**Osuko v Ogot (Civil Appeal E026 of 2022) [2024] KEHC 5697 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5697 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL E026 OF 2022**

**MS SHARIFF, J**

**APRIL 30, 2024**

**BETWEEN**

**WILSON OSIAKO OSUKO ..... APPELLANT**

**AND**

**GRACE AKINYI OGOT ..... RESPONDENT**

***(Being an appeal from the judgment and decree of Hon. F. M. Rashid (SRM) delivered on 25/3/2022 in Winam PMCC NO 191 Of 2016 between Grace Akinyi Ogot vs Wilson Osiako Ogot)***

**JUDGMENT**

## Background And Facts

1. Grace Akinyi Ogot (Respondent) impleaded Wilson Osiako Osuko (Appellant) at the Winam Magistrate's Court seeking general damages, costs and interests of the suit emanating from a traffic accident. She averred that on 22/11/2016 she was a fare paying passenger aboard the Appellant's motor vehicle reg. no. KAQ xxxx when it lost control occasioning her serious injuries.

2. She held the Appellant as the owner of the vehicle vicariously liable for among other things excessive speeding, driving a defective motor vehicle and disregarding traffic laws.

3. On its part the Appellant generally denied owning the vehicle or being responsible for the accident. Without prejudice he averred that if an accident occurred it was solely caused by the Respondent's negligence.

4. In support of her case at the at the magistrate's court the Respondent called 3 witnesses. PW1 the Respondent stated that on 22/11/2016 at 8.40 am she boarded the Respondent's vehicle at Nico Shop headed to Kisumu. She narrated that the driver seemed drunk and as a precaution she requested for a refund of her fare which was turned down on the pretext that it was rush hour. She recounted that on reaching Coptic Church on the way to Kisumu the vehicle fatally knocked a pedestrian in the process of which she also sustained injuries.

5. In the aftermath of the accident the Appellant contended that she went to JOOTRH hospital where he was treated and discharged. She blamed the driver of the vehicle for careless driving.

6. PW2 Philip Kilimo a Clinical Officer at Kisumu County Hospital testified that the Respondent sustained injuries to the forehead, upper limb and chest. Additionally, he stated that there was tenderness to the chest, back, minor cut wound to the left elbow and the right leg was bruised. He produced the P3 form as PEXH3.

7. PW3 Geoffrey Ndiema a police officer attached to Kondele Police Station testified that he visited the scene of the accident. He asserted that indeed the Appellant was a passenger in motor vehicle reg no. KAQ xxxx. He testified that the matatu was being driven by one Charles Mbogo Aguga who was subsequently charged with causing death by dangerous driving and driving while intoxicated. He produced the Police Abstract as Pexh2. He equally affirmed that the Respondent was injured as a result of the accident and he issued a P3 form.

8. The Appellant did not call any witness in support of its case.

9. Via a judgment dated 25/3/2022 the Magistrate found the Appellant 100% liable for the accident and awarded the Respondent general damages of Kshs.120,000/= plus costs and interests of the suit.

10. Aggrieved the Appellant filed a memorandum of appeal on 14/4/2022 contending that: -

    1. The learned trial magistrate erred in law and fact in finding that-the plaintiff proved his case on a balance of probability yet the plaintiff never adduced any evidence of injury considering that the initial-treatment-notes were not produced in evidence.

    2. The learned trial magistrate erred in law and fact in failing to hold that failure to produce the initial treatment notes was fatal-to-the-respondents' case.

    3. The learned trial magistrate erred in law and fact in using the wrong principles in the assessment of damages thereby arriving-at an erroneous decision.

    4. The learned trial magistrate failed to appreciate the totality of the evidence before-him and the submissions made on behalf-of the-appellant-thus-arriving at an erroneous decision.

    5. The learned trial magistrate erred in applying erroneous standers of proof and failed to appreciate that the respondent had failed to discharge the burden of proof placed upon her as a matter of law.

    6. The Learned Magistrate erred in assessing general damages at Kshs.120,000/= and failed to apply the principles applicable in award of damages and comparable award made for similar injuries.

11. On 27/9/2023 directions were taken to the effect that the appeal be canvassed by way of written submissions.

12. On 30/1/2024 both parties indicated that they had filed written submission.

**Appellant's Submissions**

13. In his submissions dated 20/4/2013 the Appellant restates the court's role on a first appeal as enunciated in the cases of *Selle & Another vs Associated Motor Boat Co. and Another* (1968) EA and *Peters vs Sunday Post LTD* 1958 EA 424. He urges the court to find that there was no evidence in support of the Magistrate's finding.

14. He submits that the Respondent's failure to produce initial treatment documents from JOOTRH was fatal to her case. The Appellant contends that initial treatment documents are very important in a claim for general damages and medical expenses for injuries sustained.

15. Additionally, he avers that P3 would not suffice as proof of injuries, as it was filled 8 days after the accident and there was no evidence or basis on which it was filled. He affirms that a P3 is unreliable as it is not based on any official record as was held in the case of *Fadna Issa Omar vs Malne Sirengo Chipo & 3 others* [2016] eKLR.

16. He equally submits that the Respondent had not met the threshold stipulated in Section 107(1), (2) and Section 112 of the *Evidence Act* to the effect that whoever alleges must prove and that the burden of disproving or proving a fact was on the party in whose knowledge the fact was. The Appellant relies on the case of Timsales Limited vs Wilson Libuywa Nakuru HCCA No. 135 of 2006 as was mentioned in the *Fadna Issa Omar case* (*supra*), where it was stated: -

> " Dr Kiambaa's report does not help the Respondent. In any alleged factory accident, which is disputed by the employer it is the duty of the employee, as the plaintiff to prove on a balance of probabilities that he indeed suffered the alleged accident. A medical report by a doctor who examined him much later is of little, if any, help at all. Although it may be based on the doctor's examination of the Plaintiff on whom he may, like in this case, have observed the scars, unless it is supported by initial treatment card it will not prove that the plaintiff indeed suffered an injury on the day and place, he claimed he did. The scars observed on such person would very well relate to injuries suffered in another accident altogether."

17. It affirms that the absence of initial treatment chits raises the probability of the Respondent's injuries having been sustained elsewhere. He urges this court to find the appeal meritorious.

**Respondent's Submissions**

18. On her part the Respondent contends that there was no rebuttal to her case and evidence at the lower court, hence it could not be said that the magistrate misapprehended the evidence. She avers that she had discharged her burden of proof. She relies on the case of *Mbuthia Macharia vs Annah Mutua & Another* [2017] eKLR in which it was stated that:-

> " The legal burden is discharged by way of evidence with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case the incidence of both the legal and evidential burden was with the Appellant."

19. She asserts that once she made out her case the burden shifted to the Appellant to disprove it.

20. Regarding the injuries suffered she affirms that the treatment receipts from JOOTRH produced as P.exh-1 (a) and (b) and the P3 form (Pexh3) were sufficient proof of the injuries. She urges this court to uphold the award of damages by the magistrate based on *Fred Barasa Matayo vs Channan Agricultural Contractors* [2013] eKLR and *Dickson Ndungu Kirembe vs Theresia Atieno & 4 Others* [2014] eKLR.

21. In respect of costs she urges this court to be guided by *Margret Ncekei Thuranira vs Mary Mpinda & another* [2015] eKLR

**Analysis And Determination**

22. Before delving into the merits and demerits of the appeal it is important to restate the duty of the court on a first appeal which is to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, giving due allowance to the fact that that it did not see the witnesses testifying. (see the case of *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123).

23. From the record and submissions, the issue that arise for determination is whether the learned magistrate was wrong in awarding damages in the absence of initial treatment chits.

    Whether the learned magistrate was wrong in awarding damages in the absence of initial treatment chits.

24. The common thread in the Appellant's submissions is that the non-production of initial treatment documents was fatal to the Respondent's case. It is his contention that the chits were the only nexus between the accident and the injuries. He urged that in their absence, there could be no causal link between the accident and the injuries. He avers that the receipts from JOOTRH were not tied to any injuries and hence should be disregarded.

25. Moreover, it was his contention that the P3 itself would not suffice as it was filled 8 days after occurrence of the accident. He pointed out that the Clinical Officer did not provide the basis on which he filled the P3 form. According to him the P3 form can only be filled with reference to the initial treatment documents.

26. I have extensively perused the record of appeal. The Respondent testified that she was treated at JOOTRH and discharged on the same day. She equally testified that she suffered injuries to the left elbow, chest, head and left leg. PW2 the Clinical Officer on his part testified as to the injuries suffered by the Respondent and produced a P3 form, but no questions were put to him on cross-examination.

27. I have similarly looked at the authority provided by the Appellant. In my opinion the circumstances in that case are very different from those in this suit. First and foremost, in that case the initial treatment documents were not produced and the doctor who filled the P3 form was not called to give evidence. In this case the Clinical Officer was called and gave evidence on the injuries and no questions were put to him.

28. The Respondent has proven the injuries suffered on a balance of probabilities. PW1 and PW2's evidence on the injuries remain uncontroverted and unshaken in cross-examination. Furthermore, the receipt from JOOTRH indicates a head injury which is one of the injuries indicated to have been suffered by the Respondent. I say all this bearing in mind the standard of proof in civil cases.

29. It is trite law that an appellate court will only interfere with a finding of fact by the trial court if it is based on no evidence, or on a misapprehension of the evidence, or where the trial court is shown demonstrably to have relied on wrong principles in reaching the findings he did. (see the Court of Appeal case of *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) IKAR).

30. Furthermore, in the Court of Appeal case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30, it was held that: -

    > " The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that , short of this, the amount is so inordinately low or so

inordinately high that it must be a wholly erroneous estimate of the damages." see also *Butt v Khan* (1981) KLR 349 and *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* (1979) EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu Civil Appeal No. 284 of 2001; (2004) eKLR.

31. Nothing in the magistrate's decision points to it having been arrived at through misapprehension of evidence, reliance on wrong principles or that it was based on no evidence.

32. The appeal is accordingly dismissed with costs to the Respondent.

**DELIVERED, DATED, SIGNED AT KISUMU THIS 30TH DAY OF APRIL 2024.**

**MWANAISHA. S. SHARIFF**

**JUDGE**