THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL APPEAL NO. 32 OF 2018

[Arising out of Civil Suit No. 755 of 2012 at Nakawa Chief Magistrates Court]

ZAWEDDE DOROTHY::APPELLANT

VERSUS

ALI AUGUSTINE [Suing by a next Friend Ojok Augustine] ::::::::::::::::RESPONDENT

BEFORE HON. JUSTICE ESTA NAMBAYO

JUDGEMENT

The Appellant, Zawedde Dorothy, being aggrieved by the decision and orders of Her Worship Buchyana Lillian, Chief Magistrate, in Civil Suit No. 755 of 2012 at Nakawa Chief Magistrates Court delivered on the 11th October, 2017, has filed this appeal on grounds that: -

1. **The Learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record and as a result came to a wrong and erroneous decision.**
2. **The Learned Trial Chief Magistrate erred in law and fact when she proceeded to decide the case basing and relying on a joint scheduling Memorandum which was undated and suspect on the face of it.**
3. **The Learned Trial Chief Magistrate erred in law and fact when she accepted and admitted as exhibits documents which were not tendered in Court by authors.**

4. **The Learned Trial Chief Magistrate erred in law and fact when she awarded specific damages which were not strictly proved.**

The Appellant prays for orders of this court that: -

i. **The appeal be allowed, the judgement and decree of the lower court be set aside.**
ii. **The Respondent's suit be dismissed**
iii. **In the alternative, a retrial be ordered**
iv. **Costs of this appeal and in the court below be awarded to the Appellant.**

Background to the Appeal

The brief background to this appeal is that on the 7th of May, 2012 at around 1745hrs, the Respondent, Ali Augustine aged 4 years, was crossing the road at Bukoto UCB near Kampala International School, when the Appellant driving motor vehicle registration No. UAQ 100R, knocked him, causing him to sustain injuries. The Respondent filed a suit through his next friend Ojok Augustine and judgement was entered in his favor, hence this appeal.

Representation

Learned Counsel Mufumba Jolly appeared for the Appellant while Counsel Ssozi Stephen is for the Respondent. Written submissions have been filed for the parties as directed by this court.

This being a first appeal, I'm alive to the legal obligation of this court to re- appraise the evidence on record and come up with my own decision but not disregarding the judgment appealed from, as stated in the case of ***Fr. Nasensio Begumisa & 3 Others –v- Eric Tibebaga SCCA No.17 of 2002***, that: -

"*... the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the trial judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong*."

This Court is also mindful of the fact that in case of any conflicting evidence, the Appeal Court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions ***(See Lovinsa Nankya -v- Nsibambi [1980] HOB 81***). With the above principles in mind, I will now turn to the grounds of appeal raised.

Ground 1: The Learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record and as a result came to a wrong and erroneous decision.

This is a general ground of appeal which requires evaluation of the entire evidence on record. I will address it after looking at the other grounds.

Ground 2: The Learned Trial Chief Magistrate erred in law and fact when she proceeded to decide the case basing and relying on a joint scheduling Memorandum which was undated and suspect on the face of it.

Submissions for the Appellant

Counsel for the Appellant submitted that the Appellant pleaded under paragraph 4 of her Written Statement of Defence that she was not driving too fast as alleged by the Respondent in paragraph 6 of his Plaint. That the joint scheduling memorandum on court record shows that the Respondent was negligent while crossing the road

and that the guardians who were walking with him allowed him to cross the road alone. Furthermore, that the Appellant informed the Respondent's guardians to go to Mulago Hospital but they opted for Case Hospital. Counsel explained that the above facts don't show that the Appellant admitted any liability in negligence or damages. That the Appellant was surprised to learn that the points of Agreement in the Joint Scheduling Memorandum stated that the accident was solely caused by the Appellant's negligence and that she was liable in damages to the Respondent. The Appellant contended that the above claim was disputed in her Defence and it was also an agreed issue for determination in the Joint Scheduling Memorandum.

Submissions for the Respondent

In reply, Counsel for the Respondent submitted that the Joint Scheduling Memorandum was signed by the Appellant's Counsel in accordance with Order 6 Rule 26 of the Civil Procedure Rules and approved by the trial Chief Magistrate. That the Appellant was bound by her pleadings under Order 6 Rule 7 CPR and that in case of any difference or change she would have proceeded under Order 6 Rule 19 of the CPR for the amendment. Secondly, that the Appellant did not specifically reply to paragraph 6 of the Plaint which focused specifically on negligence and its particulars. Counsel relied on the case of **Energoprojekt Niskogradnja & Ors -v- *Brigadier Kasirye Gwanga & Ors. HCMA No.558 of 2009*, [Arising out of Civil Suit N0. 186 of 2009],** where Court noted that where facts are sworn to in an affidavit and they are not denied by the opposite party, the presumption is that such facts are accepted.

Counsel further argued that the Appellant cannot depart from the joint scheduling memorandum that was signed by her Counsel during the scheduling of the case. He relied on the case of ***Imperial Bank Ltd -v- T. Brucks East Africa Ltd & Anor Civil***

Suit No.637 of 2013 and Annet Zimbiha -v- Attorney General HCCS No.109 of 2011.

On the issue of an undated joint scheduling Memorandum, Counsel relied on Article 126 (2) (e) of the 1995 Constitution of Uganda and the cases of ***Saggu -v- Roadmaster Cycles (U) Ltd [2002] 1 EA 258,*** where court emphasized that matters of procedure are not of a fundamental nature. That in this case, failure to date a joint scheduling memorandum was an error of both Counsel and it is only a matter of procedure.

Analysis:

S.57 of the Evidence Act, provides that;

"no fact need be proved in any proceedings which the parties to the proceedings or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleadings in force at the time they are deemed to have admitted by their pleadings; except that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions".

Under Order 12 Rule 1 of the Civil Procedure Rules, courts are required to hold a scheduling conference to sort out points of agreement, disagreement, explore the possibility of mediation, arbitration and any form of settlement.

In Kampala District Land Board and Anor –v- National Housing and Construction Corporation, SCCA No.2 of 2004, Court noted that; *"facts once admitted needed no further proof and were no longer in issue."*

In the instant case, during the scheduling conference, counsel for the parties set out agreed facts as follows: -

i. An accident occurred and was solely caused by the negligence of the Defendant.
ii. The motor vehicle registration No. UAQ 100R was being driven or under the operation and control of the Defendant and accordingly she is liable in damages to the Plaintiff as a result of the accident.
iii. The Plaintiff was injured sustaining multiple bruises, concussion to the brain, loss of consciousness, right elbow and cheek, muscle and scalp tenderness, elbow bruises.
iv. The Defendant is liable in damages to the Plaintiff as a result of the accident

The 1st issue for trial was whether the defendant was liable in negligence to injuries caused on the plaintiff. In her judgement, the learned trial Magistrates found and rightly so, that facts admitted need not be proved and she went ahead to answer the 1st issue in the affirmative. I find no reason to fault the finding of the learned trial Chief Magistrate because her reasoning and finding are in line with the provisions of the law as shown above.

On the ground that the Scheduling Memorandum was not dated, I'm guided by section 43 of The Interpretation Act, which provides that;

"where any form is prescribed by any Act, an instrument or document which purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead."

Without evidence to show that failure to indicate a date in the joint scheduling memorandum was intended to mislead the Appellant, it is my finding that such an

omission was a deviation from the requirements of form, which was not calculated to mislead and should be ignored. The omission did not also cause any miscarriage of justice to the Appellant. In ***Re Christine Namatovu Tebajjukira [1992-93] HCB 85,*** the Supreme Court emphasized that: -

"The administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights".

It is my view that the omission to insert a date or citation of an incorrect date if not deliberately intended to misled or cause confusion to the detriment of any of the parties to the suit, is not fatal. In this case, it has not been shown that the none insertion of the date was intended to cause confusion to the detriment of the Appellant and/or the Respondent. The Appellant has not shown that there was miscarriage of justice arising from the omission to insert a date. Therefore, I find no merit in this ground of appeal and it fails.

Ground 3: The Learned Trial Chief Magistrate erred in law and fact when she accepted and admitted as exhibits documents which were not tendered in Court by authors.

Submissions for the Appellant

Counsel for the Appellant submitted that PW2, Ojok Augustine had several documents attached to his witness statement, most of which he had not authored. That when Counsel for the Respondent (plaintiff) sought to have the documents marked as exhibits, Counsel for the Appellant, upon being asked by court whether she had any objection, she told court that she had no objection. The court then marked and admitted the documents erroneously as exhibits. Counsel explained that the documents were not authored by PW2, that they were photocopies and should

not have been admitted and relied on by the trial Magistrate as exhibits. She relied on S. 63 and 61 of the Evidence Act and explained that the documents admitted as exhibits were from Case hospital, they were not identified by any one from Case hospital and or PW2 before being admitted as exhibits. She referred this Court to "The Modern Law of Evidence, 2nd Edition at page 9, by Adrian Keane and prayed that this court be pleased to find that the said documents were erroneously admitted as exhibits and should be struck off the court record record.

Submissions for the Respondent

In reply, Counsel for the Respondent explained that Counsel for the Appellant/defendant, did not object to the documents being tendered in court as exhibits through PW2 during the hearing of the matter before the learned trial Chief Magistrate. He relied on the case of ***Kasangaki & Anor –v- Samaaki & Anor CA No. 08 of 2014 [2016]*** where court held that;

"documents produced by the plaintiff were not challenged by the defendant and as such, they can form a basis for judgement in the plaintiff's favor"

Counsel also relied on the case of ***Alade –v- Olukade (1976)2 SC 183*** where the court held that;

"where objection has not been raised by the opposing party to the reception in evidence of a document, the document will be admitted in evidence and the opposing party cannot afterwards be heard to complain about its admission"

Counsel submitted that the learned trial Chief Magistrate was right to admit the documents because Counsel for the Appellant/defendant did not object to their being tendered in court as exhibits at the trial. He prayed that this court finds no merit in this ground of appeal which should also fail.

Analysis

During the hearing of this matter, when the witness statement of PW2 was tendered in court as evidence in chief, Counsel for the Respondent/Plaintiff informed Court that the statement had exhibits attached and he prayed that they be numbered as presented. In reply, Counsel for the Appellant/defendant informed court that she had no objection. Court then went ahead to number the attachments as exhibits 1 up to exhibit 7. There was no objection raised by Counsel for the Appellant/defendant at the admission of the said documents as exhibits. This meant that Counsel had no problem with the learned trial Chief Magistrate admitting the documents as exhibits. During cross examination, PW2 informed court that he is the one who paid the bills as reflected in the documents. Counsel for the Appellant/defendant did not, at any one point, inform court that there was need to call the authors of the documents that PW2 was relying on and which court had admitted with her consent to give evidence so that during cross examination the credibility of the documents would be tested. In ***Uganda -v- Dusman Sabuni 1981(HCB) 1***, Court noted that: -

"an omission or neglect to challenge the evidence-in-chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible or probably untrue."

In this case, Counsel for the Appellant/defendant having failed to challenge the credibility of the documents at the time of tendering them in court as exhibits and during cross examination, he cannot now raise issues of admissibility and credibility of the documents at appeal. I'm fortified and persuaded by the holding in the Nigerian supreme court case of ***Salua Jagun Olukade –v- Abolade Agboola Alade, Nigeria SC No. 237 of 1974 F,*** where court noted that;

"where in the court below, the evidence not being strictly admissible, not being that on which the court can properly act, if the person against whom it is read does not object, but treats it as admissible, then before the court of appeal, he/she is not at liberty to complain of the order on the ground that the evidence was not admissible."

In view of the above therefore, the Appellant's counsel having not objected to the admission of the documents through PW2 as exhibits and having opted not to cross examine PW2 to show the inadmissibility of the documents, cannot now rise on appeal to challenge the credibility and admissibility of the same documents on grounds that they were wrongly admitted in evidence as exhibits by the trial Magistrate. I find that the trial Chief Magistrate did not error in admitting the documents as exhibits and relying on them in her judgement. Be that as it may, in yet another Nigeria supreme court case, which I also find persuasive, of ***Okoye & Anor –v- Obiaso and Ors, (2010) Vol. 186 Lrcn 181 at 203 Para PZ - Z,*** *Adekeye, JSC noted that: -*

"The cardinal consideration in the admissibility of a document is relevance. Once a piece of document is relevant, it is admissible… The courts have always engaged three criteria in the admissibility of a document like: - (1) Whether the document is pleaded, (2) Whether the document is relevant to the subject matter of dispute and (3) Whether it is legally admissible."

In this case, the documents in issue are relevant to the subject matter, they were pleaded in paragraph 7 of the plaint and attached to the plaint as annexure "E" and admitted by consent of Counsel for the Appellant/defendant. It is my finding in view of the above that the trial Magistrate rightly admitted the documents as exhibits.

Ground 4

The Learned Trial Chief Magistrate erred in law and fact when she awarded specific damages which were not strictly proved.

It is the Appellant's evidence that after the accident, she paid for the first aid treatment at Kadic Hospital as reflected in Exh. D1 and Exh D2 at Nakasero hospital where the child was taken for an x-ray. Altogether, the Appellant, according to court record paid 874,000/- in medical bills and an undisclosed amount for the ambulance fuel to deliver the child at Nakasero hospital for the x-ray. These payments were made before the children's treatment at CASE hospital.

The Respondent/Plaintiff's claim for special damages is 9,150,000/- which are costs incurred at CASE hospital including meals and accommodation at 6,250,000/-, theatre operation at 2,400,000/- and transport to hospital at 500,000/- all costs at CASE hospital only amounting to 9,150,000/- [one million, one hundred fifty thousand shillings only]. This is provided in PW2's evidence. Receipts showing the payments at CASE hospital detailing the breakdown of the payments were tendered in court upon consent by Counsel for the Appellant/defendant as Exh. P.7.

In ***Gapco (U) Ltd –v- A.S. Transporters (U) Ltd CACA No. 18/2004, court noted that: -***

"Special damages must be specifically pleaded and proved, but that strictly proving does not mean that proof must always be documentary evidence. Special damages can also be proved by direct evidence; for example, by evidence of a person who received or paid or testimonies of experts conversant with the matter."

In ***Haji Asuman Mutekanga – v - Equator Growers(U) Ltd, SCCA No.7/1995,*** Court noted that;

"special damages and loss of profit must be specifically pleaded, they must also be proved exactly, that is to say, on the balance of probability."

In view of the above, I find that the evidence presented by the Respondent/plaintiff is enough to confirm the expenses that he incurred in the course of treatment at CASE hospital. Expenses incurred outside CASE hospital were not pleaded and proved. I find that the Learned Trial Chief Magistrate was right to award 9,150,000/- [nine million, one hundred and fifty thousand shillings only] as special damages to the Respondent/Plaintiff. This ground of appeal also fails.

Having found as above, I find no reason to fault the findings and orders of the Learned Trial Chief Magistrate. I find that she properly evaluated the evidence on record, she also came to a proper decision and made the right orders. I would therefore answer the 1st ground of appeal in the negative.

All in all, I find no merit in this appeal and it is hereby dismissed with orders that: -

1. **The judgement, orders and decree of the learned trial Chief Magistrate are hereby confirmed.**
2. **The Appellant/defendant pays special damages amounting to 9,150,000/- [nine million, one hundred fifty thousand shillings only]**
3. **The Appellant pays costs of this appeal and in the court below**

I so order.

Dated, signed and delivered by mail at Kampala, this 21st day of April, 2022.

Esta Nambayo

JUDGE

11th /4/2022.