Mwangi v Njuguna (Civil Appeal E054 of 2021)
[2024] KEHC 7713 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7713 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E054 OF 2021

H NAMISI, J

JUNE 28, 2024

BETWEEN

CECILIA WAMAITHA MWANGI ..... APPELLANT

AND

GABRIEL NJUGUNA ..... RESPONDENT

(Being an Appeal against judgement and decree of Hon. V.A. Kachuodho (SRM) delivered on 29th March 2021 in Thika CMCC No. 688 of 2018)

JUDGMENT

1. This appeal arises from proceedings in the magistrate court against the Appellant, seeking payment of Kshs 330,708 in damages arising from a motor vehicle accident that occurred on 31st December 2015. The accident occurred along the Thika-Matuu Road, involving the Appellant's motor vehicle registration number KBP 760B and the Respondent's motor vehicle registration number KBL 641R. The Respondent blamed the Driver of the Appellant's motor vehicle for the accident and damage to the Respondent's motor vehicle. The Appellant entered appearance and filed a Statement of Defence denying liability for the accident.

2. The matter came up for hearing on 15th February 2021. The Respondent called 2 witnesses; PW1, the Police Officer attached at Thika Police Station and PW2, the Recoveries Officer at Kenya Alliance Insurance, the insurer of the Respondent's motor vehicle. The Appellant did not call any witness.

3. The trial court delivered its judgement on 29th March 2021 and entered judgement for the Respondent as prayed in the Plaint. The Respondent was also awarded costs of the suit and interest at court rates from the date of judgement until payment in full.

4. The Appellant, being dissatisfied by the judgement, filed a Memorandum of Appeal dated 7th April 2021 on the following grounds:

i. That the Learned Trial Magistrate erred in law and fact in holding that the Respondent had proved the case as against the Appellant without considering the weight of the evidence adduced, sieving through the same thereby arriving at an erroneous decision;

ii. That the Learned Trial Magistrate erred in law and in fact by holding that the Respondents were entitled to the orders sought without them calling the Respondent to testify and shed light on the occurrence of the accident or call an eye witness so as to determine liability and thereby erred by holding that the Appellant was 100% to blame thereby arriving at an erroneous decision;

iii. That the Trial Magistrate erred in law and fact by failing to consider the evidence of the police officer who indicated that the OB (Occurrence Book) the Respondent had visited the station and gave the officer at the OB a scenario of how the accident occurred and without further investigations by the officer it was indicated that the Appellant's vehicle was to blame even without inquiring from the Appellant's driver as to the said occurrence of the accident thereby arriving at an erroneous decision;

iv. That the Learned Trial Magistrate erred in law and in fact by failing to analyse the police evidence that no investigations were ever done, no eye witness ever recorder a statement, the Appellant driver was never charged with any traffic offence and neither did he record a statement, no sketch plans for the accident and by holding that the Respondent had proved their case on 100% liability gravely erred in evidence thereby arriving at a wrong decision;

v. That the Learned Trial Magistrate erred in law and in fact by awarding the respondent the entire claim including VAT of Kshs 39,488/= when no such receipt as to the payment of the said VAT was ever produced thereby arriving at the erroneous decision;

vi. That the Learned Trial Magistrate erred in law and in fact by awarding the Respondent the entire claim as prayed for in the Plaint when no such receipts to prove or show how the figure of Kshs 286,288/- was arrived at thereby arriving at an erroneous decision;

vii. That the Learned Trial Magistrate erred in law and in fact by holding that she had analysed all the pleadings plus submissions whilst the judgment was silent on all the issues raised in the submissions by the Appellant thereby arriving at an erroneous decision.

5. Parties canvassed the appeal by way of written submissions. The Appellant filed written submissions dated 24th July 2023. The Respondent's written submissions are dated 9th October 2023.

Issues for Determination

6. I have read the Record of Appeal as well as the submissions filed by the parties respectively. In the Appellant's submissions, the issues for determination are aptly summarised as follows:

i. whether the Respondent had proven their case to occasion 100% liability to be Appellant;

ii. Whether the Respondent deserved the damages awarded.

Analysis & Determination

7. This being a first appeal, the court relies on the principles set out in Selle and Another vs Associated Motor Boat Company Ltd & others [1968] 1EA 123:

> " ...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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

8. In the case of Bundi Murube -vs- Joseph Omkuba Nyamuro [1982 – 88]1 KAR 108, the Court stated thus:

> " 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."

9. With respect to liability, in the case of Stapley –v- Gypsum Mines Limited (2) (1953) A.C 663 at P. 681, Lord Reid reasoned that:

> " To determine what cause an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it..... The question must be determined by applying common sense to the fact of each particular case. One may find that a matte of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly cause the accident. I doubt whether any test can apply generally."

10. It was not disputed that an accident occurred involving the Appellant's motor vehicle and the Respondent's motor vehicle, which was evidenced in the Police Abstract. The Police Abstract further indicates that results of the investigations were that motor vehicle KBP 760B was to blame for the accident. Although the Appellant, in Ground 3 of the Appeal, avers that the Police recorded the Respondent's version of events without conducting any investigation, the Appellant did not provide an alternative account of events of the material day.

11. From the impugned judgement, the trial court had to decide on a balance of probabilities who between the Appellant and Respondent caused the accident. Under the *Evidence Act*, the onus was the Respondent to present admissible evidence for the trial court to give judgement in his favor to

support negligence on the part of the Appellant. To this end, the Police Officer (PW1) presented uncontroverted evidence that the Appellant was to blame for the accident. In this instance, the trial court did not have any other evidence to consider save for the evidence presented by the Respondent.

12. In the cases of Embu Road Services V Riimi (1968) EA22 and 25, Mzuri Muhhidin V Nazzar Bin Seif (1961) EA 201, Menezes Stylianicers Ltd CA No.46 of 1962 the courts held inter alia; -

> " Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence". See also Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).

13. Once the Respondent had discharged his burden of proof, the burden then shifted to the Appellant. The Appellant did not adduce any evidence to discharge his burden, thus leading to the finding by the trial court on the issue of liability. I see no reason to interfere with this finding.

14. On the issue of special damages, it is trite that special damages ought to be specifically pleaded and proved. In the case of Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR, the Court of Appeal observed thus:

> " 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.
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> In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited v Murunga & Others Nairobi CA No. 192 of 1992 (ur) appears in the Jivanji case:
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> "It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council vs Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another v Chebon Civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgment:
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> "It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage form Bowen LJ's judgment at 532-533 in Ratcliffe v Evans [1892] QB 524, an English leading case of pleading and proof of damage.
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> "The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To

insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

15. The above position notwithstanding, in the case of Nkuene Dairy Farmers Co-op Society Ltd & Another -vs- Ngacha Ndeiya [2010] eKLR, the Court of Appeal took the position of:

> " Motor vehicle parts are sold in shops. An assessor, we think would be in a position to know their cost. The prices may vary from one shop to another but the prices are nonetheless ascertainable even without purchasing the item and fixing it on the damaged vehicle. Motor vehicle parts are common items and any price which the assessor might have given could be counterchecked and either accepted or disproved. The Appellants having not questioned those prices must be taken to have accepted the report as representing the correct market prices of the various parts which were shown on the Assessor's report. The experience of the Assessor was not challenged...The Respondent, to our mind, particularized his claim in the plaint and called acceptable evidence to prove the same and we have no basis for faulting both the trial and first appellate courts in the concurrent decision they came to. Indeed the decision of *David Bagine vs. Martin Bundi Civil Appeal No. 283 of 1996* which Mr. Kaburu cited to us, does state that a motor vehicle Assessor's report would provide acceptable evidence to prove the value of material damage to a motor vehicle...We agree with Mr. Charles Kariuki that the Assessor's report was sufficient proof and the failure to produce receipts for any repairs done was not fatal to the respondent's claim..."

16. The Respondent herein produced a Re-Inspection Report indicating the repair work done on the Respondent's motor vehicle following the accident. The repairs were done in accordance with the Assessor's Report. Accordingly, I find that the trial court rightly found that the Respondent was entitled to the special damages that had been pleaded and proved.

17. In view of the foregoing, I find no reason to interfere with the judgement of the trial court. The Appeal, therefore, lacks merit and is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED AT KIAMBU THIS 28 DAY OF JUNE 2024.

HELENE R. NAMISI

JUDGE

In the presence of:

.....Ms.Muturi h/b Mr. Kanyi..... for the Appellant

.....N/A..... for the Respondent

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