Maina v Thuo (Civil Appeal 29 of 2018) [2023] KECA 711 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 711 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 29 OF 2018

HM OKWENGU, F SICHALE & J MOHAMMED, JJA

JUNE 9, 2023

BETWEEN

HELLEN MUIHU MAINA ..... APPELLANT

AND

SIMON NJOROGE THUO ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Kiambu (Ngugi, J.) made on 27th July 2018 in Civil Appeal No 199 of 2016)

JUDGMENT

Background

1. This is a second appeal from the judgment of the High Court (Joel Ngugi, J. – as he then was) which was delivered on July 27, 2018. The background of the appeal is that Hellen Muihu Maina, (the appellant) sued Stephen Njoroge Thuo, (the respondent) at the Murang'a Senior Principal Magistrate's Court which suit was subsequently transferred to the Thika Chief Magistrate's Court. In her suit, the appellant sought compensation for personal injuries that she claimed to have suffered following a road traffic accident that occurred January 15, 2000. In the plaint, the appellant claimed that the accident involved motor vehicle registration number KAG 172A which was owned by the respondent, and which was so negligently and recklessly driven by the respondent's driver that he caused an accident that caused injuries to the appellant. The respondent filed a defence denying any liability for the accident. After considering the evidence presented by the parties, the trial court found the respondent to be 100% liable for the accident and that the appellant had proved her case on a balance of probabilities. The trial court awarded the appellant the sum of Kshs 550,000.00 as general damages, Kshs 1,600.00 as special damages together with costs of the suit.

2. The respondent was aggrieved by that decision and appealed to the High Court, challenged the judgment of the trial court on three broad areas. First, that the trial court had entered a finding on liability that was not supported by the evidence; second, that the trial court had failed to note that

the evidence proffered by the appellant was contradictory; and finally, that the trial court had failed to take into account or consider any evidence tendered by the respondent. The appellant on her part opposed the appeal and argued that the first appeal was not warranted and that there was no basis for the first appellate court to interfere with the judgment of the trial court. The appellant urged the court to dismiss the appeal.

3. The first appellate court considered the evidence together with the grounds of appeal raised by the respondent. On the question whether the court had considered the evidence from both sides, the first appellate court found that there was no indication that the trial court had properly evaluated and appreciated the evidence by the respondent.

4. The first appellate court also found various discrepancies in the evidence tendered by the appellant, including the fact that she did not prove that she was a fare paying passenger in the motor vehicle; that her names in the various documents that she produced were different and that this was not explained; and that the injuries that she claimed to have suffered were not consistently described in the plaint, her medical report or the medical evidence. The court also held that there was insufficient evidence to reach the conclusion that the appellant was a passenger in the motor vehicle that caused the accident. In the end, the court found and held that:

> "I find and hold that given the evidence presented in the case, there was insufficient proof on a balance of probabilities to establish the respondent's case. In particular, there was insufficient proof to demonstrate that the respondent was a passenger in Motor Vehicle Registration Number KAG 172X on 15/01/2000 when the Motor Vehicle was involved in a Road Traffic Accident at Kihunguro, Ruiru along Thika Road. Finally, there was insufficient evidence that the respondent suffered the injuries alleged in the Plaint as a result of the road traffic accident. It was an error for the Learned Trial Magistrate to have found the appellant negligent."

5. With that, the first appellate court allowed the appeal, set aside the decision of the trial court, and dismissed the appellant's case. That is the finding that now leads us to this appeal.

6. The jurisdiction of this court on a second appeal is restricted to the consideration of issues of law only. In *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR this court observed that:

> "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This court in a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters, they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

7. Those are the prescriptions in law under which we set out to consider this appeal. The appellant has set out nine grounds, which upon our consideration, raise two main issues, that is: whether the first appellate court erred by undertaking a biased scrutiny of the evidence and facts; and whether the trial court adopted a degree and standard of proof in analysis of the evidence, the combined effect of which was to lead the first appellate court to err. These are issues of law as noted by thiscourt in *Peters v Sunday Post Limited* [1958] EA 424.

8. The first appellate court noted that there was an error in the manner that the trial court had dealt with the evidence before it, as it did not undertake any analysis of the evidence that was led by the respondent. This finding by the first appellate court is borne out in the judgment of the trial court.

9. The concurrent findings of the trial court and the first appellate court were that there had been an accident that occurred on January 15, 2000 which involved motor vehicle registration number KAG 172K. However, the points of departure between the two courts below are on various discrepancies which in the view of the first appellate court disproved the appellant's case.

10. The first appellate court considered the discrepancies in the evidence adduced by the appellant. The first issue raised by the first appellate court were the discrepancies in the name of the appellant. The court noted that the appellant had been referred to by different names in different documents: Hellen Muihu Maina, Hellen Muhiu Njoroge, Hellen Muigo and Hellen Muigu Njoroge, and that there had been no explanation that was given for these different names in different documents.

11. The first appellate court also noted that there were discrepancies and inconsistencies with regard to the route the motor vehicle took prior to getting into the accident, as well as with regard to the site of the injuries that the appellant claimed to have suffered.

12. At the hearing of the appeal, learned counsel, Mr. Mwangi Ben appeared for the appellant while learned counsel, Mr. Ndurumo appeared for the respondent. The appeal was disposed of by way of written submissions. Learned counsel for the appellant in written submissions faulted the first appellate court for its analysis, stating that the discrepancies in her name were minor since they were mainly caused by misspelling, and were due to the fact that the appellant was unconscious when she was taken to the hospital and also due to cultural diversity in spelling names other than Christian names. In the counsel's view, these discrepancies were minor and could have been cured under article 159 of the *Constitution*.

13. Counsel further submitted that the first appellate court erred in imposing a degree of proof inconsistent with the legal burden of proof in civil matters. In counsel's view, the first appellate court adopted the degree and scale of beyond all reasonable doubt rather than on a balance of probabilities. Counsel asserted that the appellant discharged her burden of proof under section 109 of the *Evidence Act* by proving that she was injured in the accident.

14. Counsel further submitted that in addressing the injuries sustained by the appellant, the learned Judge was biased as the appellant produced and relied on the P3 form, the medical report, the treatment and discharge form from the hospital, yet the learned Judge imposed on the appellant a standard of proof beyond all reasonable doubt. Further, that at no time did counsel for the respondent seek to have the appellant re-examined by a doctor to confirm and/or ascertain the injuries, neither did they seek to authenticate the documents produced.

15. Learned counsel for the respondent opposed the appeal and submitted that the instant appeal is misplaced and the appellant is on a mere fishing expedition that will amount to nothing. Counsel further submitted that the first appellate court acted within its powers and legal mandate, and that the learned Judge was fully aware of his powers and limitations as a first appellate court and acted accordingly.

16. Counsel decried the many contradictions and inconsistencies in the appellant's evidence. Regarding the discrepancies in the appellant's names, counsel asserted that there was no documentary evidence adduced to prove that the different names referred to one and the same person. Further, that the discrepancies in the appellant's name cannot be blamed on cultural diversity and that the makers of the various documents were never called to prove that they all referred to one and the same person.

17. Counsel emphasized that the doctrine of he who alleges must prove must be adhered to, as it is anchored in law vide section 107 (1) of the *Evidence Act*. The case of *M'Bita Ntiro v Mbae Mwirichia & another* [2018] eKLR was cited in support of this proposition.

18. Counsel was emphatic that the appellant's evidence was marred with many inconsistencies from the dates on various documents to the appellant's names. Counsel asserted that in contrast, the respondent filed a very straight forward statement of defence and produced two witnesses whose evidence was not adequately considered by the trial court. Counsel urged us to dismiss the appeal with costs to the respondent.

19. We have considered the record of appeal, the submissions by counsel for the parties, the authorities cited and the law. The first appellate court found that there were various discrepancies that emerged from the evidence. In *Philip Nzaka Watu v Republic* [2016] eKLR this court did note that:

> "Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

20. While those statements were made in the context of a criminal appeal, we are of the view that they apply with equal force to civil appeals such as the one before us. Were the discrepancies herein so germane that they went to the root of this appeal?

21. First is the question of the various spellings of the names referring to the appellant. The appellant's counsel submitted that the appellant was unconscious when she was taken to the hospital after the accident. The learned Judge summarized the discrepancies, inconsistencies and contradictions in the appellant's case as follows:

> "First, there is discrepancies in names. In various documents produced, the respondent is referred to by different names. The respondent is named as Hellen Miuhu Maina. That is also the name in her police abstract as well as the medical report produced in court. The same name appears in the receipt dated 17th May, 2000 by Ruiru Hospital being in payment for a P3 form. However, the name entered into the OB is Hellen Muhiu Njoroge. Additionally, the name in the receipt for the medical report is Hellen Muhiu Mwangi. Further, the name in the receipt No. 2504 dated 16th January, 2000 issued by Ruiru Hospital refers to Hellen Muigo while the receipt No. 2530 issued by the same hospital refers to Hellen Muigu Njoroge. No explanation at all was given for these different permutations of the names of the respondent. On appeal the respondent's advocates refers to the issue as one of a "technicality..."

22. The learned Judge found that the evidence adduced by the appellant was riddled with many discrepancies and inconsistencies. The first appellate court found that the trial court did not carry out any analysis to come to a reasoned conclusion whether the appellant was a passenger in the motor vehicle or not when it determined that the respondent was negligent. The learned Judge found that the appellant did not produce any receipt to prove that she was a fare-paying passenger in the motor vehicle. The learned Judge found that in the Kenyan context, this would not be dispositive but in the context of other factors in the case, including the many discrepancies and inconsistencies in the evidence adduced by the appellant, it assumes some importance.

23. The learned Judge found that there was a discrepancy regarding the route that the Motor Vehicle used to travel to Nairobi from Muranga. The respondent called two witnesses in support of his case. Julius

Kiragu Muthui (DW1) was the driver of the Motor Vehicle No. KAG 172X when it was involved in an accident. The respondent testified as DW2 and corroborated DW1's evidence that all passengers in his vehicles were issued with receipts and that it was curious that the appellant did not have one. Further, DW1 and the respondent both testified that they drove the respective motor vehicles from Othaya on the way to Nairobi using the Mukurwe-ini- Karatina-Sagana-Kenol-Thika Road.

24. The appellant testified that she boarded the Motor Vehicle at a place called Gatheri along the Kiriaini-Murang'a Road and that the road traffic accident occurred in Ruiru. It was the appellant's further testimony that she was not issued with a receipt when she boarded the motor vehicle.

25. The appellant called a policeman, PC Macdonald Njorome who produced the Police Abstract. In his testimony, he admitted that he was not the Investigation Ruiru Police testified that (OB) or filled

26. It was the respondent's testimony that the appellant was not a passenger in the Motor Vehicle as she did not have a receipt and that she claimed to have used a different route – the Kiria-ini- Muranga-Thika Road. From the record, the evidence of DW1 and the respondent was consistent and unshaken after cross-examination. On the other hand, the appellant's evidence was inconsistent and was not sufficient to prove her case.

27. In the circumstances, we find that the learned Judge did not err when he found that there was insufficient proof to demonstrate that the appellant was a passenger in Motor Vehicle No KAG 172X when it was involved in a road traffic accident on January 15, 2000.

28. Further, There was a discrepancy with regard to the injuries that the appellant is said to have suffered in the accident. We have considered the fact that the medical report led in evidence showed that the appellant had suffered fractures on the right leg, while in her pleadings and in her testimony, she claimed that the injury was on the left leg. In our view, this discrepancy directly contradicts the other evidence on record with regard to the injuries that the appellant claimed to have suffered, which were said to include a fracture to her left leg. In the circumstances, we find that the learned Judge did not err when he found that there was insufficient evidence that the appellant suffered injuries alleged in the plaint as a result of the road traffic accident and that it was an error for the trial court to have found the respondent negligent in the circumstances.

29. We find that the contradictory evidence with respect to the injuries negated her case in regard to the accident and the injuries, and the first appellate court therefore did not err in finding that this particular discrepancy was material and went to the root of the appellant's case. On this score, the appeal fails.

30. As a result, we are satisfied that the first appellate court properly analyzed the first appeal and came to the correct conclusion. This appeal therefore lacks merit and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2023

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR