Ghani & another v Eastern Produce (K) Ltd (Civil Appeal 63 of 2013) [2024] KEHC 2922 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2922 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 63 OF 2013

JRA WANANDA, J

MARCH 22, 2024

BETWEEN

I. GHANI ..... 1ST APPELLANT

GEORGE NJUGUNA ..... 2ND APPELLANT

AND

EASTERN PRODUCE (K) LTD ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment delivered on 5/04/2013 in Eldoret Chief Magistrate's Court Civil Case No. 796 of 2002 in which the Plaintiff was awarded damages for material loss allegedly suffered as a result of a road accident. In the suit, the Appellants were the Defendants while the Respondent was the Plaintiff. The Appeal is framed as being against the trial Court's findings on both liability and quantum.

2. The background of the matter is that by the Plaint filed on 18/05/1999 through Messrs A.G.N Kamau & Co. Advocates, initially as Nairobi Senior Principal Magistrates Court Civil Case No. EJ 398 of 1999 and which Plaint was later amended and filed on 14/07/1999, the Respondent pleaded that it was the owner of the Motor Vehicle Registration No. (hereinafter "the Peugeot pick-up") while the 1st Appellant was the owner of the Massey Ferguson Tractor Registration No. KUW 312 (hereinafter "the tractor") and the 2nd Appellant its servant or agent and thus the 1st Appellant was vicariously liable for the actions of the 2nd Appellant. It was alleged further that on 1/05/1997 at about 3.00 pm, the Respondent's said Peugeot pick-up was being driven along the road adjoining Kipkebon Estate office in Nandi Hills Road when the 2nd Appellant drove the said tractor so recklessly and/or negligently that it collided with the Respondent's said Peugeot pick-up damaging it and injuring ten passengers in the Respondent's Peugeot pick-up. The Respondent claimed that as a result of the accident, it had suffered loss and damage and particularised the damages in terms of cost of repairs, assessment and re-

assessment charges and investigation and police abstract fees which amounted to an aggregate amount of Kshs 392,052/-.

3. The Appellants filed their Statement of Defence on 18/04/2000 through Messrs Kimaru Kiplagat & Co. Advocates. In the defence, they denied the allegations of negligence and instead, blamed the Respondent for the accident. The Defence was later amended and filed on 9/07/2003.

4. By the order made by the High Court on 22/04/2001, the suit was subsequently transferred to Eldoret. On 14/01/2003, the Respondent appointed new Advocates, Anne W. Kimani & Co.

5. On their part, the Appellants filed an Amended Statement of Defence on 9/07/2003 and introduced a Counterclaim against the Respondent for the sum of Kshs 349,616/- being alleged cost of repair of the tractor. The Appellants also sought unspecified loss of user.

6. The suit then proceeded to full trial wherein the Respondent presented 5 witnesses while the Appellants called 3 witnesses. The trial commenced on 26/06/2003.

Respondent's Evidence Before the Trial Court

7. PW1 was an auto-consultant practicing as an Assessor/Valuer of motor vehicles. He testified that his firm is known as Prozy Auto Consultants Ltd, that he inspected the Respondent's said Peugeot pick-up, made a Report and calculated repair costs at Kshs 300,252.35/-, and that he made two Reports for which he charged Kshs 11,200/- and Kshs 2,500/-, respectively. He then produced the Reports. In cross-examination, he stated that the repair charges were paid by the insurance company from whom he received instructions, that the repairs were done by Marshalls Kericho branch, and that there are receipts for each spare parts. He then gave a long description of the damage.

8. PW2 was the driver of the Respondent's said Peugeot pick-up at the time of the accident. He stated that on 1/05/1997, around 3.30 pm, he was carrying 15 employees of the Respondent in the Peugeot pick-up, that he was driving along a small one-way road within the tea estate, the road was only sufficient for one motor vehicle at a go, that the Appellant's tractor came from the right side from the gate of Kipkeben offices, the tractor hit his Peugeot pick-up on the driver's door side, and that he (PW2) was driving at 40 kh/hr. He blamed the tractor because he (PW2) was on the highway, that the tractor driver should have stopped and let PW2's Peugeot pick-up pass, and that the Peugeot pick-up was damaged on the driver's door/cabin. In cross-examination, he reiterated that the tractor came from inside the company compound, and that the gate had been opened for the tractor to come out. He stated that he did not know whether anyone was charged for a traffic offence.

9. PW3 was a Legal Assistant from the Respondent's insurer's Claims department. He testified that the insurance was comprehensive, that the Peugeot pick-up was extensively damaged in the accident, that they appointed Messrs Prozy Auto Consultants Ltd to assess the damage and who made several Reports, that the Peugeot pick-up was repaired at Kshs 300,252/- which the insurer paid, that they paid the Assessor Kshs 17,700/- and Kshs 11,100/- to Crystal Clear Assessors, and that in total, the insurer claimed Kshs 329,952/-. He produced several exhibits. In re-examination, he conceded that he had not produced a Receipt to acknowledge payment for the repairs but stated that, in Court, the Assessor had acknowledged receipt.

10. PW4 was a Branch Manager at Marshall's EA He produced several exhibits including the invoice and receipt for repair charges of Kshs 300,252.35 issued by Insurance Company of East Africa (ICEA), the insurer of the Peugeot pick-up. In cross-examination, he stated that the Peugeot pick-up had been assessed before repairs, that it had been assessed by another Loss Assessor and that the work of Marshall's E.A was only to repair.

11. PW5 was a traffic police officer. He confirmed occurrence of the accident and that it involved the Peugeot pick-up and the tractor referred to herein. He stated that the accident was reported at the Nandi Police Station and was investigated by other officers, and that the police abstract indicates that the matter was still pending under investigations. He then produced the police abstract. In cross-examination, he conceded that he did not investigate the case but confirmed the registration number of the tractor as KUW 312. He stated that he did not have the investigations Report because he was not able to trace the relevant police file as a long time had lapsed. He also conceded that the names of the drivers of the two vehicles were not indicated in the police abstract and that only names of witnesses were indicated. In conclusion, he agreed that he could not tell who was to blame for the accident.

Appellant's Evidence Before the Trial Court

12. DW1 stated that he was a supervisor at the company known as Tracks Construction Company. He testified that they were building an airstrip and that the 1st Appellant was his employer at the time, that he was at work around 3.00 pm when he left with the driver of the tractor KUW 312 which belonged to the 1st Appellant. He confirmed that the same was being driven by the 2nd Appellant who drove to the gate and stopped to see if it was clear to join the main road, that the Peugeot pick-up came from the left side, that the tractor had not joined the main road, that the driver of the Peugeot pick-up applied brakes, skidded and hit the tractor on the front tyre left side, that the Peugeot pick-up stopped at a distance ahead, that there were skid marks and he concluded that the driver of the Peugeot pick-up had tried to brake, that the tractor was damaged on the left side, the tractor was repaired, that he does not recall that the driver of the tractor being charged with a traffic offence, that the tractor was stationary when it was knocked. He insisted that it is the driver of the Peugeot pick-up who caused the accident and rammed into the tractor. In cross-examination, he stated that he saw the Peugeot pick-up when he was at the gate, a distance of about 200 metres.

13. DW2 was the 1st Appellant, another officer from Tucks Building & Construction Co. Ltd. He too testified that at the material time, they were building an airstrip, on 1/5//1997, he received a phone call informing him that an accident had occurred, he was called by DW1 who informed him that a vehicle had rammed into the tractor, that DW1 told him that the tractor had stopped at a junction at the gate when the vehicle came at a high speed, branched, skidded and knocked the tractor, that the hub was damaged. DW2 stated that he went to the scene and saw skid marks caused by the Peugeot pick-up. He stated that the driver of the tractor, the 1st Appellant, was not charged with any traffic offence and that they repaired the tractor at Kshs 349,616/-. He produced a list of spares purchased. In cross-examination, he conceded that he was not at the scene when the accident occurred, and that he saw the skid marks on the next day. He stated that a valuation report was not made and that the supporting documents were for 1998 and 2004 because the spares were not readily available, that it took them time to get spares, that the repairs were done within the company and that is why there were no labour charges.

14. DW3 was a motor vehicle assessor. He testified that he assessed the tractor on 15/02/1998 upon instructions given to him by the 1st Appellant who told him that a matatu had hit the tractor, that he assessed the tractor and prepared a Report, that the total repair cost was Kshs 349,616/-, he charged Kshs 5,000/- and that he took photographs after the tractor was repaired. In cross-examination, he conceded that he took the photographs on 12/01/2011. He also conceded that he did not take photographs before repair and according to him, the reason was because the 1st Appellant had told him that they had agreed on the repair but that the Respondent changed its mind.

Trial Court's Judgment

15. After the hearing, as aforesaid, the trial Court delivered its Judgment on 5/04/2013 in favour of the Respondent. Liability was entered at 100% against the Appellants and damages awarded at Kshs 329,952/- as prayed in the Plaint, plus costs and interest.

Appeal

16. Aggrieved by the trial Court's said decision, the Appellants filed this Appeal on 3/05/2013. They cited the following 7 grounds:

    i. That the learned Resident Magistrate erred in law and fact in holding that the Appellants were wholly to blame for the accident despite the glaring and overwhelming evidence on record which indicated that the Respondent was wholly and/or substantially to blame for the occurrence of the accident.

    ii. That the Learned trial Magistrate erred in law and fact in awarding damages to the Respondent who had not proved his case on negligence and or balance of probabilities.

    iii. That the Learned trial Magistrate erred law and fact in dismissing and totally disregarding the Appellants meritorious counterclaim against the Respondents contrary to the evidence on record.

    iv. That the learned trial Magistrate erred in law and fact in failing to consider all the facts and documentary evidence placed before him.

    v. That the learned trial Magistrate erred in law and in fact in failing to make a Ruling on all the issues raised in the pleadings.

    vi. That the Learned trial Magistrate failed to consider the evidence adduced and submissions by the Appellant.

17. It was then agreed and directed that the Application be canvassed by way of written submissions. While the Respondent filed its Submissions 13/01/2023, up to the time of concluding this Judgment, I had not come across the Appellant's Submissions.

Respondents' Submissions

18. On the issue of liability, Counsel for the Respondent submitted that PW2 who was driving the Respondent's Peugeot pick-up had established that the driver of the tractor was to blame as he should have stopped to give way. Counsel added that the driver of the tractor was never called as a witness and that DW1 conceded that the Peugeot pick-up was on the main road while the tractor was attempting to join the main road when the accident occurred. He added that the fact that the Peugeot pick-up was hit on its side proves that the tractor entered the road without confirming that it was clear. On the issue of drivers joining the main road from feeder roads, Counsel cited the case of *Henry Obonyo Ogele v Patel V.K. Manubhai & 2 Others* [2017] eKLR.

19. On the issue of ownership of the Respondent's Peugeot pick-up, Counsel submitted that the Respondent produced the police abstract to prove ownership. He cited the case of *Simon Ngure Kirongo (appealing as the Legal Representative of the estate of Philisila Nyambura Cyrus Kironjo v John Muhia Kanotha* [2016] eKLR. Counsel submitted further that the Respondent, through its witnesses, had established the damages claimed, that the documents produced in evidence by the Respondent's witnesses were never challenged and that therefore the trial Magistrates award should not be disturbed.

He cited the case of *Nkuene Dairy Farmers Co-op Society Ltd & Another v Ngacha Ndeiya* [2010] eKLR.

20. Regarding the Appellants' Counterclaim, Counsel submitted that the same has no legs to stand having been brought 6 years after the cause of action and in effect time barred by virtue of the provisions of Section 4 of the *Limitation of Actions Act*, that the Court lacks jurisdiction to entertain a stale claim, that the Magistrate was correct to conclude that the claim was an afterthought and was not sufficiently proved. He cited the case of *Philister Odero Ochieng versus Eastern Produce (K) Ltd*, Eldoret Civil Appeal No. 103 of 2012 and also the case of *Kenya Ports Authority v Modern Holdings [EA] Limited* [2017] eKLR, among others, and urged this Court to uphold the lower Court's Judgment.

Determination

21. The duty of an appellate Court was set out in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

22. The Appellant having failed to file Submissions, this Court is not in a clear position to ascertain the grievances raised. All this Court can rely on is the Memorandum of Appeal which however cannot on its own fully bring out the Appellant's case. It is however clear that the Appellant's major ground of Appeal is on the trial Court's findings on the issue of liability. In the circumstances, I find the following to be the issues arising for determination.

    i. Whether the trial Magistrate was corrrect in reaching the finding that the Appellants were to blame for causing the accident.

    ii. What then should be the fate of the damages awarded to the Respondent?

23. I now proceed to analyse and determine the said issues.

Whether the Trial Magistrate Erred in Reaching the Finding that the Appellants Were to Blame for Causing the Accident

24. It is now settled that an appellate Court will only interfere with the findings of a trial Court if the same were not supported by evidence or were premised on wrong principles of the law. This was the import of the holding in *Bundi Murube v Joseph Omkuba Nyamuro* [1982-88]1KAR 108, where the Court of Appeal held as follows:

> " However, a Court on appeal will not normally interfere with a finding of fact by the 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 making the findings he did." And also, in *Rahima Tayabb & Another v Ann Mary Kinamu* [1982-88] 1KAR 90 Law JA also stated; -
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> "An appellant Court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanor of witnesses who has given evidence before him."

25. The Respondent being the Plaintiff in the trial Court, pursuant to the *Evidence Act*, Cap 80, the burden of proof lay on the Respondent. Sections 107 and 108 thereof provide as follows:

Section 107

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

26. In this instant case, PW2 who was the driver of the Respondent's said Peugeot pick-up at the time of the accident stated that he was driving along a small one-way road within the tea estate, and that the road was only sufficient for one motor vehicle at a go. He stated that the Appellant's tractor appeared from the right side from the gate of Kipkeben offices and hit the Peugeot pick-up on the driver's door side. He stated that he was driving at a speed of 40 kh/hr, that he was on the highway and that the tractor driver should have stopped and let his Peugeot pick-up pass. He therefore blamed the tractor driver. He further stated that the Peugeot pick-up was damaged on the driver's door/cabin. Indeed, the photographs attached to the Assessment reports demonstrate this point of impact. In cross-examination, he stated that the tractor was from inside the company compound, and that the gate had been opened for the tractor to come out.

27. On the part of the Appellants, the driver of the tractor was not called as a witness. However, DW1 stated that he was a supervisor and that he left with the driver of the tractor. He stated that the same was being driven by the 2nd Appellant who drove to the gate and stopped to ensure that it was safe to join the main road, that the Respondent's Peugeot pick-up came from the left side, the tractor had not joined the main road, that the driver of the Peugeot pick-up applied brakes, skidded and hit the tractor on the front tyre left side, that the Peugeot pick-up stopped at a distance ahead, that the tractor was damaged on the left side, and that the tractor was stationary when it was knocked. He insisted that it is the driver of the Peugeot pick-up who caused the accident as he rammed into the tractor.

28. The two versions only converge in agreeing that the collision occurred, that it involved the tractor and the Peugeot pick-up, and that the Peugeot pick-up was on the main road and the tractor was on the feeder road. Since no sketch map was produced, this Court cannot accurately ascertain whether the point of impact was on the main road or on the feeder road. PW2 and DW1, the only alleged eye-witnesses, gave conflicting testimonies on this fact.

29. The evidence of the traffic police officer, PW5, was not very helpful since he stated that he was not involved in the investigations relating to the accident, the same having been conducted by other officers. The police abstract that he produced was also not helpful as it merely indicates that the matter was still pending under investigations. He also did not have the investigations Report because according to him, he was unable to trace the police file since a long time had lapsed. The police abstract also did not indicate the names of the drivers of the two motor vehicles, only names of witnesses were indicated. He agreed that he could not tell who was to blame for the accident.

30. There are therefore two conflicting versions of how the accident occurred.

31. In the celebrated case of *Peters v Sunday Post* [1958] EA 424 and p. 429 E Sir Kenneth O'Connor P. Stated as follows:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

32. Similarly, in the case of *Kiruga v Kiruga & Another* [1988] KLR 348, the Court of Appeal emphasized as follows:

> " 2. An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.
>
> 3. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.
>
> 4. Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed."

33. As this is a first appeal, the role of this Court is to revisit the evidence on record, re-evaluate it and reach its own conclusion. An appellate Court will not however ordinarily interfere with findings of fact by the trial Court unless it is demonstrated that such findings were based on no evidence at all, or on a misapprehension of it or the Court is shown to have acted on wrong principles in reaching the findings. It is therefore upon the Appellant to demonstrate to this Court that the said factors exist and thus justifying this Court's intervention. Since in this case, there is a conflict of primary facts between witnesses, by failing to file written Submissions, the Appellant has lost the opportunity to demonstrate that there are justifiable grounds for this Court to disturb the findings of the trial Court.

34. In any case, in my assessment, between the evidence of PW2 and DWI, I find the evidence of PW2 more believable. First, although the police abstract does not indicate the names of the drivers of the two respective vehicles, it has not been denied that PW2 was the driver of the Peugeot pick-up. On the Appellant's part, the driver of the tractor was never called as a witness. Although DW1 alleges that he was a passenger in the tractor, I note that the police abstract lists the names of 3 witnesses but DW1 does not feature as one of them. Indeed, this issue was raised during cross-examination. Apart from his oral evidence therefore, there is nothing else to corroborate the allegation that DW1 was really a passenger in the tractor.

35. I also find it improbable that, as alleged by the Appellants, that the Respondent's Peugeot pick-up which was undeniably being driven on the main road, for some reason, just left the road and veered to exactly where the tractor was stationery at the junction. In the absence of corroborating evidence, that explanation sounds incredible, unrealistic and implausible. Having perused the photographs attached to the assessment roads, I note that the damage to the Peugeot pick-up was squarely on the left door side, evidence consistent with a vehicle on a main road being hit by another one joining from a junction.

In my assessment, the Appellants failed to give a convincing contrary account of how the accident occurred.

36. In view of the foregoing, I am satisfied that the learned Magistrate carefully considered the evidence before him and having evaluated the same came to the correct conclusion that the Respondent had proved its case. I have, on my part, re-evaluated the evidence, assessed the same and, while remembering that I did not have the benefit of seeing and hearing the witnesses, have come to the same conclusion, as did the learned Magistrate, that the Respondent had proved its case. Consequently, I find that this ground of appeal lacks merit and the same is rejected.

What Should be the Fate of the Damages Awarded to the Respondent?

37. The suit the basis of this Appeal being a material damage claim arising out of a road accident, the Respondent sought damages for Kshs 300,252/- as cost of repairs, Kshs 17,700/- as Assessment and Re-assessment fees, Kshs 11,100/- as investigation fees and Kshs 100/- as police abstract charges. Needless to state, these are special damages and the aggregate amount is Kshs 329,052/-.

38. It is trite law that special damages must be both pleaded and proved. In the case of *Hahn v. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, the Court of Appeal held as follows:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved .... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

39. Similarly, in the case of *Richard Okuku Oloo v South Nyanza Sugar Co. Ltd* [2013] eKLR the Court of Appeal again held as follows:

> " We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of."

40. In this case, the Magistrate awarded the entire amount of Kshs 329,052/-. The Appellants do not seem to have any major complaint on proof of the said figure. Nevertheless, I have perused the record and I am satisfied that the Respondent produced all necessary invoices, receipts and/or other documentary proof in support of each of the respective items. I do not therefore have any reason to fault the Learned Magistrate's award of Kshs 329,052/-.

Final Order

41. In the premises, this Appeal is dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF MARCH 2024

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WANANDA J. R. ANURO

JUDGE