Hajj v Prime Fuels (K) Limited (Civil Appeal 168 of 2017)
[2024] KEHC 10309 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 10309 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 168 OF 2017

F WANGARI, J

MAY 30, 2024

BETWEEN

HALUYA AHMED HAJJ ..... APPELLANT

AND

PRIME FUELS (K) LIMITED ..... RESPONDENT

(Being an Appeal against the Judgement and Decree of Honourable A. Lesootia (SRM) delivered on 28th July,2017 in Mombasa CMCC No. 2090 of 2013)

JUDGMENT

1. This is an appeal from the judgement of the Learned Hon. A. Lesootia (SRM) in Mombasa CMCC No. 2090 of 2013 given on 28th July, 2017.

2. The Appellant raised a total of eight (8) grounds of appeal in its memorandum of appeal dated 29th August, 2017 and lodged on the same date. The grounds are follows: -

    a. That the Learned Trial Magistrate erred in both law and fact by failing to find that the Plaintiff had proved her claim on the required standard of proof and was entitled to Judgment as prayed for in the plaint dated 18th October, 2013.

    b. That the Learned Trial Magistrate erred in both law and fact in failing to consider the evidence of the plaintiff to the effect that the defendant's/respondent's Motor Vehicle Registration Number KAT 054/ZC 6901 was the cause of the accident on 21st December, 2011.

    c. That the Learned Trial Magistrate erred in both law and fact by misconstruing the evidence of Pw3 Police Officer Abdullahi Didat as to the cause of the accident on the material day.

d. That the Learned Trial Magistrate erred in both law and fact in failing to appreciate the basic principles for proof of the tort of negligence in common law by placing a higher burden of proof upon the plaintiff than is required in law.

e. That the Learned Trial Magistrate erred in both law and fact in failing to find that the Defendant/Respondent failed to challenge and/or controvert the evidence of the Plaintiff/ Appellant on the cause of the accident and that the plaintiff was therefore entitled to the Judgment on liability.

f. That the Learned Trial Magistrate failed to properly consider and evaluate the evidence on record thereby arriving at a wrong judgment.

g. That the Learned Trial Magistrate erred in both law and fact by relying on the evidence of the Defence Witnesses who were not present during the accident and who did not have any expertise in investigations.

h. That the judgment dated 28th July, 2017 did not consider and decide on all issues that were before Court.

3. The Appellants therefore sought for the appeal to be allowed and that judgement delivered on 28th July, 2017 be set aside and in its place, judgement be entered in favour of the Appellant as prayed in the plaint. The Appellants also sought for interest on damages and costs to be awarded to them.

4. Directions were taken that the written submissions be filed. Both parties duly filed their submissions and cited various authorities in support of their rival positions. The Appellant's submissions are dated 22nd November, 2023 whereas the Respondent's submissions are dated 22nd January, 2024. Am grateful for parties' compliance with the directions. The court shall make reference to the said submissions and authorities when rendering itself on the merit or otherwise of the appeal.

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

6. This was aptly stated in the cases of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters v Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

7. In *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

> In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that

: "[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

8. I shall not reproduce the parties' pleadings before the Trial Court as they already form part of the record suffice to summarize the genesis of the claim. As per the plaint dated 18th October, 2013 the appellant prayed for general and special damages against the respondent as a result of a road traffic accident that occurred on the 21st December, 2011. The Respondent filed its defence on 14th November, 2013 denying the allegations by the Appellant.

9. It was the Appellant's evidence that the accident was caused by the negligence of the Respondent. She sustained the following injuries;

    a. Fracture of the mid 1/3 of the left clavicle.

    b. Fracture of the 1st rib on the left side of the chest.

    c. Fracture of the 2nd rib on the left side of the chest.

    d. Left sided hemo-thorax (blood in pleural cavity)

    e. 10cm long and deep rugged wound on the forehead.

    f. Bruises on the lower back

10. The respondents had called two witnesses who denied liability of the accident and blamed motor vehicle KBN 327T being the PSV vehicle that the appellant had been travelling in.

Summary of the Appellants' Case

11. The Appellant Haluya Ahmed Hajj told the trial court that she had boarded a PSV vehicle heading to Mombasa and upon reaching Mikindani, a lorry that was coming from the opposite direction had tilted and lay on the vehicle that she had been travelling in.

12. Upon cross examination, she stated that the matatu had 13 passengers and that the motor vehicle she was in was not over speeding. She had been rushed to the Coast General Hospital and later a medical report prepared in respect of the injuries she had sustained. After the medical examination, the Appellant was found to have sustained severe multiple bone and soft tissue injuries. Dr. S. K Ndegwa who testified as PW1 in the Magistrate's Court opined that the appellant will live with 10% permanent disability due to the nature of injuries sustained.

13. Pw3 was No. 70875 Cpl Abdulahi Didat. He told the court that he was not the investigating officer but had a record of how the accident occurred. He told the court that the account of the witnesses differed as some stated that there was a head on collision while others could not tell what exactly happened.

14. Upon being cross examined, he told the court that the point of impact was on the right side of the road from Mariakani and that indicated that the PSV must have left its lane. He further stated in cross examination that he could not blame the driver of the lorry.

Summary of the Respondent's case

15. Francis Laban Aveno Odanga testified as the Respondent's first witness. He told the court that he was an insurance investigator and had been engaged by Trident Insurance. In his investigation he had visited Changamwe Police Station and established that the accident occurred when motor vehicle KBN 327T was overtaking another motor vehicle and collided with motor vehicle KAT 054K/ZC 6901 head on. That the driver of the PSV had died on the spot.

16. Upon being cross-examined, he told the court that he blamed the driver of the PSV and that the matter was still pending under investigation at the Changamwe Police Station.

17. Dw2 James Mutinda Ngewa a safety manager with the respondent told the court that he had been called by the respondent's driver. That when he arrived at the scene the truck was on the left side as one faces Nairobi and the PSV had been moved to the right. He told the court that the truck driver had since passed away and a death certificate was produced.

Analysis and Determination

18. I have considered the appeal lodged, the submissions filed both for and against which I have summarized as above, the authorities cited as well as the law. In this appeal, the Appellant has challenged the finding of the trial court. The issue for determination will therefore be whether the Appellant proved his case on a balance of probabilities against the Respondent and the other peripheral considerations would be the award of costs and interests.

19. It is trite that the legal burden of proof lies with the person who alleges. The Appellant bears the legal burden of proof to prove the claim against the Respondent. 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 dependant on the existence of facts which he asserts must prove that those facts exist."

20. Once the Appellant discharges the legal burden of proof, the burden is then shifted to the Respondent to adduce evidence against the Appellant's claim. This burden is well captured under sections 109 and 112 of the same Act as follows:

Section 109

> 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 the fact shall lie on any particular person.
>
> Section 112
>
> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

21. The above legal provisions are well captured in *Anne Wambui Ndiritu v. Joseph Kiprono Ropkoi & another* [2005] 1 EA 334 and *Evans Nyakwana –v- Cleophas Bwana Ongaro* [2015] eKLR.

Liability

22. It is not in dispute that an accident occurred on 21st December, 2011 involving motor vehicle registration number KBN 327T a PSV where the appellant was a passenger and the Respondent's

motor vehicle registration number KAT 054K/ZC 6901. It is also not in contest that the Appellant sustained injuries as a result of the said accident. What is in dispute was who to blame.

23. As held in various authorities, this court will now embark on its duty as an appellate court re-evaluate, re-assess and re-analyze the evidence before the Trial Court's with a view to satisfy itself on its correctness. The Appellants assert that the Trial Court erred in dismissing the suit since the Respondent did not controvert the evidence adduced by the Appellant. The Appellant also states that the court erred in relying on the evidence of the police officer.

24. In his judgment, Hon. A Lesootia (SRM) stated,

> " The Plaintiff's testimony did not shed light on the circumstances involving the accident. However, Pw3 the Police Officer testifies that the Motor Vehicle in which the Plaintiff was travelling in must have been overtaking and another over-speeding on the actual point of impact when on the right side of the road. He gave His testimony that the PSV must have left its lane to collusion with the defendant's motor vehicle....I thus hold the defendant not for the accident..... In conclusion ... that the plaintiff has not proved her case on the balance of probabilities and this suit stands dismissed with costs to the defendant."

25. Pw3 was the Appellant's witness and he had given an account of the accident as per the police records that he had. His account was completely different from that of the Appellant who told the court that the truck tilted and lay on their vehicle. There was no other evidence to support this claim. The evidence of the Appellant was thus not corroborated by oral or documentary evidence. It is sad that she sustained very serious injuries but she seems to have sued the wrong party as there is no fault that attached to the truck driver.

26. I take the cognizance that the trial court had the advantage of evaluating and hearing witnesses testify on oath as to the circumstances of the accident. I have no such advantage as to the demeanor and velocity of the witnesses as the trial court. As such, it would be foolhardy for me to overturn such a finding on liability and I thus proceed to uphold the finding that the Appellant had failed to establish her case on a balance of probability and that the Respondent was to blame or at all.

Quantum

27. The Trial Court had failed to assess damages as required even in the event of dismissing a case.

28. The Appellant had submitted that an award of Kshs. 2,000,000/= as general damages would suffice given the nature of injuries sustained by the Appellant. They relied on the decisions in *Edward Nzamili Katana v CMC Motors Ltd* [1997] eKLR and *Hellen Atieno Oduor v. S.S Mehta & Sons Ltd & Muthitu Nanua* [2015] eKLR where the court had awarded Kshs.1,300,000/- and Kshs.1,500,000/- respectively for comparable injuries.

29. On his part, the Respondent submits that in the unlikely event that the court finds that the Appellant proved her case, then the Appellant should be awarded an amount not exceeding Kshs. 450,000/- and they had relied on the cases of *Joseph Mavulu Mutua v Samuel Njoroge Mwangi* [2003] eKLR and *Garbriel Kariuki Kigathi & Ano v Monica Wangui Wangechi* [2016] eKLR where the Court had awarded Kshs. 320,000/- and Kshs. 400,000/- respectively for comparable injuries.

30. The injuries as per Dr. S. K Ndegwa's medical report were indicated as follows: -

    a. Fracture of the mid 1/3 of the left clavicle.

    b. Fracture of the 1st rib on the left side of the chest.

c. Fracture of the 2nd rib on the left side of the chest.

d. Left sided hemo-thorax (blood in pleural cavity)

e. 10cm long and deep rugged wound on the forehead.

f. Bruises on the lower back

31. Permanent partial disability was assessed at 10% and the reasons for the percentage were the nature of severe injuries sustained. The other injuries were indicated that they would heal with time. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that "comparable injuries should attract comparable awards". The only caution is that no two injuries are the same.

32. The cases cited by the Appellant bears comparable injuries as the present case. In *Gerald Ireri Harrison & 2 others v Danson Ngari* [2018] eKLR, the court reduced an award of Kshs. 2,061,360/= to Kshs. 800,000/= in 2018. In the case, the Respondent had sustained depressed fracture of the right frontal bone at the supra orbital region with hemorrhagic contusion under the frontal lobe under soft tissue injuries – swelling on the frontal scalp and right periorbital region. I find the injuries herein to be comparable. Taking into account the current inflation, I could have awarded Kshs. 900,000/- as general damages had the Appellant been successful

Costs of the suit

33. On the issue of costs, a careful reading of Section 27 of the *Civil Procedure Act* indicates that it is trite law that they follow the cause or event as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540. It is that costs must follow the event unless the court, for some good reasons, orders otherwise. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exist some other good reasons and or cause for not awarding costs to the successful party.

34. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The *Halsbury's Laws of England*, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

> " The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice"

35. Any departure from this trite law can only be for good reasons which the Supreme Court in *Jasbir Singh Rai & others v Tarlochan Rai & others* [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted as follows:

> " The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Costs follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section

27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

36. I have said enough to show that award of costs is intertwined with the court's exercise of discretion. The Appellant sustained severe injuries and a 10% permanent disability. In as much as she is not successful in her bid to establish her case against the respondent, it would be an affront to condemn her to further pay costs. I thus hold that each party shall bear their own costs of this appeal.

37. Flowing from the above, I proceed to make the following disposition: -

    a. The appeal herein lacks merit and is hereby dismissed

    b. Each party shall bear their own costs in this Appeal.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 30TH DAY OF MAY, 2024.

.....

F. WANGARI

JUDGE

In the presence of;

Takah Advocate h/b for Mutubia Advocate for Appellant

Osewe Advocate h/b for Ndambuki Advocate for Respondent

Barile - Court Assistant