Chepkwony & another v Chesaro & another (Civil Appeal E021 of 2021) [2024] KEHC 9702 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9702 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CIVIL APPEAL E021 OF 2021

RB NGETICH, J

JULY 25, 2024

BETWEEN

FRANCIS CHEPKWONY ..... 1ST APPELLANT

JOHN KARANU ..... 2ND APPELLANT

AND

JOSEPH CHESARO ..... 1ST RESPONDENT

ROSE KIPRONO (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN KIPRONO) ..... 2ND RESPONDENT

(Being an Appeal from the Judgement of Hon. Biwott SPM delivered on the 23rd September, 2021 in Kabarnet CMCC NO 09 of 2019)

JUDGMENT

1. This appeal arises from suit filed plaintiff/ 1st Respondent vide a plaint dated 18th March, 2019, seeking for damages for injuries resulting from a road traffic accident which occurred on the 29th April,2016 along Kabarnet Marigat road near Kitura secondary school involving the 2nd Defendant's/ Respondent Motor vehicle Registration number KBG 410M driven by the 1st Defendant/2nd Appellant in which he was travelling as a passenger which collided with motor vehicle registration No. KBU 814D owned by John Kiprono Chepkwony(deceased) and driven by Robert Kiprop (deceased).

2. The 1st Defendant filed statement of defence dated 15th May,2019 denying being the registered owner of the motor vehicle registration No. KBG 410M. The 1st defendant denied that the plaintiff was a lawful passenger in Motor Vehicle Registration No. KBG 410M Nissan Matatu and denied occurrence of the accident on the said date as well as the particulars of negligence as listed in the plaint and states that the accident was solely caused by the negligence of the Plaintiff and prayed for dismissal of the suit.

3. By judgement delivered on the 23rd September, 2021, the trial court found the owner/ driver of motor vehicle KBU 814D 90% liable for the accident and the driver of Matatu KBG 410M(Appellant's) 10% liable for the accident.

4. Dissatisfied and aggrieved by the judgment of the trial court, the 1st Appellant Francis Chepkwony and the 2nd Appellant John Karanu appeals to this court on the following grounds namely: -

    i. That the Learned trial magistrate erred in law and fact in finding that the Appellants was liable for the accident.

    ii. That the learned trial magistrate erred in law and in fact in failing to accord due regard to the evidence by the Appellants witnesses and the Appellant's submissions in arriving at its judgement on liability.

5. The Appellants pray for orders: -

    a. That this appeal be allowed.

    b. The judgement of the trial court delivered on the 23rd September, 201 on liability be set aside and the suit be dismissed against the Appellants.

    c. The costs of this appeal be borne by the Respondents.

6. This appeal proceeded by way of written submissions. Only the 1st Respondent filed their submissions dated 26th February,2024. The 1st Respondent opposes this appeal stating that it has no merit at all.

1St Respondent's Submissions

7. The 1st Respondent who was the Plaintiff in lower court Kabarnet SPMCC No.9 of 2019 and the others in files Nos. 18, 19, 20, 22, 23, 24, 25, 26 and 27 who were passengers in motor vehicle registration number KBG 410M a matatu submit that they were travelling from Marigat when KBU 814D heading towards Kabarnet moved into their lane and collided with the matatu which was being driven by the 1st appellant.

8. They submit that the evidence on the issue of liability was recorded in suit No. Kabarnet SPMCC No. 9 of 2019 between David Kipmereng Kiprop and Francis Chepkwony and 2 Others and at page 4 of the supplementary proceedings, a consent was recorded on 5th March,2020 and PW 2's evidence was to apply in cases No. 8,10,11,12,13,14B, 14, 16, 19 and 20 all of 2019.

9. And submit that PW2 who was police officer also testified in Kabarnet SPMCC No. 9 of 2019 and judgement was delivered on the 23rd September, 2021 where the court found the owner/driver of motor vehicle KBU 814D 90% liable for the accident and the driver of the matatu KBG 410M 10% Liable.

10. The 1st respondent submit that the trial magistrate did not err in his findings on liability as the findings are supported by the evidence on record and quoted PW 1 David Kimereng who stated that:-

    " ..... our driver did not avoid it by swerving away....."

11. And at page 3 of the supplementary record of appeal on cross examination PW 1 stated:-

    " ... our driver did not swerve". He saw other motor vehicle at a distance for some minutes before collision...our driver did not swerve to avoid the accident..."

12. They submit that DW1 at page 9 of the supplementary Record of Appeal stated that the it had a tyre burst and at page 10 of the supplementary Record of Appeal DW1 in cross examination stated that the other motor vehicle had a tyre burst before reaching him. That he saw it at about 50m distance ahead and he heard the tyre burst.

13. The appellants further submit that the trial magistrate erred in apportioning blame as he did and submit that there is evidence of the driver of the matatu seeing the tyre burst and not doing anything. That a driver also owes a duty of care to other drivers and 10% apportionment is reasonable and is based on the evidence before the Learned trial magistrate; and urged this court to find so and dismiss the appeal with costs.

14. On the issue of damages, they rely on the court of appeal case in Bashir Ahmed Butt Vs Uwais Ahmed Khan (1982-88)1KAR1, the case of Savanna Saw Mills Vs Gorge Mwale Mudomo(2005) eKLR and in the case of Gitobu Imanyara & 2 Others Vs Attorney General(2016) eKLR.

15. They submit that the awards in the various cases were not inordinately high and reiterate submissions filed in the lower court files and the authorities cited.

16. In conclusion, the 1st respondent submit that the Appellants have failed to demonstrate that the learned trial magistrate erred in his apportionment of liability or in assessment of damages and urged this court to dismiss this appeal with costs and the submissions herein should be adopted in the other appeals to with Kabarnet HCCA No's 18, 19,20,22,23,24,25,26 and 27 all of 2021.

Analysis And Determination

17. This being the first appellate court, the duty of a first appellate court was captured in the case of Selle & another v Associated Motor Boat Company Ltd & others [1968] EA 123 as follows:-

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such 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 witness and should make due allowances in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally."

18. In view of the above, I have perused and considered evidence adduced before the trial court and wish to consider whether the trial magistrate applied the correct principles in holding the owner/driver of the Matatu Registration N0.KBG 410 M 10% liable for the accident. Did the driver of KBG410M contribute to the occurrence of the accident? It is not disputed that the 1st respondent and respondents in the other appeals consolidated with this appeal for purposes of hearing were all passengers in motor vehicle registration KBG410M.It is not disputed that the said matatu collided with motor vehicle KBU814D.The 1st respondents blames motor vehicle KBU814D for being driven at high speed and moving to their lane and motor vehicle KBG410M for failing to swerve to avoid the accident.

19. Evidence on record is that the tyre of KBU814 D burst and collided with the matatu on the matatu's lane. It is also evident that the passengers and driver of the matatu saw the tyre burst. The plaintiff/1st respondent said the driver of KBG410M did not swerve to avoid the accident. He was rightfully on

his lane but upon seeing the other vehicle had lost control due to tyre burst, the driver of KBU814 D should have swerved to avoid collision or reduce impact of the collision if it turned out to be inevitable.

20. The provisions under section 107,109 and 112 of the Evidence Act were extensively dealt with in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which 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 places 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."

21. Pw 2 to testify was No. 79321 Cpl. Muse Aden who was a Deputy Base Commander Baringo County testified that on the 29th April,2016, an accident occured along Kabarnet-Marigat road at 7: 00p.m involving motor vehicles KBG 410M Toyota Matatu and Motor vehicle KBU 814D Nissan Wing Road. He said driver of matatu was hit head on by Wing Road KBU814D moving from the opposite direction which had tyre burst. That the Wing Road Nissan driver never kept to his own lane and the recommendations was that the driver of motor vehicle KBU 814D was at fault by failing to maintain his lane. He produced the sketch plan which indicated that the matatu was on its lane and that the Wing Road came to the matatu's lane.

22. DW1 Robert Kipkorir Kiprop, driver of motor vehicle KBG 410M matatu testified he was driving at a speed of 50Km/hr and when they reached Kituro he saw a motor vehicle registration KBU 814D coming from Nakuru direction heading to Kabarnet. He said that it was a Nissan Saloon which had a tyre burst and that it lost control and moved to his lane and he could not swerve to his left because it was steep and he could have rolled. That the other motor vehicle KBU was at a high speed hence it hit him on his lane and he tried to go to the extreme left but could not avoid the accident. He blames the driver of motor vehicle KBU 814D for being careless. On cross examination, he said that the other vehicle had a tyre burst before reaching him and he saw it about 50m distance ahead. He said that he heard the tyre burst.

23. In the case of William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLE 526, Kimaru, J. stated that 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 that 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."

24. From the evidence adduced the driver of matatu said he saw the other vehicle at a distance of 50 meters having lost control due to tyre burst. He said he could not swerve because it was steep and he could not therefore avoid the accident. However, in my view he should have made attempts to swerve to extreme left and reduce speed to reduce impact. The driver of the matatu owed a duty of care to his passengers which he did not observe. In the case Treadsetter Tyres Ltd v John Wekesa Wepukhulu (2010) eKLR

Ibrahim J in allowing an appeal, quoted Charles Worth & Percy On Negligence, 9th Edition at P. 387 on the question of proof, and burden thereof where it is stated:-

> " In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence maybe reasonably inferior and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

25. Similarly, in Nickson Muthoka Mutavi v Kenya Agricultural Research Institute (2016) eKLR, Nyamweya, J quoted Halsbury's Laws of England, 4th Edition at paragraph 662 at page 476 where it is stated that:

> " The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the prove of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of a causal connection must be established."

26. In my view failure to swerve by driver of KBG410M contributed to a smaller extent to the accident and I am in agreement with trial court on apportionment of liability. Apportioning liability at 10% in my view is reasonable and fair.

27. From the foregoing, I see no basis of setting aside the trial court's finding on liability. There is no ground of appeal on quantum and the quantum will remain as assessed by the trial court. This finding to apply in Kabarnet HCCA No's 18, 19,20,22,23,24,25,26 and 27 all of 2021.

28. Final orders:

    1. Appeal is hereby dismissed.
    2. Costs to the Respondents.
    3. Orders (a) and (b) above to apply in Kabarnet HCCA No's 18, 19,20,22,23,24,25,26 and 27 all of 2021.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 25TH DAY OF JULY 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

Elvis & Komen – Court Assistants.

Mr. Mbiyu for Respondents.

Mr. Njuguna for Appellants.