Kivunanga v Omamoimbuye (Civil Appeal 31 of 2022)
[2024] KEHC 10813 (KLR) (26 August 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 31 OF 2022

SC CHIRCHIR, J

AUGUST 26, 2024

BETWEEN

SAMUEL KADUKILI KIVUNANGA ..... APPELLANT

AND

ABEL OMAMO ALIAS GEOFFREY HABIL OMAMOIMBUYE .... RESPONDENT

(Being an appeal from the Judgement of Hon.Malesi, (Principal Magistrate), delivered on 10th May 2022 in Kakamega CMCC NO.80 OF 2018)

JUDGMENT

1. The Appellant filed suit against the respondent in the lower court, seeking damages for injuries sustained as a result of a road traffic accident which occurred on 4th July 2017 along Kisumu- kakamega highway. The accident was between motorcycle registration number KMDW 966 Y and motor vehicle registration number KAP 018 G. The Appellant was a pillion passenger on the Motor cycle.

2. The trial court delivered judgment on 10th may 2022, in which it dismissed the suit for want of proof on liability , and assessed general damages at ksh. 1,000,000 had the claim succeeded.

Memorandum of Appeal

3. Aggrieved by the outcome , the Appellant proffered this Appeal and set out the following grounds;

    a. The learned trial magistrate erred in law and in fact in failing to find 100% liability on the part of the respondent, despite the evidence showing that the respondent's driver/ agent drove the motor vehicle registration number KAP 018G Toyota Hilux negligently an carelessly by driving over barrier separating the dual carriageway on which he was driving, onto the appellant's lane on the other side of the dual carriage way, hence injuring the appellant.

b. The learned trial magistrate was correct in finding that the respondent was properly impleaded in the suit and that the respondent was the actual owner of the motor vehicle registration number KAP 018 G Toyota Hilux, at the time of the accident, but the learned trial magistrate erred in law and in fact, in failing to find that the appellant was only a pillion passenger abroad motor cycle registration no. KMDW 966 Y, and therefore was not to be blamed for the accident in any way.

c. The learned trial magistrate erred in law and in fact in failing to consider the evidence adduced by the Appellant in the form of a police abstract, and the evidence adduced by the respondent's witness, who was the driver of the suit motor vehicle, on the manner that the accident occurred.

d. The learned trial magistrate erred in law and in fact in filing to find that the Appellant failed to discharge the burden of proof on liability, when the evidence adduce was overwhelming and showed that the respondent and his driver were to blame for the accident.

e. The learned trial magistrate erred in law and in fat in failing to consider in whole evidence in court.

4. The appeal proceeded by way of written submissions.

Appellant's Submissions

5. It is the Appellant's submission that the trial magistrate was right in holding that the Respondent was correctly impleaded and points out that no cross-appeal was preferred against this finding in any event.

6. It is further submitted that the Appellant was a pillion passenger and therefore could not have contributed to the accident in any way. It is stated that according to the evidence of PW4, the police officer, the driver of the subject vehicle was charged with careless driving and fined Ksh.20,000. It is thus argued that there was sufficient evidence to establish liability on the part of the respondent.

Respondent's Submissions

7. It is the Respondent's submission that there was no evidence proving that the Respondent was the owner of the vehicle. Further that there was nothing linking the Respondent to the subject driver and thus vicarious liability on the part of the respondent was not established.

Analysis and determination

8. This is the first appellate court and its mandate is well settled . It is to review the evidence afresh, evaluate it and arrive at its own findings. In the case of Gitobu Imanyara v AG [2016] e KLR the court of Appeal stated as follows: This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that on 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 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 allowances in this respect. See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd v Brown [1970] E.A.L."

9. I have reviewed the evidence , the parties submissions and the memorandum of Appeal. The following issues arise for determination:

a). whether the ownership of the subject vehicle by the respondent was proved

b). whether vicarious liability was proved.

c). who was responsible for the accident

d). whether the Appellant is entitled to an award on damages

Whether ownership of the vehicle was proved

10. The Trial Court found that the Respondent herein was correctly impleaded . The Respondent has submitted that he was not the owner of the subject motor vehicle. He has further submitted that consequently there was no proof that he was vicariously liable for the subject accident.

11. However, I notice that there was no cross-appeal on the issue of ownership and therefore I will take it that the trial court's finding on the ownership of the vehicle is not contested on appeal. Despite the Respondent taking up this issue on his submissions , submissions are not pleadings. If he wanted to contest the trial court's finding in this regard he ought to have placed it before court by way of cross-Appeal. He did not , and consequently this court finds that the trial court finding in this regard is uncontested.

Whether vicarious liability was proved

1. On the question of vicarious liability, the court in the case of Kansa v Solanki [1969] EA 318 stated as follows:

> " Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See Bernard v Sully [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver."

36. The respondent told the court that he did not know the driver of the vehicle; that he had neither employed him as a driver or mechanic. However to the extent that he has not challenged the findings of the trial court on the fact that he was correctly impleaded, then in line with the decision in Solanki's case the onus was on him to rebut the presumption that the vehicle was being driven for his or joint benefit with the then driver.

I do find and hold that the respondent was vicariously liable.

Whether the Appellant proved his case on a balance of probabilities.

37. The Appellant (as PW1) told the Court that he was a pillion passenger on motor vehicle registration number KMDW 966Y. They were riding along Kakamega-Kisumu highway when the Respondent's vehicle, registration number KAP 018 G approaching from the opposite direction, lost control, due to high speed and crossed over to the opposite side of the dual carriageway, and hit the motorbike

38. On the other hand, DW1, the driver of the subject motor vehicle, denied losing control. He stated that he was on his lane when a motorcycle "appeared from nowhere and hit the vehicle"; that at the time of collision, the motorcycle had a pillion passenger. At cross-examination he stated "The motorcycle appeared from nowhere and rammed to me...I had not seen the motorcycle..."

39. The trial magistrate's finding was that it was not clear on how the accident happened, and considering that the burden of proof lay with the plaintiff, he had failed to discharge that burden and hence dismissed the suit on the Appellant's failure to meet the standard of proof.

40. That, in my view, is where the trial Magistrate erred. The correct position is that two different versions on how the accident occurred were presented to the Court. To the Appellant, the Respondent's motor vehicle left its lane and headed to their lane, hence the collision. To the Respondent , the driver was on his lane when the rider "appeared from nowhere" and hit his vehicle.

41. Where two different versions on the occurrence of an accident are presented, courts have traditionally held that both parties should then be held equally liable. Thus, based on the evidence available the appropriate conclusion would have been that both the Rider and the driver were to blame.

42. In this regard, I wish to rely on the decision of Madan J (as he then was) in Welch v Standard Bank Limited [1970] EA 115 where he expressed himself as follows:;"When there is no material to generate actual persuasion in the courts mind, still the court cannot un-concernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability. Every day, proof of collision is held to be sufficient to call on the two defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court has nothing by which to draw and distinction between them. So, also, if they are both dead and cannot give evidence enabling the court to draw a distinction between them, they must both be held to blame, and equally to blame.....justice must not be denied because the proceedings before the court failed to conform to conventional rules provided, in it judgment, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardizing the vital task of doing justice. Provided there is no transgression of this sacred duty, the court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion.....There being nothing to enable the court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame."

43. I hasten to add however that the above decision of Welch(supra) would have been the appropriate finding if the suit was between the Rider and the driver in this case. However , the Appellant was a pillion passenger. There was no role he played in the causation of the accident.

44. I further note that in his pleadings, the Appellant invoked the doctrine of Res Ipsa Loquitor. Explaining the concept of the doctrine, the East African Court of Appeal in Embu Public Road Services v Riimi [1968] EA 22 cited in Susan Kanini Wagangi and Ano v Patrick Mbithi Karita [2019] eKLR stated; "The doctrine of Res Ipsa Loquitor is one which a plaintiff by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of defendant. The Defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident or that there was a probable

cause of the accident which does not connote negligence on his part or that the accident was due to circumstances beyond his control".

45. Further I associate myself with the views of Justice Mbogoli Msagha(as he then was) in the case of Uchumi Supermarket Ltd & another v Boniface Ouma [2021]e KLR. Where he held as follows: "The Respondent having pleaded the doctrine, the burden of proof shifted to the Appellant to either disprove the same or to show that the Respondent contributed to the accident but they did not."

46. Looking at DW1's testimony, he admits that he never saw the motorbike; that it came from nowhere. Motorists are under an obligation to be on proper look out. They are to be on the lookout for other motorists, Motor Bike Riders, pedestrians, hand carts,road signs and virtually everything on and around the road. It is a tall order, but it is a responsibility that comes with handling potentially lethal machines on the road.

47. Thus the the driver's admission that " he did not see" is an admission of liability on his part and has consequently failed to successfully challenge the Application of the above doctrine.

48. Does the above conclusion absolve the Rider of the Motor Bike? Maybe not, but the issue of liability in this case is between the Driver and the Rider. The Appellant was an innocent passenger. If the Respondent considered the Rider of the motorbike to have been responsible or partly contributed to the accident, he ought to have pleaded so and set out particulars of negligence in the defence. He did not do this.

49. Further, and in any event, the Respondent ought to have taken out 3rd party proceedings against the Rider of the motorcycle. That is what Order 1 Rule 15 of the Civil procedure Rules require of the defendant, whenever he or she shifts blame to a party who is not already a party to the suit. Order 1 rule 15 of the Civil Procedure Rules provides as follows:

> " 15.
>
> (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, 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."

50. The respondent failed to join the Rider of the motor cycle in this suit , and consequently he must shoulder the burden alone.

51. I am satisfied that the Appellant proved his case on a balance of probabilities against the Respondent and therefore this Court finds the 2nd Defendant fully liable.

52. I have further taken note of the fact that the 1st Defendant failed to enter appearance and judgement on default of appearance was entered against him. A copy of official search was produced. It showed that the first Defendant was the registered owner of the vehicle. This Court therefore finds both Defendants jointly and severally fully liable for the accident.

Quantum of Damages

53. PW3, Dr. Godfrey Barasa Wasike examined the Appellant and produced the medical report from Lubuni clinic and a discharge summary from Eldoret hospital. He told the court that he is the one who treated and admitted the Appellant at Eldoret hospital. In the report it is stated that that the Appellant sustained the following injuries:

    a). Subdural haematoma

    b). Intracerebral bleeding in both hemispheres

    c). Cut wounds on both armpits

    d). Cut wound with multiple bruises to the right leg.

54. He told the court that the Appellant was in a coma with severe head injury. An emergency operation was conducted on the head. He was admitted in the ICU for one month.

55. The trial Magistrate determined that he would have awarded Kshs. 1,000,000 for the injuries had the case succeeded.

56. The principles upon which an appellate court can interfere with a trial court's assessment of damages are well settled. The appellate court can only interfere if the trial court considered an irrelevant factor or failed to consider an a relevant one or the award is too high or too low as to make it , in the judgment of the court, an erroneous estimate of the damage suffered by the plaintiff. (Ref:Gitobu Imanyara vs AG (Supra)

57. I have compared the injuries sustained and with past cases with similar injuries. In the case of Elizabeth Mokaya Bogonko v Fredrick Omondi [2022] e KLR, the appellate court revised downward a lower court award from ksh. 850,000 to ksh.500,000. The injuries were fairly similar to the present case and the decision was made in the year 2020

58. In Kinyanjui & Ano v Mwangi [2023] KEHC 3614(KRL) the high court upheld the court award of Kshs. 1.3 million where the Claimant had sustained a severe head injury with loss of consciousness for 3 days. However, the injuries in that case included a fractured tibia and fibula. The decision was delivered in May 2023.

59. In June 2020, the high court in Lawrence Musyoka Mulonzi & another v Daniel John Koto Ndambuki [2020] eKLR reviewed the lower court award for Kshs. 1.5 million to Kshs.750,000 , for fairly similar injuries. I find this decisions quite persuasive.

60. Consequently I consider Kshs. 1,000,000 arrived at by the trial court to be on the high side and in view of the cited cases and factors of inflation, I consider Kshs. 850,000 a fair compensation for the injuries sustained, and I award the same.

Special Damages

60. The Appellant pleaded Kshs. 3,337,574 on account of treatment expenses. Whereas the Appellant produced an invoice for the above amount there was no receipt that he produced to show that he paid this amount. What are available are only a billing statement and an invoice . Special damages not

only require a specific plea for the same but also strict proof. In the absence of a receipt the Appellant failed the standard of a strict proof. Further, I noted that the billings were being debited to a corporate account and not a patient account and raises the question of whether the Appellant was meeting this cost or was being paid by a corporate entity. I concur with the trial court in the dismissal of this particular claim.

61. The Appellant proved the expenses for search fees at ksh. 550 and the costs of medical report at ksh. 3000. A total of ksh. Kshs.3550 is therefore awarded on account of special damages.

62. In the end, the appeal herein succeeds and I proceed to make the following orders:

    a. The Lower Court's judgement is hereby set aside.

    b. Judgement is hereby entered for the plaintiff as against the defendants jointly and severally on liability at a 100% basis.

    c. The Plaintiff is awarded Kshs. 850,000 on general damages and Kshs. 3,550 on special damages:

    d. The costs of this appeal as well as the costs in the lower court is awarded to the Appellant.

    e. The award on damages will attract interest at court rates from the date of the judgement at the lower court.

DATED, SIGNED AND DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS, THIS 26TH DAY OF AUGUST 2024

S.CHIRCHIR

JUDGE .

In the presence of :

Godwin – Court Assistant.

Ms Anuro for the Appellant.