Kadhengi v Mboe (Civil Appeal E215 of 2021)
[2024] KEHC 7879 (KLR) (25 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7879 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E215 OF 2021

DKN MAGARE, J

JUNE 25, 2024

BETWEEN

JUMA KARISA KADHENGI ..... APPELLANT

AND

AZENATH MBOE ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the judgment and decree of Hon. Kiage, Senior Resident Magistrate in Mombasa CMCC No. 1658 of 2021 delivered on 19th October 2021.

2. The Appellant was the Plaintiff in the suit in court below. The Appeal is on liability only. It is based on the ground that the lower court erred in not finding the Respondent wholly liable for the accident.

3. The court apportioned liability as 80:20 in favour of the Appellant. It is this Appeal that we shall that we shall deal with.

4. In the Plaint dated 23rd July 2018, the Appellant claimed for damages in respect of the accident that occurred on 14th March 2018 along Moyne Road at Jamhuri in Nyali within Mombasa County involving the Appellant and the Respondent's Motor vehicle Registration No. KBZ 810J. The Appellant blamed the Respondent wholly for the accident.

5. The Respondent entered appearance and filed a written statement of Defence dated 21/11/2018 denying liability and blaming the causation of the accident on the Appellant.

6. The learned magistrate considered the case and awarded as follows:

    a. Liability 80:20 in favour of the Plaintiff

    b. General Damages Ksh.80,000/-

    c. Special Damages Ksh.2,000/-

d. Costs and interest at court rates

7. Aggrieved, the Appellant lodged the Memorandum of Appeal dated 9/11/2021 challenging the lower court's finding on liability hence this Appeal.

8. The appellant filed a Replying Affidavit on 28/10/2020 sworn by Charles Gathu, dated 27/10/2020. In its Ruling, the court dismissed the Application.

Evidence

9. The Appellant called PW1, Dr. Adede who testified and produced medical report dated 10/4/2018. It was his case that the Appellant had no complaints of pain at the time of examination.

10. PW2 was testified that he was the conductor of the Matatu. He adopted and relied on his witness statement dated 23rd July 2018.

11. It was his case that he was in matatu registration No. KAM 948J when he sustained injuries due to negligence on the part of the Respondent who negligently drove his Motor vehicle Registration No. KBZ 810J and caused it to hit the Appellant.

12. PW3, PC Justus Yegon produced the Abstract and stated that Motor vehicle Registration No. KBZ 810J was to blame for the accident for the reason that the said motor vehicle failed to give way.

13. The Defence case was closed without calling witnesses. The case against the 2nd Defend ant was withdrawn.

Submissions

14. The Appellants filed submissions dated 9/5/2024. It was submitted that the court correctly awarded liability. It was further submitted that the Appellant had failed to discharge his evidentiary burden under Section 107 of the *Evidence Act*.

15. They also relied among others on Daniel Toroitich Arap Moi v Mwangi Stephen Muriith & Another (2014) eKLR and Mbuthia Macharia v Anne Mutua Ndwiga & Another (2017)e KLR.

16. It was further submitted for the Respondent that the Appellant did not call the driver of the matatu because such evidence would be adverse to the Appellant's case. They relied on Lucy Nyambura Gitonga v Vijaykumar Shamji Patel & Another (2021) eKLR.

17. It was also submitted for the Appellant that there would be no liability without fault and the learned magistrate was as such correct and decided on the basis of the evidence availed in court. On this, reliance was placed on the case of Kiema Mutuku v Cargo Handling Services Limited (1991) KA R258.

18. I was urged to dismiss the Appeal.

19. The Appellant did not file submissions.

Analysis

20. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a lower court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

21. In the cases of Peters vs Sunday Post Limited [1958] EA 424 , the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

22. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

23. The singular issue is whether the learned magistrate erred in his finding on liability.

24. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

25. Therefore, it follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case.

26. Clearly, the burden of proof was on the Appellant to avail evidence to prove on a balance of probabilities that the Respondent was 100% liable for the accident.

27. I understand the occurrence of the accident was not disputed. Indeed, the accident occurred and this was the common position of the parties, in the lower court, and even this Court.

28. What is disputed is whether the Appellant was 20% negligent. The standard is a simple one on the preponderance or balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

29. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

30. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

31. Following the detailed authorities above, I have to demystify the evidence produced in the lower court to discern whether the Appellant proved on a balance of probabilities that the Respondent was fully to blame for accident. The lower court found the Appellant 20% liable for the accident.

32. In as much as the Appellant maintained that the Appellant had proved his case on liability of 100% against the Respondent, there are concerns which were not addressed.

33. There was no evidence to disclaim the Appellant who was the conductor aboard matatu registration no. KAM 948J from liability. No eye witness was called and the police abstract produced in evidence was as such not corroborated as the Police Officer who produced the report was not at the scene of the accident. It is difficult for this court to fault the finding of the learned magistrate on liability.

34. Therefore, whereas the Police Officer who testified for the Appellant was categorical that the Respondent did not give way hence the accident, the opinion was however not supported by the evidence of the eye witness. The circumstances of the occurrence of the accident were as such not clear as to fully blame the Respondent.

35. Circumstances of the case are crucial in determining the natural cause of events. In the case of Berkley Steward v Waiyaki Vol 1 KAR 1118 {1986 – 1989} it was held:

> " Under Section 119 of the *Evidence Act*, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in relation to the facts of the particular case."

36. Like the lower court, this court is thus left in conjecture as to how the Respondent was 100% to blame for the accident. Therefore, the lower court was correct in finding contributory negligence and I find no basis to disturb the apportionment of liability in the ratio of 80:20 in favour of the Appellant.

37. In the case of Caparo Industries PLC v Dickman {1990} 1 ALL ER 568 and Chun Pui v Lee Chuen Tal {1988} RTR 298 the determinants of negligence were stated as follows:

> " The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused ...
>
> What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case."

38. The issue at hand is what was the basis for the finding of 80:20 liability. The question is whether, the Appellant was liable for the accident. The Respondent was an owner. The burden of proving contributory negligence on the part of the plaintiff is on the defendant. in Embu Road Services V Riimi (1968) EA22 and 25 Mzuri Muhhidin V Nazzar Bin Seif (1961) EA 201, Menezes Stylianicers Ltd CA No.46 of 1962 the court stated hereunder: -

> " Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence".

39. A finding on contributory negligence must be based on facts. The court will be slow to interfere with such finding unless it is based on no evidence or the court below was simply wrong. In Jones V Livox Quarries Ltd [1952] 2 QB608 the Court of Appeal stated that; -

> " An appellate court will generally only interfere with a finding of contributory negligence in the event of a substantial misjudgment of the factual basis of the apportionment by the trial court. In such circumstances the appellant Court may reassess the apportionment if it is satisfied that the assessment made by the Judge was plainly incorrect"

40. In the case of MacDrugall App V Central Railroad Co. Rbr 63 Cal 431 the court held that; -

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence"

41. In Grace v Australian Knitting Mills Ltd [1938] AC 85 the court stated: -

> "It is clear that the decision in Donoghurt case treats negligence, where there is a duty to take care, as a specific tort in itself and not simply as, an element in some more complex relationship or some specialized breach of duty, and still less as having any dependence on contract. All that is necessary as a step to establish the tort of action able negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however essential in English Law that the duty should be established: The mere fact that a man is injured by another's act gives in itself no cause of action. If the act is deliberate, the party injured will have to claim in Law even though the injury is interment, so long as the other party is merely exercising a legal right if the act involves lack of due care, again no case of actionable negligence, will arise witness the duty to careful exists.

42. In the case of Alfred Chivatsi Chai & another v Mercy Zawadi Nyambu [2019] eKLR, Nyakundi R J, stated as follows: -

> "By reason of the said duty of care, the same standard of care underlying the defence of contributory negligence is that people should take reasonable care for their own safety as well that of others. When it comes to contributory negligence and res ipsa loquitor the test can be followed.
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> In the case of Benner v Chemical Construction Ltd [1971] 3 ALL ER 822 where the Court of Appeal said in a Judgment by David C. J –
>
> "In my view it is not necessary for the doctrine to be pleaded, if the accident is proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the defendants, that it is for the defendants to explain and show how the accident could have happened without negligence."
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> Further in Lodigelly Iron Coal Co. Ltd v Mcmillan [1934] A.C.
>
> "The court held it in strict legal analyses negligence means more than heedless or careless conduct whether in omission or commission. It properly connotes the aspect concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."

43. It is thus clear that before a plaintiff is held contributorily negligent, there must be evidence tendered to that effect. This is difference where we have cross negligence of two vehicles. In this case there was no evidence tendered on the breach of duty of care. The court cannot see how a passenger or a conductor in this case, sitting in a vehicle can be held liable.

44. The court cannot also hold the owner of the vehicle the Appellant was travelling in liable. The respondent cannot say that the award of liability was due to sympathy. There was no appeal on negligence. Only contributory negligence was appealed. I find none. It is therefore proved that the Plaintiff in the court below proved his case to 100% liability against the Respondent.

45. In the case of *Obala v Okello & 2 others (Civil Appeal E022 of 2022)* [2022] KEHC 15762 (KLR) (22 November 2022) (Judgment), Justice Aburili stated as follows: -

> "It is also worth noting that it was the appellant who introduced the aspect of a third party in the proceedings and therefore, under those circumstances, it was incumbent upon the appellant, if her case was that a third party was to blame for the accident, to enjoin the said third party as she had already alluded to in her own pleadings."

I find that the appellant was under an obligation, if she felt that someone else was responsible for or contributed to her predicament in the case, to enjoin that someone else as a third party, following the procedure laid out in the law, so that she can claim from him any loss or award that she may suffer, should the case be determined in favour of the respondent. A court of law can only determine the case or issues between the parties who are before it and not those parties who should have been or are yet to appear or be made parties to proceedings before it.

39. In the case of Kenya Commercial Bank v Suntra Investment Bank Ltd (2015) eKLR, it was held that: -

> "In law, a third party is enjoined in a suit at the instance of the defendant and through the set procedure under order 1 rule 15-22 of the Civil Procedure Rules. And, liability between the defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the defendant and has given directions under order 1 rule 22 of the Civil Procedure Rules. The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the defendant and cannot be a bona fide issue triable between the defendant and the plaintiff. On the basis of those legal reasons, even if the third party had been joined, which he has not, it is not a triable issue at all for purposes of liability between the plaintiff and the defendant. Looking at the defence and the generalized denials, it is a mere sham. It is a perfect candidate for striking out."

46. The case of Stella Nasimiyu Wangila &another v Raphael Oduro Wanyama(2016) eKLR where the court held that: -

> " The owner and driver of the said pick-up registration No KAY 651A are not parties in this case. The defendant had an option and opportunity to enjoin that party to the suit – See order 1 rules 15 of the Civil Procedure Rules. He did not do so. A court cannot adjudicate on issues touching a party or pass judgment against a party who is not a party in a suit. Failure to join the party that the defendant blames for the accident as a third party or a necessary party and or seek indemnity from that party has a legal consequence."

47. In the circumstances, I find no basis for finding of 80: 20. The same is for setting aside. The Respondent is found to be 100% liable for the Accident. I set aside the award of 80: 20 and replace it with 100% liable.

Determination

48. The upshot of the foregoing is that I make the following Orders: -

a. The Appeal is allowed. The finding of liability is set aside. The Respondent is found 100% liable for the accident.

b. The Appellant shall have the costs of Ksh 55,000/= for this Appeal.

c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF JUNE, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for parties

Court Assistant – Jedidah