Wainaina v Gathima Investment & 2 others (Civil Appeal E297 of 2022) [2024] KEHC 10153 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEHC 10153 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E297 OF 2022

S MBUNGI, J

JUNE 28, 2024

BETWEEN

STEPHEN WAINAINA ..... APPELLANT

AND

GATHIMA INVESTMENT ..... 1ST RESPONDENT

LUCY NGINA MAGU ..... 2ND RESPONDENT

SUMAC DTM LIMITED ..... 3RD RESPONDENT

(Being an appeal from the judgement and decree of the Chief Magistrate Court at Kiambu Law Courts by Hon. M. A. Opondo (PM) in CMCC No. E448 of 2021 delivered on 16th November, 2022.)

JUDGMENT

Introduction

1. This appeal arises from the Judgement of Hon. M. A. Opondo (PM) delivered on November 16, 2022 in Kiambu Civil Suit No. E448 of 2021 which sought to compel the respondent to pay the Plaintiff general damages, special damages of Kshs. 3,500/-, cost of the suit together with interests, hence precipitating this appeal herein where the Appellant seeks the following orders: -

    a. The appeal be allowed with costs.

    b. The judgement/decision of Hon. M. A. Opondo delivered on 16th November, 2022 be set aside and/or varied.

    c. That this Honourable court to deliver a fresh Judgement based on the evidence on record and submissions of parties on record.

d. In the alternative this Honourable Court directs that the award of Special, General damages and liability be assessed afresh in the lower court.

e. The costs be awarded to the Appellant.

f. Such further orders may be made as this Honourable Court may deem fit.

2. The Appellant's six grounds as stated in the Memorandum of Appeal dated 24th November, 2022 are as follows:

i. That the learned trial magistrate erred in law and in fact in failing to analyze all the relevant evidence availed at the trial and award the Plaintiff the relief sought in the plaint.

ii. That the learned magistrate erred both in law and fact by failing to consider submissions and legal authorities tendered before the court by the parties and arrived at an award that was manifestly low.

iii. That the learned trial magistrate erred in law and in fact by failing to find that the Plaintiff had proved his case on a balance of probabilities.

iv. That the learned trial magistrate erred in law and in fact by failing to take into consideration the nature of injuries the plaintiff sustained and failed to address the issue of quantum while disregarded awarding the general damages altogether.

v. That the learned trial magistrate erred in law and in fact by misdirecting itself and addressing the matter as having proceeded as formal proof and further addressing it as a part-heard as evident in the Judgement.

vi. That the learned trial magistrate erred in law and in fact by dismissing the Plaintiff's case by disregarding the Doctrine of Res ipsa loquitur.

3. The court on 18th July, 2023 directed that the parties file and exchange written submissions. Parties complied. The Appellant filed his written submissions dated 20th February, 2024 on 28th March, 2024 while the 2nd and 3rd Respondents filed their written submissions dated 26th April, 2024 on an even date.

Issues For Determination

4. The Appellant isolated the following issues for determination in the appeal: -

a. Whether the trial court justifiably dealt with apportionment of liability among parties.

b. Whether the Plaintiff proved her case on a balance of probability.

c. Whether the award for damages for the injuries sustained was given due consideration.

5. The 1st and 3rd Respondents' isolated only one issue for determination in the appeal as follows: -

a. Whether the appellant proved his case on a balance of probability ad whether the appeal should be dismissed with costs to the Respondent.

Appellant's case as per submission

6. The Appellant's counsel submits that the trial magistrate in its judgement found that this matter had been part-heard, and an interlocutory judgement had already been entered against the 1st Defendant/ Respondent, and went ahead to scrutinize whether proper service was effected(pg.69).

7. He submits that the Appellant/Plaintiff filed a request for interlocutory judgement dated 04.03.2022 and filed on 25.03.2022, the same was entered administratively on 29th.03.2022 by the Honourable trial court. The matter was certified ready for hearing on 11.05.2022, when the trial court was satisfied that all parties had complied and interlocutory judgement entered accordingly.

8. He submits that the main hearing was on 12.10.2022, but the trial court in its judgement misdirected itself and said that the matter was set for formal proof. He stresses that at the hearing, the said trial court did not raise any issue in regard to the interlocutory judgement against the 1st defendant, but only drew this attention on its judgement.

9. He submits that the trial court misdirected itself in holding that the hearing before it was part-heard as the same was slated for fresh hearing.

10. The Appellant asserts that if the trial court noted inconsistency on the interlocutory judgement entered, it was only fair to let the plaintiff know before writing its judgement, since the entering and declining of such is purely done by the courts administratively and parties have no control, but are guided by the court.

11. He further submits that the Plaintiff/Appellant called upon PW2, Pc Kibe, who produced a police abstract dated 13.05.2021, which blamed motor vehicle Reg. No. KCQ 023Z Mercedes Trailer for the accident. He avers that from the police preliminary investigations the said motor vehicle was under possession and control by 1st Defendant/Respondent.

12. He submits that the 2nd Defendant/Respondent is well described in the plaint as the insured, who was under possession and the registered co-owner of the motor vehicle Reg. No. KCQ 023Z ZE327S as per copy of records (NTSA) produced in court by PW1, as Plaintiff exhibit 8.

13. He submits that the 3rd defendant, from the copy of records produced in court is described as the co-owner of the said motor vehicle blamed for the accident regardless of them being a financier institution under Consolidated Bank.

14. It is submitted for the Appellant that the 2nd and 3rd Defendant were sued vicariously for the acts and omissions of the 1st defendant, who is their driver, agent and/or servant.

15. It is further submitted that as per the affidavit of service filed together with the interlocutory judgement dated 4.03.2022 and deponed on 24.03.2021 by one process server, Kooro Erastus Samuel, the 1st and 2nd defendants were duly served in person after they confirmed ownership of motor vehicle Reg. No. KCQ 023Z ZE327S Mercedes Trailer.

16. He asserts that if the 2nd Respondent were not aware of Reg. No. KCQ 023Z ZE 327S's involvement in this case and the accident on 11.05.2020, they would have denied service and even raised this in their defence statement, but went on to admit the contents of paragraph 3 and 4 of the plaint.

17. The Appellant asserts that the Plaintiff/Appellant in this matter was lawfully a passenger in motor vehicle Reg. No. KCA 712M. He testified that he was seated at the front left side of the vehicle, when motor vehicle Reg. No. KCQ 023Z ZE 327S Mercedes Trailer rammed into the vehicle he was travelling in from behind and it overturned.

18. This evidence was reiterated by PW2, the police officer who produced a police abstract in support of the Plaintiff/Appellant case which clearly indicated that the motor vehicle Reg. No. KCQ 023Z ZE 327S Mercedes trailer was wholly blamed for the accident.

19. Moreover, it is trite law that passengers have no control in the manner in which the motor vehicle is being driven as a result the Plaintiff should not be held liable for the aforementioned accident.

20. Relying on the decision of Lady Justice Nambuye in Boniface Waiti & another versus Michael Kariuki Kamau (2007) eKLR where the court held that:-

> " ...a passenger has no control over the manner of driving a vehicle in which they are conveyed and they cannot be penalized for the poor workmanship of the control of the vehicle".

21. The Appellant submits that there is absolutely no merit in the defence/response, as the Plaintiff/Appellant's case stands unchallenged since the defendant did not offer any evidence to controvert the Plaintiff's evidence. Therefore, in the face of evidence as adduced the Appellant urges that the Plaintiff/appellant has admirably proved his case beyond a balance of probabilities and invites the court to find the Defendants/Respondents 100% liable for the occurrence of the accident.

22. To further buttress its position, the Appellant relied on the decision in North End Trading Company Limited (carrying on the business under the registered name of Kenya Refuse Handlers Limited vs City Council of Nairobi (2019) Eklr, where the learned Judge adopted the decision in, Edward Muriga through Stanely Muriga vs Nathaniel D. Schulter Civil Appeal No. 23 of 1997 which held as follows:-

> " .....it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence".

23. Further in North End Trading Company Limited vs City Council of Nairobi (supra), the learned Judge further adopted the decision in Motrex Knitwear Limited vs Gopitex Knitwear Mills Limited Nairobi (Milimani) Hccc No. 834 of 2002, where Lesiit, J citing the case of Auttar Singh and Another vs Raju Govindji, HCCC No. 548 of 1998 appreciated that;

> " although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defense are unsubstantiated. In the circumstances, the counter claim must fail".

24. The Appellant affirms that the trial court in its judgement did not tackle the issue of liability expressively, instead faulted the issue of service of the 1st defendant and questioned how interlocutory judgement was entered.

25. He submits that the trial court heavily believed that the 1st defendant who was the driver of the motor vehicle Reg. No. KCQ 023Z ZE 327S Mercedes trailer ought to have borne liability but failed to expressly state so.

26. As to whether the Plaintiff proved his case on a balance of probability, The Appellant adopted his witness statement as his evidence in chief and it was his evidence that he was travelling as a lawful passenger in motor vehicle registration No. KCA 712M Isuzu lorry, when motor vehicle registration No. KCQ023Z ZE 327S Mercedes trailer was carelessly driven without due care to other road users that it lost control, veered off its lane and rammed on to the vehicle the Appellant was travelling in, making it overturn thereby causing a road traffic accident where the Plaintiff sustained injuries.

27. The Plaintiff Appellant submits that he called upon a 2nd witness PW2, who confirmed the occurrence of the said accident and reiterated the evidence of the Plaintiff/Appellant. The police abstract produced clearly identified the motor vehicle to blame as KCQ 023Z ZE 327S Mercedes trailer.

28. The Appellant submits that he further produced 8 documents per the list dated 18.9.2021 (record of appeal page 9) all in support of his evidence, both his statement and testimony under oath.

29. He affirms that the defendant having not called any witnesses to rebut the Appellant's testimony and choosing not to participate in the hearing, he urges the court to find that the Plaintiff proved his case on a balance of probability and find the Respondent 100% liable for the accident.

30. In support of his submission, he relied on the case of North End Trading Company Limited vs City Council of Nairobi (2019) eKLR(supra).

31. Submitting on On whether the award for damages for the injuries sustained was given due consideration. The Appellant submits that As underlined in Halsbury's law of England, 4th edition Vol 12 par 884

> "Damages are awarded for the physical and mental distress caused to the Plaintiff, both pre-trial and future as a result of injury. This includes the pain caused by the injury itself and the treatment intended to alleviate it; the awareness of an embarrassment at the disability of disfigurement or suffers caused by anxiety that the Plaintiff's condition may deteriorate".

32. He submits that the trial court did not in any way look into the issue of quantum of general damages or even speak if the case succeeded before it what it ought to have awarded, despite all the evidence before court establishing that the Plaintiff/Appellants had sustained injuries as a result of the accident that occurred on 11.05.2020.

33. The appellant testified under oath before the Honourable trial Court to have sustained several injuries as a result of the accident. He produced treatment notes from Cargo Human Care Medical Centre that corroborated his oral testimony. He further produced a medical report by Dr. Titus Ndeti Nzina dated 23.06.2021 as Plaintiff exhibit 7, which stated that he sustained deep cut wound on the forehead with swelling and tenderness and cut wound on the left eye lid.

34. He stated that according to Dr. Ndeti's medical report, the Plaintiff suffered a lot of pain and loss of body fluid as a result of the accident. The injuries sustained were severe soft tissue injuries which caused him grievous harm. He suffered temporary incapacity. The plaintiff has been left with residual scars on the both scars that is of cosmetic significance. Moreover, he still experiences recurring pain and tenderness on the exertion. This has greatly affected the Plaintiff as a casual labourer.

    Taking into account the nature of injuries sustained, the age of the following quoted authority and the rate of inflation, he submits that Kshs. 350,000/- will be adequate compensation and relied on the past award as a guide in the quantification of reasonable proximate general damages herein in MERU HCCC NO. 70 OF 2019, JOHN MWENDWA KUTI & ANORTHER VS IBRAHIM KUNYAGA (F. Gikonyo, J. 06.02.2020) where the Respondent in this matter sustained soft tissue injuries as head injury, multiple bruises on the scalp and injuries on the shoulders, the award of Kshs. 350,000/- was upheld by the High Court in 2020.

    Further he relies on BUNGOMA HCCC NO. 17 OF 2019

    POA LINKS SERVICES LTD & ANOTHER VS SINDANI BOAZ BONZEMO (S. N. Riechi, 10.03.2021) where the Respondent suffered; blunt injury to the chest, bruises of the lower abdomen, bruises of the right hip joint, bruises of the thigh and bruises on the knee. The trial magistrate awarded

Kshs. 350,000/- as compensation for general damages for these injuries. The award was upheld by the high court in 2021.

35. He submits that on special damages, the plaintiff paid Kshs. 3,000/- for the medical report produced a receipt as evidence as plaintiff exhibit 4(b) and he also produced Kshs. 550/- as a receipt of the motor vehicle copy of records and urges the Court to award Kshs. 3,550/- as special damages pleaded and proved. He ask the court to substitute the trial court's Judgement with proper findings/judgement as his appeal is merited and prays for costs.

Respondent's case as per submissions

36. The Respondent's counsel submits that the trial magistrate justifiably dismissed the Appellant's case and established that the evidence adduced by the Appellant on trial was inconclusive proof that the Respondents were negligent.

    He submits that despite the Appellant's averments that the Respondents were negligent for the accident that occurred on 11th May, 2020 whereby he was travelling on board the 1st Respondent's motor vehicle KCQ 023Z which was driven by one Joseph Irungu and the allegations that the said motor vehicle KCQ 023Z was carelessly driven thereby causing an accident as a result which the Appellant sustained injuries which he blames the Respondents and consequently sought compensation in form of damages and further, the premise of this appeal., the Respondent denied causing the said accident and any subsequent claim of negligence arising therefrom.

37. The Respondents relying on the case of Amalgamated Saw Mills Ltd vs Stephen Mutuunguru HCA 75 of 2005 where the court held that

    > "a Plaintiff must prove a causal link between someone's negligence and injury. He must adduce evidence from which on a balance of probabilities a connection between the two may be drawn. An injury alone is not proof of negligence"

    and In Eastern Produce (K) Ltd vs Christopher Atiado Osiro (2006) eKLR the court stated that

    > "the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant,"

    the court in that case cited the famous decision of Kiema Mutuku vs Kenya Cargo Hauling Services Ltd (1991) Eklr 258 where the court of Appeal, reiterating the foregoing stated that,

    > "there is a yet no liability without fault in the legal system in Kenya and a Plaintiff must prove some negligence against the defendant where the claim is based on negligence".

38. The Respondent submits that the police abstract produced by the Plaintiff's witness, a police constable attached at Karuri police station stated that no charge, criminal or otherwise has been preferred against 2nd and 3rd Respondents concerning the said accidents.

39. He submits that the Appellant did not show that the cause of the accident was in any way attributable to the Respondent's actions and no evidence to the effect whether the accident occurred as a result of veering off its right lane or failing to stop at a speed bump was adduced.

40. He submits that there was no prima facie case established by the Appellant to warrant him to attribute the alleged acts of negligence to the Respondents and the court in Midans Services Limited & another

vs Ronald Kapute (2022) eKLR while quoting the case of Gideon Ndung'u Nguribu & another vs Michael Njagi Karimi (2017) eKLR where the court of Appeal stated that

> "determination of liability in a road traffic case is not a scientific affair"

and proceed to quote Lord Reid in Stapley vs Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:

> "to determine what caused 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 ..."

41. He submits that it is from this premise that the Appellant failed to prove that the respondents were to blame for the accident and therefore the appeal is not merited.

42. The Respondent relying in decision in Ephantus Mwangi & another vs Duncan Mwangi Wambugu (1982 – 1988) IKAR 278) stated,

> "An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding".

the court went on further to say,

> "This is a first (and only) appeal so this court is obliged to reconsider the evidence, assess it and make appropriate conclusions about it, remembering we have not seen or heard the witness and making due allowance for this."

43. He submits that from the foregoing, the judgement and decree of the Chief Magistrate's Court at Kiambu Law Courts by Honourable M. A. Opondo (PM) in CMCC E448 of 2021 delivered by the Honourable court on 16th November 2022 be upheld and the appeal be dismissed with costs to the Respondents and prays that the Honourable Court dismisses the appeal with costs to the Respondents and that it adjudicates and determines this matter and enter a just judgement in light of the evidence on record.

Decision

44. Being a first appeal, the court relies on a number of Principles as set out in Selle and another vs. Associated Motor Boat Company Ltd & others (1968) 1 EA 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 witness 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 particular circumstances or probabilities materially to estimate the evidence."

45. In Gitobu Imanyara & 2 others vs Attorney General (2016) eKLR the Court of Appeal stated that: -

> "An 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 allowance in this respect."

46. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles as was espoused in the case of Mburu & another V Kinga Civil appeal 277 of 2023 (2024) KEHC 1889 (KLR).That on first appeal, the Court is under a duty to reconsider and re -evaluate the evidence on record and draw its own conclusions; That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witness testify before it; and That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

47. I have looked at the memorandum of appeal, pleadings, proceedings of the lower court and submissions filed by the parties.

48. The Appellant's counsel faulted the trial court for bringing out the issue as to whether the interlocutory judgement entered against the 1st defendant was properly entered at time of writing the judgement. This to them was prejudicial for they were left with no chance of making amends like re-service of the summons. It's their submissions that the trial court should have brought that issue before the start of the hearing. I totally agree with these submissions. The Court of Appeal in the case of BB1 appeal in IEBC vs David Ndii and 81 others (Civil Appeal No. E291 of 2021) where Justice D. K. Musinga stated at paragraph 440 of the judgement that: -

> "...I must state that in all proceedings where a party is alleged to have been served with a hearing notice (or any other court process) in any manner, before a court proceeds to commence a hearing in the absence of such a party, even if there is an affidavit(s) of service indicating that all the parties in the matter had been duly served, the court, in the interest of Justice and to ensure a fair hearing, has to satisfy itself that there was proper service before it commences a hearing. The record of the court should so reflect...."

49. From the above holding it is clear that the learned trial magistrate erred when she set aside the interlocutory judgment against the first defendant after having found that there was no proper service. This is an issue which should have been dealt with by the magistrate who entered the interlocutory judgement against the 1st Defendant or the trial court should have dealt with it before commencing the hearing.

50. This misapprehension of the procedure goes to the root of the question of a fair trial. I agree with the Appellant's submissions that he was greatly prejudiced.

51. To me the only way to ameliorate the situation is to order for a re-trial of the suit where the issues of service of the processes involved will be interrogated if need be.

52. Having found that there is a need for a re-trial, I find it not necessary to delve on the merits of the appeal on other issues raised. The judgement appealed against and the decree thereof is hereby set aside.

53. I therefore order that the matter be mentioned before the Chief Magistrate Limuru for re-trial before another magistrate other than Hon. M. A. Opondo (PM).

54. Each party to bear own costs of this appeal and costs of the lower court for the mistake cannot be attributed to any of the party.

Right of appeal 30 days.

It is so ordered.

DATED, SIGNED AND DELIVERED ON 28TH JUNE, 2024 BY HON. MR. JUSTICE S. MBUNGI VIRTUALLY AT KAKAMEGA HIGH COURT.

S. MBUNGI

JUDGE

In the Presence/absence of:

Appellant/advocate .....

Respondent/advocate .....

Court assistant .....