IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, F. SICHALE & S. Ole KANTAI, JJA)

CIVIL APPEAL NO. 155 OF 2016

BETWEEN

PETER NJOROGE KAMAU..........................APPELLANT

AND

THE HON. ATTORNEY GENERAL..........RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya

at Nairobi (Njuguna, J.) dated 24th March, 2016

in **H.C.C.CA NO. 187 'A' of 2014)**

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JUDGMENT OF THE COURT

1. This is a second appeal from the decision of the High Court **(L. Njuguna, J.)** which was the first appellate court having determined the appeal preferred to it from the decision of the Chief Magistrate's Court.

2. Peter Njoroge Kamau, the appellant, sued the **Attorney General** in February 2008 in the Chief Magistrate's Court. He claimed from the State general damages for injuries allegedly inflicted on him by a serving Police Officer who shot him on or about 28th October 2006 at Umoja Estate without any justifiable cause. Although the Attorney General entered appearance, he filed defence out of time without leave of the court as a result of which the learned Magistrate struck it out on 24th September 2008, and proceeded to fix the suit for formal proof on 5th February 2010.

3. The suit eventually came up for hearing before the Resident Magistrate on 21st June 2013 when the plaintiff took objection to the defendant's counsel cross-examining the plaintiff on the ground that the defence had been struck out. The trial Magistrate took the view correctly that a defendant who has appeared in a suit where interlocutory judgment is subsequently entered against such defendant *"still had a right to cross-examine the plaintiff to test the veracity of his evidence with a view to arriving at a different position on the quantum of damages due, if any any."*

4. The learned Resident Magistrate went on to postulate that the limitation of a defendant who has entered appearance but has not filed defence *"would quite obviously have no founding (sic) upon which to place evidence before the court; his would be limited to*

testing that (sic) adduced by the plaintiff. To suggest that a party who has appeared but filed no defence holds the same position in law as a party who has neither appeared nor filed defence would make nonsense of the necessity to enter appearance."

5. The learned Magistrate found the objection unmerited and dismissed it, thus allowing the cross-examination.

6. On 24th March 2016, the Resident Magistrate delivered judgment in the suit in which he found that the dates given in evidence on the shooting of the appellant were inconsistent; that the inconsistency "*cast doubt on the claim"* and that *"looked at as a whole (the doubt) (sic) is quite material to the ....claim."*

7. The learned Resident Magistrate proceeded to find that the appellant had *"failed to establish the matters pleaded."* Said the Magistrate in his judgment:-

"There is simply no evidence before me to demonstrate that the plaintiff (appellant) was as he stated shot (sic) on the 28.10.2007 (sic) without which evidence there is no purpose in proceeding further to determine whether indeed he was as claimed shot by the police."

8. The Magistrate then proceeded to dismiss the suit with costs but assessed general damages at Kshs 250,000/= which he would have granted had the action succeeded.

9. Aggrieved, the appellant appealed to the High Court against the decision. On 24th March 2016, the High Court (L. Njuguna, J.) dismissed the appeal following her finding that the appellant failed to prove his case as it was not clear when the shooting took place. That decision provoked this second appeal.

10. In the 5 grounds of appeal proffered by the appellant, it is submitted that the issue of liability had been settled by rulings delivered on 24th September 2008 and 21st September 2013 on the striking out of the defence and giving of directions on formal proof respectively; that accordingly the learned Judge of the High Court erred in upholding the trial court judgment; that the learned Judge erred in finding that there was no interlocutory judgment and in upholding the findings made by the Resident Magistrate in absence of both defence and pleadings to support them; that the learned Judge erred in rejecting clear evidence of commission of a tort by shooting; and finally that the learned Judge used the date of the shooting as the primary evidence in proving shooting and hence liability as a tort.

11. This appeal came up for hearing before us on 23rd May 2017 when **Mr. Nyende,** learned counsel for the appellant, appeared while learned counsel **Mrs. Odhiambo** held brief for Mr. Onyiso for the Attorney General. Pursuant to The Court of Appeal Practice Directions, the appellant had filed on 29th March 2017 written submissions and a list of Authorities and a case digest. The respondent had filed on 22nd May 2017 written submissions. Both counsel highlighted their respective submissions.

12. On his part, Mr. Nyende, learned counsel for the appellant contended that after the striking out of the defence in the Resident Magistrate court, and the making by the court of the order for the suit to proceed to hearing by way of formal proof, liability was settled. The only issue for trial was quantum of damages. He submitted that the discrepancy in the dates of the shooting did not affect liability and that at any rate, it was not open to the Resident Magistrate court to open up or deal with the issue of liability. The role of the court was to assess damages to which the appellant was entitled, he contended Counsel referred us to this Court's decision in the case of **Abdullahi Ibrahim Ahmed versus Lem Lem [2013] eKLR** to buttress the proposition that *"once interlocutory judgment is entered, and formal proof is directed, the issue of liability is resolved,"* and *"the issue to be determined at formal proof is quantum of damages assessment."*

13. Also referred to is a High Court decision on the point made in **Fourways Safari Center Ltd vs General Tyres Ltd [2014] eKLR** whose ratio decidendi is that *"a court cannot pronounce a judgment on any claim or issue of defence not raised by the parties and that burden of proof on a balance of probabilities means simply a narrow win, and not a draw."* Finally, counsel for the appellant cited to us the decision of this Court in the case of **Erick Onyango Ondeng versus Republic [2014] eKLR** to support the proposition that not every contradiction or particulars as to time and date of a happening of an event warrants rejection of such evidence, unless such contradictions are grave and affect the main substance of the case.

14. Learned counsel Mrs. Odhiambo on behalf of the respondent told the Court that she had nothing to add to the written

submissions by way of highlighting. She stated in the written submissions that notwithstanding the order for formal proof, the appellant was under a duty to prove his case as required by **Section 107** of the **Evidence Act** and as demonstrated in the High Court decision in the case of **Alfred Kioko Muteti vs. Timothy Miheso [Nbi HCCC No. 232 of 2002].** This Court's decision in **Peter Karuthi Kimunya vs. Aden Guyo Haro (Nbi CA No. 307 of 2008]** was also cited in support of the proposition that under Sections 107 and 108 of the Evidence Act, it is he who alleges that must prove on a balance of probabilities. Counsel submitted that *"from the contradictions on the date of shooting, it was impossible to know when the appellant was allegedly shot or by whom."*

15. This is a second appeal. We have perused the record and the written submissions and given due consideration to highlighting of these submissions by counsel.

16. The issues that emerge in this appeal are issues of law. They relate to liability. The record shows that before the trial Resident Magistrate was a Chamber Summons application dated 25th June 2008 with a return date of 26th August 2008 seeking two orders thus:

"(1) That the defendant's defence herein be struck out and judgment entered accordingly and the matter to proceed for formal proof.

2. That costs of the application be borne by the defendant."

17. On 26th August 2008, the Resident Magistrate, Hon. M.K. Kiema (Mrs.) heard the application and reserved her ruling for delivery on 24th September 2008 – when she determined the application in her ruling delivered on that date stating as follows:-

"....consequently, a defence served out of time without the court's leave ought to be struck out. The application is therefore allowed as drawn."

18. In effect, the defence was struck out and judgment was entered accordingly and an order for formal proof was made.

19. In her analysis, the learned High Court Judge (L. Njuguna, J.) crystallized two issues; first, whether the trial Magistrate was right on the issue of liability; and secondly, whether the contradictions in relation to the date of the shooting were fatal to the appellant's case.

20. The learned Judge observed that the defence had been struck out by the Resident Magistrate and that the matter ought to have proceeded to hearing by way of formal proof. However, the learned Judge drifted into an error when she made a finding that liability was not settled. The learned Judge erred in stating:-

"In my humble view, the fact that there is no defence does not mean that the issue of liability has been settled and that the appellant did not have to proof (sic) liability. The learned Magistrate in her ruling dated the 21st day of June 2011 proceeded on the wrong principle that the issue had been settled."

21. The learned Judge also erred when she sought to distinguish this case from the authorities cited to her in **Abdullahi Ibrahim Ahmed vs. Lem Lem Tekule Muzolo (supra), Felix Mathenge vs. Kenya Power & Lighting Company Ltd [Civil Appeal No. 215 of 2002],** and **David Maina Njoroge vs. Ginyalili Farm Ltd [Civil Appeal No. 191 of 2010]** on the ground that in this appeal, interlocutory judgment had not been entered. This is what the learned Judge stated:-

"In my view, the facts in the two cases are different from the facts into the case before me. In this case, there was no interlocutory judgment entered against the respondent. The defence was struck out which meant that there was no defence on record and in the circumstances, the appellant needed to proof (sic) his case on a balance of probability. The fact that there was no defence did not mean that he did not have to proof (sic) his case and more so, liability."

22. The learned Judge went on to deal with the issue of discrepancies relating to the date of the shooting and arrived at the conclusion that "*it is not clear when the shooting took place. The documents in support of the claim also points (sic) to different dates...."*

23. If the learned Judge had perused carefully the record of the proceedings before the Resident Magistrate, she would have observed that interlocutory judgment was entered against the respondent when the appellant's application dated 25th June 2008 seeking striking out of the defence and interlocutory judgment was allowed on 24th September 2008. Clearly the learned Judge sought to distinguish the aforementioned authorities from this appeal on an erroneously factual basis namely, that in this appeal, unlike in the said cases, there was no interlocutory judgment, yet there was. The distinction that the learned Judge sought to draw between this appeal and the said authorities was not there. The learned Judge erred in that regard and arrived at a wrong legal proposition. The question of liability was a non-issue. It was a foregone conclusion. Once an interlocutory judgment was regularly entered, it meant that there was judgment on liability and the only other step remaining was assessment of damages. It would be absurd to have judgment on liability entered and then backtrack to impugn such judgment! The learned Judge fell into error in this regard.

24. Moreover, although it does not now arise in view of what we have stated above, the issue of conflicting evidence on the shooting did not, *ipso facto*, mean that no shooting took place. This being a civil and not a criminal matter, the standard of proof would be on balance of probabilities. The fact that a witness does not remember precisely when injury was sustained or inflicted does not mean that no injury was suffered.

25. The appeal before us has merit. We allow it. We set aside the judgment of the High Court (L. Njuguna, J.) dated 24th March 2016 and in its place we substitute a judgment in favour of the appellant on liability and on quantum of damages assessed at Kshs 250,000/= for the injuries sustained by the appellant in the shooting. We award the appellant costs in this appeal and in the appeal No. 187'A' of 2014 in the High Court at Milimani, Nairobi as well as costs of the suit in the Resident Magistrate's court in Nbi CMCC No. 1203 of 2008. It is so ordered.

Dated at Nairobi this 20th day of December, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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