Musudi v Ambwere (Suing in his own capacity and as administrator of the Estate of Mary Uside Madaga (Deceased) (Civil Appeal 8 of 2022) [2024] KEHC 9921 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9921 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL APPEAL 8 OF 2022

JN KAMAU, J

JULY 29, 2024

BETWEEN

REUBEN MUHAVI MUSUDI ..... APPELLANT

AND

BENSON MADAGA AMBWERE (SUING IN HIS OWN CAPACITY AND AS ADMINISTRATOR OF THE ESTATE OF MARY USIDE MADAGA (DECEASED) ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon R. Ndombi (SRM) delivered at Vihiga in the Principal Magistrate's Court Civil Case No 72 of 2019 on 7th April 2022)

JUDGMENT

Introduction

1. In her decision of 7th April 2022, the Learned Trial Magistrate, Hon R. Ndombi, Senior Resident Magistrate, found the Appellant herein to have been fifty (50%) per cent liable and entered judgment in favour of the Respondent as against him in the following terms:-

    1. General damages

        i. Pain and Suffering Kshs 10,000/=

        i. Loss of Expectation of Life Kshs 100,000/=

        ii. Loss of dependency

        10,495 x 9 x 12 x2/3 Kshs 755,460/=

    2. Special damages Kshs 157,945/=

    Kshs 1,023,405

Plus costs and interest on costs, general damages and special damages

3. Being aggrieved by the said decision, on 28th April 2022, the Appellant filed a Memorandum of Appeal dated 20th April 2022. He relied on three (3) grounds of appeal.

4. On 8th February 2023, the Respondent filed a Memorandum of Cross- Appeal to the Appellant's Appeal herein. The same was dated 7th February 2023. He also relied on three (3) grounds of cross-appeal.

5. The Appellant's Written Submissions were dated and filed on 30th January 2024 while those of the Respondent on his Cross-Appeal were dated 30th January 2023 and filed on 31st January 2024. The Judgment herein was based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

6. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

7. This was aptly stated in the case of *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

8. Having looked at the Appellant's Grounds of Appeal, the Respondent's Grounds of the Cross Appeal and the parties' Written Submissions, it appeared to this court that the said grounds were related and that the only issue that had been placed before it for determination was whether or not the Trial Court erred in having finding the Appellant to have been fifty (50%) per cent to blame for the accident herein warranting this court's interference.

9. The Appellant invoked Section 78 of the *Civil Procedure Act* Cap 21 (Laws of Kenya) and placed reliance on the case of *Selle & another v Associated Motor Boat Co Ltd & others* (*supra*). He blamed the Trial Court for having found him liable on the ground that he had failed to call a witness or to file a Third Party Notice for purposes of apportioning liability.

10. He cited Section 107(1) of the *Evidence Act* Cap 80 (Laws of Kenya) and submitted that it was the duty of the Respondent to have proved his allegations on a balance of probabilities. He asserted that this was so even where the case was heard on formal proof. He referred this court to the case of *Kirugi & another v Kabiya & 3 others* [1987] KLR 347 without highlighting the holding he was relying upon.

11. He was emphatic that it was not his duty to disprove his liability for the accident. He pointed out that he was blameless and that the Respondent did not offer much to persuade the Trial Court that he was negligent. He asserted that the evidence adduced before the Trial Court clearly showed that Motor Vehicle Registration Number KBT 206U Bus Mbukinya Service (hereinafter referred to as the "first subject Motor Vehicle") was to blame and no negligence was attributed to him.

12. He pointed out that it was the first subject Motor Vehicle that left its lane and collided with Motor Vehicle Registration Number KBH 902S Toyota Matatu (hereinafter referred to as the "second subject motor vehicle") in which the deceased was a passenger and hence he was not negligent.

13. In that regard, he placed reliance on the case of *Equator Distributors v Joe Muriu & 3 others* [2018] eKLR where it was held that a police sketch map for a road traffic accident was prepared after the event

and was not a witness account. He blamed the Trial Court for failing to consider his submissions and proceeded to apportion liability. He thus urged this court to set aside the Trial Court's and dismiss the Respondent's suit.

14. The Respondent agreed that the Trial Court erred in having found the Appellant fifty (50%) per cent liable. However, his argument was that the Appellant ought to have been held hundred (100%) per cent liable instead because the deceased was a mere passenger in the second subject Motor Vehicle in which she had no control over.

15. He contended that the Trial Court erred in failing to find that the onus was on the Appellant to move the court by instituting third party proceedings against the third party whom he blamed for negligence, recklessness and carelessness as a result of which the accident occurred causing the death of the deceased.

16. In this regard, he placed reliance on the case of *Christine Aloo v Mary Atieno Ouma* [2021] eKLR where this very court held that it was the onus of the respondent therein to have joined the third party to the proceedings against the deceased's estate and hence it was upon him to have proven that he was not negligent.

17. He submitted that as the Appellant had not raised the issue of quantum as a ground of appeal in their submissions, then the same should be upheld as was held in the case of *Christine Aloo v Mary Atieno Ouma* [2021] eKLR.

18. It was not in dispute that the deceased died as a result of the accident that occurred on 16th April 2018 along Musasa-Chavakali Road at around 7.30pm when she was traveling as a fare paying passenger in the second subject Motor Vehicle. The issues that were really in contention were:

    a. whether or not the Appellant ought to have been found liable to have caused the said accident in which the deceased sustained fatal injuries; and

    b. if so, to what extent was he liable for the said accident.

19. No 68703 PC Geoffrey Morara (hereinafter referred to as "PW2") testified that on 16th April 2018, together with other officers they visited the scene of the accident. His testimony was that the first and second subject Motor Vehicles were driving in opposite directions when they collide head on collision.

20. Notably, the Respondent only sued the owner of the second subject Motor Vehicle. Unfortunately, the deceased died and no eye witness adduced any evidence to explain how the accident occurred. PW2 was also not the Investigating Officer of this incident but the driver who took his colleagues to the scene of the accident. However, when he testified a second time, the first proceedings which had proceeded on formal proof having been set aside by the consent of the parties herein, he asserted that he was part of the team that went to the scene on the material date and he witnessed what had transpired. However, when he was cross-examined, he admitted that he was not the Investigating Officer in this matter. None of the drivers was charged with any traffic offence.

21. In the absence of any evidence of what really transpired, this court could only defer to the Police Abstract Report that the Respondent relied upon in his evidence that showed that the driver of the first subject Motor Vehicle was the one who was to blame for the said accident and PW2's evidence that the driver of the second subject Motor Vehicle was the one who was to blame for the said accident.

22. The Trial Court observed that although the Respondent set out the particulars of negligence he did not support the same by calling an eye witness and that further, that although PW2 blamed the driver of first subject Motor vehicle for having caused the accident, he had not been sued. It therefore attributed fifty (50%) per cent contribution to the driver of the second subject Motor Vehicle.

23. This court had due regard to the decision of the Court of Appeal in *Hussein Omar Farah v Lento Agencies* [2006] eKLR where both drivers were found to have been equally to blame as it was not reasonably possible to ascertain who was to blame for the accident based on the evidence of the witnesses who testified on both sides.

24. As could be seen in the aforementioned case of Hussein Omar Farah v Lento Agencies (Supra), liability could be apportioned equally between two (2) drivers if it was not possible to determine which of the two (2) had caused an accident. It was not so in this case. The driver of the first subject Motor Vehicle had been blamed for the accident.

25. This court also placed reliance on the case of *Jimnah Munene Macharia v John Kamau Erera* NBI.C.A.C.A.NO 218/1998 (unreported) where in citing the cases of *Barclays Steward Limited & another v Waiyaki* (1982-88) KAR and *Baker v Harborough Industrial Co-operative Society Limited* (1953) 1 WLR 1472, the Court of Appeal held that both drivers were equally to blame for the accident therein as it could not be deduced who was driving on his correct lane from the evidence that was adduced in court.

26. As this court held in the case *Christine Aloo v Mary Atieno Ouma* [2021] eKLR once the Respondent enumerated particulars of negligence against the driver of the second subject Motor Vehicle and absolved the driver of the first subject Motor Vehicle by not enjoining him and/or the owner of the said first subject Motor Vehicle in the proceedings, the Appellant was put on notice to enjoin the owner of the first subject Motor Vehicle as a third party to the proceedings herein.

27. If he had enjoined him as a third party, the question of liability between the drivers of the first and second subject Motor Vehicles would have been determined first before the Trial Court could delve into the question of quantum.

28. Notably, Order 1 Rule 15 of the *Civil Procedure Rules*, 2010 stipulates that:-

    1. Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)

        a. that he is entitled to contribution or indemnity; or

        b. that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

        c. that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

29. Further, Order 1 Rule 21(1) of the *Civil Procedure Rules* states that:-

> " Where a third party makes default in entering an appearance in the suit, and the suit is tried and results in favour of the plaintiff, the court may either at or after the trial enter such judgment as the nature of the suit may require for the defendant giving notice against the third party:
>
> Provided that execution thereof shall not be issued without leave of the court, until after satisfaction by such defendant of the decree against him."

30. If the owner of the first subject Motor Vehicle Registration had been enjoined as a defendant in the proceedings herein, the Appellant herein could have issued a notice indicating that he would be seeking indemnity in the event that he was found to have been found liable for damages as provided in Order 1 Rule 24 of the *Civil Procedure Rules* that states that:-

> " Where a defendant desires to claim against another person who is already a party to the suit —
>
> a. that he is entitled to contribution or indemnity; or
>
> b. that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff; or
>
> c. that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue.

31. By failing to enjoin the owner and/or the driver of the first subject Motor Vehicle as a third party, the Appellant took a great risk in not protecting its interests as it could not now seek indemnity from the owner of the said first subject motor vehicle.

32. Similarly, by failing to enjoin the owner and/or the driver of the first subject Motor Vehicle, the Respondent herein also took the risk of missing out on the compensation from him in the event he would have been found to have been to blame for the accident.

33. Just like in the case of *Mary Atieno Ouma v Christine Aloo* (*supra*), it was the Respondent herein who ought to have enjoined the owner of the first subject Motor Vehicle as a defendant so as not to lose out on compensation from him particularly because the said owner had been blamed for having caused the accident in the Police Abstract Report.

34. To this extent, the Trial Court did not therefore err when it awarded the Respondent part of the claim. It was not so much that the deceased contributed to the causation of the accident. Rather, it was the portion that would have been absorbed by the owner of the first subject Motor Vehicle that was blamed for having caused the accident herein had he found liable.

35. The above notwithstanding, the deceased was a fare paying passenger in the second subject Motor Vehicle. There was no evidence that showed that she did anything to cause the said second subject Motor Vehicle to collide with the first subject Motor Vehicle.

36. The Respondent relied on the doctrine of res ipsa loquitor. However, accidents do not just happen. He did not present any evidence to show that the driver of the said second subject Motor Vehicle took any evasive action to avoid the said accident. The Appellant was under a duty to prove that he was not liable for negligence. He did not adduce any evidence to rebut PW2's evidence that the driver of the second subject Motor vehicle was to blame for the accident as his case was closed without calling any witness.

37. Notably, PW2 testified that the driver of the second subject Motor Vehicle tried to avoid a pothole and collided with the first subject Motor Vehicle head on. The fact that the deceased died was evidence of the heavy impact evidencing high speed.

38. Both the drivers of the first and second subject Motor Vehicles ought to have exercised due diligence in their driving bearing in mind that they were both in control of lethal machines.

39. This court was therefore not persuaded that the Appellant and/or his driver and/or agent were blameless in the circumstances. They owed a duty of care to the passengers who were travelling in the second subject Motor Vehicle.

40. Bearing in mind the discrepancy in the entry in the Police Abstract Report showing that the driver of the first subject Motor Vehicle was to blame for the accident, PW2's evidence that the driver of the second subject Motor Vehicle was to blame for the accident and the fact that the deceased died and could not therefore assist the court in determining exactly what happened on that material day as she could not give her side of the story, this court found itself in a quagmire.

41. As the Appellant did not adduce any evidence, it was difficult to know exactly who was to blame more for the said accident. In the circumstances foregoing, this court came to the firm conclusion that it was best to leave apportionment of liability equally against both the drivers of the first and second subject Motor Vehicles as the Trial Court had done.

42. This court also left the quantum undisturbed as the Appellant did not indicate whether or not the same was excessive warranting interference by this court.

Disposition

43. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal dated 20th April 2022 that was lodged on 28th April 2022 was not merited and the same be and is hereby dismissed.

44. The Respondent's Cross-Appeal dated 7th February 2023 and lodged on 8th February 2023 was also not merited and the same be and is hereby dismissed.

45. As both parties were unsuccessful in their respective appeals, each party will bear its own costs of this Appeal.

46. Orders accordingly.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF JULY 2024

J. KAMAU

JUDGE