REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 50 OF 2012

Hellen Gathoni Mbuthia

Ann Njoki Mbuthia (Suing as personal representatives

of the Estate of Robinson Mbuthia Gitonga.....…Appellants

Versus

Nelson Wachira Murage…….....……..…….....….....,..…….....Respondent

(An appeal from the Judgment of Hon. K. Cheruiot, S.R.M. delivered on 16. 4. 2012, Nyeri)

JUDGMENT

It is settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions.(See ***Stanley Maore - vs- Geoffrey Mwenda[1]*).**

In my considered opinion, this appeal raises only one ground, namely, whether the learned Magistrate erred in dismissing the appellants case in the lower on grounds that the appellants failed to prove liability to the required standard. The learned Magistrates holding was premised on the ground that the appellants did not prove ownership of the motor vehicle the subject of the accident in question. True, the Respondent in his defence produced a copy of records which demonstrated that as at the date of the accident the vehicle was not registered in his name. On their part, the appellants produced a police abstract report which showed the vehicle was owned by the Respondent.

The plaint filed in the lower court demonstrates that the Respondent was sued both as the owner and or driver of the vehicle in question at the material time. The key question is whether the learned magistrate correctly identify all the issues arising from the pleadings and addressed them as required.

A close scrutiny of the judgment of the lower court shows that the learned Magistrate dwelt only on the issue of ownership of the said vehicle and made no findings at all on whether or not the Respondent was the driver of the said vehicle at the material time. At page **51** of the record, the learned Magistrate stated *"the issue is whether the plaintiffs proved ownership of the motor vehicle KMX 465 by the defendant."* Thus the learned Magistrate only framed one issue and left out yet another crucial issue, that is whether or not the appellants proved that the Respondent was driving the said vehicle at the material time. In my view since the Respondent was sued both as a driver and the owner, it was important for the court to satisfy itself that the question of whether or not he was the driver was effectively resolved. To me, this was a highly relevant issue and failure to address it led to a serious miscarriage of judgment.

Useful guidance can be obtained from *Bullen and Leake*[2]on nature of pleadings where the learned authors state as follows:-

"the system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two fold purposes of informing the court what are the issues between the parties which will govern the interlocutory proceedings before he trial and which the court will have to determine at the trial."(Emphasis added).

In my view, a close look at the pleadings in the lower court raises the second issue referred to above and the court had a duty to determine it. It was correctly held in *Galaxy Paints Co. Ltd vs Falcon Guards Limited*[3]that the issues for determination in a suit flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for determination. In fact, a judgment not founded on issues derived from the pleadings is a nullity.[4]

The form and contents of judgment is provided for under Order **21** Rule **4** of the Civil Procedure Rules, 2010 which provides as follows:-

"Judgment in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reason for such decision."

Order **21** Rule **5** provides that a court shall state its decision on each issue. In fact failure to determine all the issues raised in the pleadings is so serious that in *Chandaria vs Nyeri*[5] the court observed that failure to deal with many of the issues makes the judgment unsatisfactory and amounts to a mistrial.

On the issue whether or not the Respondent drove the motor vehicle in question at the material time, **PW1** stated that she went to the scene of the accident and that the driver of the vehicle, namely the Respondent was present. He also stated that the person who caused the accident assisted them during the funeral. On cross-examination he stated that she knew the Respondent and that he hailed from their locality.

PW2 testified that he knew the Respondent, that he was working in a farm about **10** meters from the road, he saw the deceased and the vehicle which was being driven at a high speed, it veered off the road and hit the deceased. He stated that the vehicle had **4** occupants and that the Respondent was driving. He also participated in removing the passengers from the vehicle and recorded a statement at the police station but was never called as a witness in the traffic case. He was categorical that the driver was charged with a traffic offence.

On the Respondents vehement denial that he drove the vehicle in question at the material time, I have evaluated his evidence to the said effect and considered it alongside the evidence of **PW1 & PW2** referred to above and I find that the plaintiffs evidence is more credible and consistent and supported by the Police abstract report which clearly shows that the Respondent was driving the said vehicle at the material time and also shows that he was charged with a traffic offence relating to the said accident. Interestingly, the Respondent or his advocate did not object to the production of the Police abstract report nor did they insist on cross-examining the maker of the said document. I therefore, find that the learned magistrate erred in not addressing the said pertinent issue and dwelling only on one issue thereby basing his judgment only on one issue and omitted to consider all the issues raised in the pleadings. Had he done so, he could have arrived at a different conclusion.

I therefore find no difficulty in concluding and holding that the appellants did prove to the required standard that the Respondent was driving the said vehicle at the material time. I further note that since the Respondent denied that he was driving the said vehicle, he did not deem it fit to rebut the particulars of negligence, which in my view were also proved to the required standard.

The Respondent denied that he owned the vehicle and produced a copy of records showing that the

vehicle was registered in the name of another person. I am aware that the person registered as the owner of a motor vehicle is presumed to be the owner. This is a presumption that can be rebutted. I believe this is the situation envisaged by Section **8** of the Traffic Act[6]which provides:-

"*The person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the vehicle"*

This to my understanding means a logbook or certificate of search is not conclusive proof of ownership though such document may purport to show the registered owner but may not be conclusive proof of actual ownership of a motor vehicle as the above section clearly points out or provides that the contrary can be proved. This is a clear recognition of a fact that often times, vehicles change hands but records are not adjusted to reflect the actual position.

In the case of *Samwel Mukunya Kamunge vs John Mwangi Kamuru**[7]* Hon. H. M. Okwengu, J (as she then was) stated:-

"It is true that a certificate of search from the Registrar of motor-vehicles would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor vehicles. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition of the fact that often time's vehicles change hands but the records are not amended.

I find that the trial magistrate was wrong in holding that only a certificate of search from the Registrar of motor vehicle could prove ownership of the motor-vehicle. I find a police abstract report having been produced showing the Respondent as the owner of motor vehicle KAH 264A, and evidence having been adduced that letters of demand sent to the Respondent elicited no response from him denying ownership of the motor vehicle, and the Respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle KAH 264A was owned by the Respondent."

I stand truly guided by the above decision. There is on record a demand letter dated 25th May 2009 addressed to the Respondent. There is nothing on record to show he responded to the said letter rebutting the issue of ownership. I also on this point refer to the case of *Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & Another**[8]* where the Court of Appeal sitting at Kisumu held:-

"Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary"

Court record shows that the Respondents counsel never cross-examined **PW1** and **PW2** on the police abstract nor did counsel object to its production nor did he insist of cross-examining the maker of the document. In fact the cross-examination did not address the issue of ownership at all. The effect is that the above scenario creates a serious doubt on the copy of record relied upon by the Respondent which is not conclusive evidence as stipulated by Section **8** of the Traffic Act cited above and which could be rebutted. It was necessary for the Respondent to rebut the said evidence so as to effectively rebut the presumption created by the said section. He knew he would rely on the copy of records in his evidence, hence he ought to have laid the ground of doing so by casting aspirations on the contents of the police abstract.

In *David Kahuruka Gitau & Another vs Nancy Ann Wathithi Gitau & Another*[9] this court held that the purpose of cross-examination is three-fold; **(a)** *To elicit evidence in support of your case;* **(b)** *To cast doubt on, or undermine the witness's evidence so as to weaken your opponent's case, and to undermine*

the witness's credibility; **(c)** *To put your case and challenge disputed evidence*. But once a party cross-examines an opponent's witness, he can only rebut the issues raised during cross-examination by calling witnesses. In my view, by failing to cross examine the plaintiffs witnesses on the contents of the police abstract report, meant that the Respondent did not weaken the said evidence or cast doubts on it hence he cannot hide behind the clear provisions of Section **8** of the Traffic Act cited above. In decisions cited by the Respondents counsel which I have duly considered, where the party was found to have proved ownership, there was no contrary evidence to rebut the presumption as in the present case, hence, the said decisions are distinguishable from the present case.

In light of my finding that the appellants evidence as contained in the police abstract was never contested or tested by way of cross-examination, and considering that Section 8 of the Traffic Act is not conclusive proof of ownership and can be rebutted, I find that failure by the magistrate to address the said issue particularly the question whether or not there was conclusive evidence of ownership led to an erroneous finding.

On damages, I note that the memorandum of appeal as drawn is totally unclear as to whether the appellants are challenging the award of damages save for ground number three which states that the learned magistrate erred in stating that the appellant did not prove dependency. I note that the learned Magistrate found that dependency was not proved and made no award under the said head. The Magistrate then proceeded to state that she would have awarded damages for loss of life expectation **Ksh. 60,000/=,** pain and suffering **Ksh. 5,000/=** and funeral expenses **Ksh. 10,200/=.**

On damages awarded, in my opinion, the issue that falls for determination is whether or not there is any reason to interfere with the learned magistrates' findings/award of damages.

The law on circumstances under which an appellate court would interfere with an award of damages has been reiterated in numerous authorities and in various jurisdictions throughout the world and the general principle is the same. The Court of Appeal of Nigeria discussing the same issue in the case of *Dumez (Nig) Ltd V. Ogboli**[10]* had this to say:-

*"It is settled law that "An Appellate Court will not interfere with an award of general damages by a trial Court unless:- **(a)** where the trial Court acted under a mistake of law; or **(b)** where the trial Court acted in disregard of principles; or **(c)** where the trial Court took into account irrelevant matters or failed to take into account relevant matters: or **(d)** where the trial Court acted under a misapprehension of facts; or **(e)** where injustice would result if the Appellate Court does not interfere; or **(f)** where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage."*

Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the prevailing economic environment. Therefore, as was held in the above cited case, and indeed in numerous authorities in this country, an appellate court will only interfere with the award on general damages on the above cited grounds.

In *Kivati -vs- Coastal Bottlers Ltd*[11] the Court of Appeal had the following to say:-

"The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."

In *Ken Odondi & two others vs James Okoth Omburah t/a Okoth Omburah & Company Advocates**[12]* stated as follows:-

"We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be

persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."

The Court of appeal proceeded to observe that this is the general principle to be found in *Rook v Rairrie*. [13] This principle was adopted with approval by the Court of Appeal in *Butt v Khan**[14]*** where it was held per **Law, JA**:-

"... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low..."

In the plaint the appellant pleaded that the deceased left behind the widow and **7** children all of whom at the time of filing the suit were over **18 years** except one who was **16 years** then. **PW1** and **PW2** did not in their evidence give any evidence on the alleged dependency or give details of the dependants and how the deceased used to support them. I entirely agree with the learned Magistrate that dependency was not proved at all.

As stated above, the appellants have not expressly stated in the memorandum of appeal that they seek to overturn the award of damages except ground number **3** which deals with the issues of dependency, there is no other ground challenging the awards under the other heads nor do I find reasons to interfere with the same. Accordingly, I up hold the magistrates findings on damages as enumerated above, namely, **(a)** Loss of life expectation **Ksh. 60,000/=, (b)** Pain and Suffering **Ksh. 5,000/=, (c)** Funeral expenses **Ksh. 10,200/=.**

In conclusion, I allow the appeal partly, hence I make the following orders:-

1. **That** judgement be and is hereby entered in favour of the appellants against the Respondent on liability on **100 %** basis.
2. **That** judgement be and is hereby entered in favour of the appellants against the Respondent for general damages in the sum of **Ksh. 65,200/=** plus interests at court rates from the date of judgement in the lower court until payment in full.
3. **That** judgement for Special damages in favour of the appellants in the sum of **Ksh. 10,200/=** plus interests at court rates from the date of filing suit in the lower court until payment in full.
4. **That** the Respondent shall bear the costs of the suit in the lower court and for this appeal plus interests thereon.

Orders accordingly

Dated, Signed and Delivered at **Nyeri** this **9th** day of **June** 2016

John M. Mativo

Judge

---

[1] **Nyeri civil appeal no. 147 of 2002**

[2] 12th Edition, page 3

[3] {2000} 2E.A. 385

[4] See Romanus Joseph Ongombe & Others vs Cardinal Raphael Ochieng, Kisumu Civil Appeal No. 20

of 2011,(UR)

[5] [1982] KLR 84 at 85

[6] Cap 8, Laws of Kenya

[7] Civil Application No.34 of 2002

[8] CA NO.260 OF 2004(Kisumu) (2010) eklr

[9]HCC No 43 of 2013, Nyeri

[10] {1972} 3 S.C. Page 196." Per BADA, J.C.A (P. 28, paras. C-G) -

[11] Civil Appeal No. 69 of 1984

[12] Court of Appeal, Kisumu, CA No 84 of 2009, Onyango Otieno, Azangalala & Kantai JJA

[13] [1941]1AII E.R. 297

[14] [1981] KLR 349