle and he blamed the driver of said motor vehicle for the accident by trying to overtake when it was not safe to do so. His testimony was to the effect that he was travelling aboard the suit motor vehicle, that the same was being driven at a high speed and that the driver was chasing another vehicle, that the driver upon reaching an area called Uvai, the driver tried to overtake on the wrong side (left) and caused the accident.

17. The burden of proof shifted to the Respondent to rebut these allegations. However, the Respondent did not call any witnesses to rebut evidence tendered. In its judgment, the trial court stated that the Respondent denied accusations raised by the Appellant in its defence and called for the dismissal of the Appellant’s case before closing his case but the record shows that counsel for the Respondent sought for a date for hearing of the defence case on 13/4/2022 but on the same day at a later time chose to close her case without calling any witnesses.

18. Still on liability, the trial court failed to find in favour of the Appellant for the reasons that he failed to call the investigating officer or tender sketch maps of the scene. She further found that the accident was still under investigations and for the reason that the Appellant experienced difficulty in procuring a police abstract. I have noted some anomalies here. Firstly, the accident was reported at Mutomo Police Station and the police issued an abstract which was tendered in evidence without an objection. Secondly, a police officer if one was called would have provided secondary evidence as they did not eye witnesses to the accident. Thirdly, the appellant cannot be faulted for experiencing difficulty in procuring a police abstract, because the same in my view was beyond his control. Fourthly, a sketch map is not the determining piece of evidence that can assist the circumstances on how an accident happened.

The Court of Appeal in the case of *Equator Distributors v Joel Muriu* [2018] eKLR pronounced itself as follows:

> "On probative value to be given to a police sketch map, we are aware that a police sketch map for a road traffic accident is prepared after the event, it is not an eyewitness account. However, it carries some probative value. The sketch map is not binding on the trial court and it is for the trial court to establish facts from all the evidence on record. A police sketch map is just but an item of evidence to be considered."

19. The appellant's case was not challenged by any evidence to the contrary on a balance of probabilities, his case reached the threshold and the trial court fell into error by concluding otherwise. T is not surprising that the Respondent has not disputed the appellant's case on liability in this appeal. He is found 100% liable.

General damages

20. The trial court indicated that it suspected the Appellant because he could not receive treatment the same day then travelled to Mombasa and thereafter produced medical documents from Mutomo. Counsel has faulted the trial court on this fact and contended that the trial court erred in recording that the appellant received treatment from Mombasa. I went through the trial court's handwritten record but unfortunately, the trial magistrate's handwriting was not legible to me. In my view, I am inclined to accept the Appellant's counsel submission that there was an error on the record as the Appellant produced treatment notes from Mutomo Hospital which indicate that he was attended to on 17th April 2018. This tallies with his testimony that he went to hospital on 17th April 2018 two days after the accident when he started experiencing pains.

21. Injuries recorded in the medical report tendered by Dr Titus Ndeti Nzina dated 28th May 2018 are as follows;

    i. Blunt injury to the chest

    ii. Blunt injury to the lower back

    iii. Blunt injury to the knees

    iv. Blunt injury to the hip region.

22. The doctor's findings on the appellant's injury a little more than one month after the accident were;

    i. Tenderness on the anterior chest wall

    ii. Tenderness on the lower back

    iii. Tenderness on the hop region.

23. The trial court should have notwithstanding its finding on liability, assessed the damages it would have awarded it had found merit in the appellant's case.

24. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in *Southern Engineering Company Ltd. Vs. Musingi Mutia* [1985] KLR 730 where it was held that:

> "It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to

the general conditions prevailing in the country generally, and to prior decisions which are relevant to the case in question."

25. Comparative decisions on damages awarded for soft tissue injuries;

    a. In *G4s Security Services Ltd v Oyugi Obiria* [2018] eKLR, the court upheld an award of Kshs. 180,000/- awarded as general damages for pain, suffering and loss of amenities for the following injuries, blunt trauma to the neck- blunt-blunt injury to the back, tenderness to the right ear, blunt injury to anterior chest wall and swollen right hand.

    b. In *Channan Agricultural Contractors Ltd v Fred Barasa Mutayo* [2013] eKLR , the High Court reviewed downwards an award of Kshs. 250,000/ to Kshs. 150,000/= for "moderate soft tissue injuries that were expected to heal in eight months' time.

    c. In *George Kinyanjui T/A Climax Coaches & Anor. v Hussein Mahad Kuyale* [2016] Eklr, the High Court reviewed downwards an award of Kshs. 650,000/= to Kshs. 109,890/= for soft tissue injuries.

    d. In *Dickson Ndungu Kirembe v Theresia Atieno & 4 Others* [2014] eKLR the High Court reviewed downwards an award of Kshs. 255,000/= to Kshs. 127,500= for soft tissue injuries which healed with no complications.

26. Going by the above authorities, this court finds and hereby awards the appellant kshs. 150.000/= in general damages. There was no document tendered to prove special damages other than an invoice from NTSA for kshs. 500/=. The claim for special damages therefore fails. The appellant will have costs and interests from the date of judgment in the trial court. He will also get costs of this appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 22ND DAY OF FEBRUARY, 2024

HON. JUSTICE R. K. LIMO

JUDGE