Bungoma Line Safari Ltd & another v Nyanginja & another (Civil Appeal E023 of 2024) [2024] KEHC 11754 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11754 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E023 OF 2024

RE ABURILI, J

SEPTEMBER 30, 2024

BETWEEN

BUNGOMA LINE SAFARI LTD ..... 1ST APPELLANT

AZIDA ALI NANCHA ..... 2ND APPELLANT

AND

EMILY ADHIAMBO NYANGINJA ..... 1ST RESPONDENT

GRACE NYAIRO ..... 2ND RESPONDENT

(An appeal arising out of the Judgment of the Honourable G.C. Serem at Kisumu delivered on the 29th January 2024 in Kisumu Small Claims Claim No. No. E186 of 2023)

JUDGMENT

Introduction

1. This appeal is one among other three appeals in the same series arising from the same cause of action namely, a road traffic accident which occurred on 16th March 2023 involving the appellant's motor vehicle registration number KCZ 581X and the 2nd respondent's motor vehicle registration number KCX 470N which vehicles collided along Kisumu Busia Road.

2. The respective parties in the lower court, Small Claims Court agreed that since there was more than one claim, they hear one test suit to determine liability which liability would be adopted in all the other files. Liability was therefore determined following a full hearing in SCC Claim No. E186 of 2023 between Emily Adhiambo Nyanginja versus Bungoma Line Safari.

3. The appellants herein are the same in all the series files being HCCA E023, E026, E025 AND E022 all of 2024. HCCA E023 of 2024 is the file that houses the test suit file from the lower court in SCCC E186 OF 2023. However, because the effect of hearing any one of the four appeals and the outcome

thereof will bind all the other series files, I have elected to write judgment which is similar in all respects on liability in all the other three series appeal files. I will however utilise the evidence adduced before the test suit file SCCC E186 of 2023.

4. In this case, as is the case in the other three series appeal files, 1st respondent was the plaintiff in the Small Claims Court. The respective respondents filed suit against the appellants vide an amended claim amended on the 4th July 2023 in which they sought judgement for special damages, general damages, costs of the suit and interest for injuries sustained following a road traffic accident that occurred on the 16th March 2023.

5. Specific to this appeal, the 1st respondent's case was that on the said day, she was travelling aboard motor vehicle registration number KCZ 581X along Kisumu – Busia Road which vehicle was so negligently, carelessly and/or recklessly driven by the appellants, their agents and/or servants causing the said vehicle to lose control and get involved in the accident along Kicomi area.

6. On their part, the appellants filed an amended response dated 15th September 2023 denying that the accident occurred and or that they owed the 1st respondent. The appellants further averred that if such accident occurred then it was solely caused by the negligence of the third party, the 2nd respondent herein.

7. The appellants filed and served the Third-Party Notice to the 2nd respondent who, despite service failed and or neglected to enter appearance and/or file a defense thus interlocutory judgment was entered against her on the 21st November 2023.

8. It is worth reiterating that this 1st respondent's Claim was part of a series before the Small Claims Court that included Kisumu SCC No. E185 of 2023, Kisumu SCC No. 184 of 123 and Kisumu SCC No. 182 of 2023 from which the 1st appellant has filed the respective appeals including the instant appeal and Kisumu Civil Appeal E022 of 2024, Civil Appeal 26 of 2024 and Civil Appeal E025 of 2024.

9. Further, that at the trial court, SCC No. E186 of 2023 was the test suit on liability wherein the Adjudicator apportioned liability at 80% against the 2nd respondent and 20% against the 1st appellant herein.

10. Aggrieved by the said decision, the appellant filed the memorandum of appeal in the four appeals challenging the trial court's finding and apportionment on liability, setting out the following grounds:

    a. That the learned trial magistrate erred in fact and law in failing to dismiss the suit by apportioning 20% liability to the appellants (respondents) without considering the circumstances of the case.

    b. That the learned trial magistrate erred in law and in fact in finding in favour of the respondents (claimants) against the appellant (defendant) when there was totally no credible evidence or proof of negligence on the part of the appellants.

    c. That the learned trial magistrate erred in fact and in law in failing to consider the appellants' submissions on liability by completely disregarding the submissions and authorities of the appellants and as a result arrived in unjustified decision on liability.

11. The parties filed written submissions to canvass the appeals, which submissions are the same in the four appeals in all aspects hence the necessity to write one judgment which will apply mutatis mutandis to all the other appeals.

The Appellants' Submissions

12. It was submitted that the claimant's first witness in the test suit, CW1, was not familiar with the circumstances of the accident and that despite not being the investigating officer PC Kiiru whom the 1st respondent failed to call, CW1 confirmed that motor vehicle registration KCX 470N was faulted for failing to give way to other road users.

13. It was further submitted that the 1st respondent herself was also not familiar with the circumstances of the accident as she was seated at the back and as such, her evidence was pure guess work or was couched to reserve the truth from the court and that therefore her testimony ought to be disregarded.

14. The appellants submitted that their witness, RW1, who was driving the appellant's car and who testified that he tried to avoid the accident by suddenly stopping and/or applying emergency brakes but that it was the driver of motor registration no. KCX 470N who encroached too much in his lane, thereby causing the accident.

15. It was thus submitted that the learned Adjudicator erred in law and fact when he held the appellants 20% liable when all the evidence clearly showed that the 2nd respondent owner of motor vehicle registration number KCX 470N was wholly to blame for the accident and thus the appellants were entirely blameless.

16. The appellants submitted that the 1st respondent failed to offer much to persuade the court that the appellants were negligent.

17. The appellants submitted that the court failed to consider the evidence tendered on how the accident happened and came to an erroneous conclusion on liability based on speculation.

18. It was further submitted that the appeal herein has merit and that the same ought to be allowed and the suit in the trial court against the appellants be dismissed with costs as they were entirely blameless for the accident.

The 1st Respondent's Submissions

19. The 1st respondent briefly submitted in support of the judgment of the Adjudicator arguing that there was no denial that the accident subject of this suit happened and therefore the finding of the trial court that the appellants were equally responsible for the accident was not made in error and that it was incorrect for the appellants to state that the trial court failed to give reasons on how it arrived at the apportionment of liability. The 1st respondent implored this Court to find no merit in the appeal and dismiss it with costs.

Analysis and Determination

20. This is a first and last appellate Court. An appeal lies to this Court from the Small Claims Court on points of law only. It follows that any issues of fact cannot be canvassed before this court noting that the *Small Claims Court Act* provides for review of the decision of that Court by an aggrieved party, which review can sieve and take into account factual matters so that the residue or remnants that reach this Court on appeal would only be points of law for determination.

21. Section 38 of the *Small Claims Court Act* provides that:

> " 38.

(1) A person aggrieved by the decision or an order Appeals. of the Court may appeal against that decision or order to the High Court on matters of law. (2) An appeal from any decision or order referred to in subsection (1) shall be final."

22. What constitutes, points of law is now settled. In Peter Gichuki King'ara v IEBC & 2 Others, Nyeri Civil Appeal No. 31 of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA), the court of Appeal stated thus:

23. "It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law."

24. The issues of failure to exercise discretion is equally a point of law. In Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR, the court stated that: -"This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR)."

25. In the instant appeal, the appellants have in their memorandum of appeal referred to errors of fact and law. I will restrict myself to whether there are any points of law arising for determination.

26. I have carefully considered the evidence on record on liability and the grounds of appeal challenging the apportionment of liability between the appellants and the 2nd respondent.

27. This suit revolves around the issue of liability. As to whether the question of apportionment of liability is a point of law, I borrow from persuasive decisions that follow. In Yakub Hussein Ganyo v Auto Industries Limited & another [2020] eKLR, Nyakundi J persuasively cited cases from other jurisdictions and stated as follows:

> "...apportionment of liability of the Learned trial Magistrate, my view is that it is purely a matter of discretion, unless appellant demonstrates that such a direction taken in the matter was clearly wrong or was a decision taken without any iota of evidence. In a comparative jurisprudence "Cheong Guin Fan & Another v Murugian s/o Rangasamy {2004} 1SLR 628 at 87 the Court stated interalia:
>
> "The apportionment of liability is more an exercise of discretion than in clinical science."
>
> In the same jurisdiction, the Court of Appeal in Asnah bte Ab Rahman v Lijianlin {2016} 2 SLR 944 it was held:
>
> "That it has been said that a finding of apportionment is a finding upon a question not of principle or a positive finding of fact or law but of proportion, of balance and relative emphasis and of weighing different considerations, two considerations emphasized by the Court of Appeal were the relative causative potency of the parties conduct and the relative moral blameworthiness of their conduct." (See also Lakhamshi v Attorney General {1971}

EA 118, 120, Baker v Marker Harbour Industrial Co-operative Society Ltd {1953} WLR 1472)."

28. As earlier stated, the judgement impugned herein arose out of a suit, Kisumu SCC No. E186 OF 2023 which was part of a series including Kisumu SCC No. E185 of 2023, Kisumu SCC No. 184 of 123 and Kisumu SCC No. 182 of 2023 from which the appellants have filed the respective appeals including the instant appeal and Kisumu Civil Appeal E022 of 2024, Civil Appeal 26 of 2024 and Civil Appeal E025 of 2024. The parties herein were represented by the same advocates in all the Claims and in the instant appeal.

29. At the trial court, SCC No. E186 of 2023, now this Civil Appeal E023 of 2024 which was the test suit on liability, liability was apportioned at 80% against the 2nd respondent and 20% against the appellants herein. The appellants now seek to have this court consider the issue of liability afresh based on the evidence adduced in the lower court in in Kisumu SCC No. E186 of 2023 and as applied to all other series matters and appeals listed herein.

30. I will first discuss the purpose and effect of selection of a test suit. Order 38 Rules 1 and 2 of the Civil Procedure Rules provides as follows: -

> Order 38 – Selection of Test Suit1.Staying several suits against the same defendant [Order 38, rule 1.]
>
> Where two or more persons have instituted suits against the same defendant and such persons under rule 1 of Order I could have been joined as co-plaintiffs in one suit, upon the application of any of the parties with notice to all affected parties, the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in the other suits until the selected suit shall have been determined, or shall have failed to be a real trial of the issues.
>
> 2. Staying similar suits upon application by defendant [Order 38, rule 2.]
>
> Where a plaintiff has instituted two or more suits, and under rule 3 of Order 1 the several dependants could properly have been joined as co-defendants in one suit, the court, if satisfied upon the application of a defendant that the issues to be tried in the suit to which he is a party are precisely similar to the issues to be determined in another of such suits, may order that the suit to which such defendant is a party be stayed until such other suit shall have been determined or shall have failed to be a real trial of the issues.

31. A test suit is thus a convenient mode of treatment of multiple suits between the same parties where similar issues of law and fact arise. In Samwel Kariuki Nyangishi v John Disilberger [2002] eKLR the court explained the reasons for selecting a test suit as follows;

> " The reasons why we have a test suit is because the said case would not be an embarrassment to the court and parties where several courts decide on liability arriving at a different proportion from that of the first court trying the matter."

32. Therefore, having selected Kisumu SCC No. E186 of 2023 as the test suit, once liability was determined, the parties were bound by that finding on liability.

33. Consequently, having determined the issue of liability in the test suit, the trial court only needed to adopt the same or if it was to depart from the findings, give reasons for doing so. In Amos Muchiri

Ndung'u v Chinga Tea Factory & David Muthumbi Mathenge [2010] eKLR, the court explained the purpose, the process and the result of an outcome of a test suit as follows:

> " A test case is a suit brought specifically for the establishment of an important legal right or principle. It can also be a term that describes a case that tests the validity of a particular law. Test cases are useful because they establish legal rights or principles and thereby serve as precedent for future similar cases. Test cases save the judicial system time and expenses of conducting proceedings for each and every case that involves the same issue or issues.In my view, the learned magistrate was to determine liability in the test case on the basis evidence adduced in the said case because admittedly the accident arose from the same accident, same facts, same evidence and same witnesses were to be used to determine liability and in was not necessary for the plaintiffs in all the suits to testify to determine liability. For this reason, I find that liability having been established in favour of the plaintiff in the test case, the same applied and was binding in the other suits. It was not necessary for each and every plaintiff to testify in the test case.' (Emphasis mine)

34. What then was the evidence considered in Kisumu SCC No. E186 OF 2023 which is applicable to all the series matters arising from the same cause of action subject of these four appeals?

35. The Claimant in SCCC E186 of 2023 was Emily Adhiambo Nyanginja, the second respondent herein. She testified and called two witnesses in support of her case. CW1, No. 71788 P.C. Simon Biwott testified and produced the police abstract issued on the 20.3.2023 over the accident herein that was reported vide OB 73/16/13/23. In cross-examination, CW1 testified that the report was made by a driver who stated that he was hit by motor vehicle registration number KCX 470N, owned by the 2nd respondent who failed to give way. In re-examination, CW1 testified that he was not the investigating officer.

36. The claimant herself testified as CW2 and adopted her statement dated 7th July 2023 as her evidence in chief wherein she had stated that on the 16.3.2023, she was travelling aboard motor vehicle registration number KCZ 581X along Kisumu – Busia road when at Kicomi area, the vehicle lost control and was involved in a "self – involving accident."

37. In cross-examination, the claimant admitted that she was seated at the back of motor vehicle registration number KCZ 581X and that it was dark and that she could not see the front and just heard a bang. It was her testimony in cross examination that the driver of motor vehicle registration number KCZ 581X, the appellants' vehicle, was over speeding.

38. The appellants called two witnesses to support their case. RW1, Eric Ouma Onyango, the driver of the appellants' vehicle adopted his statement dated 1.9.2023 as his evidence in chief. It was his testimony that he blamed the driver of motor vehicle registration KCX 470N for the accident for not giving way and was making a U-turn. He testified that the people in motor vehicle registration number KCX 470N were drank as they had tumblers in the car. It was his testimony that he was driving at a normal speed of 30km/hr.

39. In cross-examination, RW1 reiterated that he was driving at a normal speed of 30km/hr. He denied receiving any calls while driving as they are not allowed to have any phones. It was his testimony that the other vehicle did not give way for him to turn. He testified that he was already in motion. He further stated that he stopped and the offending vehicle still hit him. He maintained that the driver of the offending vehicle was drank.

40. RW2 No. 65670 PC Kithongo Kiiru who was the investigating officer testified that he blamed the driver of motor vehicle registration number KCX 470N who made a U-turn and did not give way. In cross-

examination, RW2 testified that he did not witness the accident but got there after 15 minutes. He testified that he analysed and got information from the driver. He reiterated that the offending vehicle was motor vehicle registration number KCX 470N who misjudged the distance of the other vehicle.

41. In re-examination, it was RW2's testimony that he got both vehicles at the scene but only the appellants' driver was at the scene and that the driver of motor vehicle registration number KCX 470N has never been traced.

42. The uncontroverted evidence on record is that two vehicles were involved in the accident. The A responsibility to prove that the negligence of the appellants caused the accident rested solely on the 1st respondent. This was the central issue that was prominent during the trial before the Learned adjudicator.

43. In order to determine liability for the accident, the Adjudicator had to carefully consider the evidence before her. The 1st respondent as per section 107 (i) of the *evidence Act*, had the responsibility of providing admissible material evidence that would prove negligence on the part of the Respondent. Based on the proven facts, the trial court would then make a judgement in favour of the Appellants. The Court in Ciabaitani M'Mairanyi & Others v Blue Shield Insurance Co. Ltd CA No.101 of 2000(2005) 1EA 280 held that; -

> "Whereas under section 107 of the *Evidence Act*, which deals with the evidentiary burden of proof, the burden of proof lies upon the party who invokes, the aid of the law and substantially asserts the affirmative of the issue. Section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

44. Sections 107 and 108 of the *Evidence Act*, place the duty of proving a fact with the party who claims the existence of any relevant fact in question. This burden of proof may shift from the asserting party to the Defendant. Lord Denning in Miller v Minister of Pensions [1947] 2 All ER at 374 held as follows;

> "If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to determinate conclusion the way or the other, then the man must be given the benefit of doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. The 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 probably than not', the burden is discharged, but, if the probabilities are equal, it is not."

45. Pleadings remain crucial in civil cases as they serve as the foundation for presenting evidence to establish the disputed matters. In light of this, the burden fell upon the 1st respondent to demonstrate the occurrence of the accident and establish that the negligence of the second respondent was the cause. Additionally, Section 109 of the *Evidence Act* allows the court to presume the existence of specific facts.

46. In the case of Raila Amolo Odinga & Another V IEBC & 2 Others [2017] eKLR the Supreme Court expounded the evidential burden of proof as follows;

> "(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness

with which he or she discharges this, this, evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."

47. In Kamaru & Another v Mwanembe & Another {1995 – 98 1 EA 84} it was stated as follows, concerning proof of contributory negligence:

> " The burden of proving contributory negligence on the part of the plaintiff rests squarely on the defendant. That is when it is open to the trial Court to apportion liability and on that account reduce the award of damages." (See also G. V. Odunga Digest on Civil Case Law and Procedure, 2nd Edition Law Africa Publishing Co. 2010) Pg 2942 at para (D).

48. Further, in Treadsetters Tyres Ltd v John Wekesa Wephukulu {2010}e KLR, Ibrahim J citing a passage in Charlesworth & Percy on negligence 9th Edition at page 387 had this to say:

> " In an action for negligence, as in every 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 may be reasonably inferior and (2). Whether assuming it may be reasonably inferred, negligence is infact inferred, proof of liability is on a balance of probabilities as applied in civil claims and generally discerned from the evidence of the claimant as against the defendant. This is what the Law stipulates in Section 107, 108 and 109 of the *Evidence Act*."

49. G. V. Odunga in his Digest on Civil Cases Law and Procedure 2nd Edition 2010 Law Africa Publishing House Pg 249 at para 6421 paragraph (D), cited the principle established in Lolligenccy Iron & Coal Company M'mullan {1934} A. C. 25 and stated as follows:

> " In strict legal analysis, negligence means more than needless or reckless conduct, whether in commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."

50. Thus, the burden of proof required from litigating parties varies significantly, with each form imposing different responsibilities on the parties involved. In the series matters subject of the four appeals, the issue presented to the Learned Adjudicator and before this Court is whether the 1st respondent proved appellants.

51. From the evidence adduced before the Small Claims Court in the test suit and restated herein, it is clear that none of the witnesses presented by the 1st respondent was in a position to tell how the accident occurred. In her own admission, it was dark, she was seated at the back and she just heard a bang. She did testify that the driver of the appellants' vehicle was speeding. However, the appellant's driver testified that he was doing a normal speed of 30km/hr.

52. Both witnesses called by the appellants, RW1 and RW2 were firm in their testimonies that it was the driver of motor vehicle registration number KCX 470N who was to blame for the accident. This evidence was not controverted by the 1st respondent.

53. In my view, the evidence on record as adduced by the appellants established on a balance of probabilities that it was the 2nd respondent who was liable for the accident. The said evidence remained

uncontroverted and as such, I find no reason why the learned Adjudicator blamed the appellants for the accident.

54. I find that there was simply no evidence adduced by the 1st respondent to impose liability on the appellants. None of the witnesses presented by the 1st respondent witnessed the accident and thus they were not in a position to testify as to how it occurred, for the Adjudicator to impose liability on the appellants.

55. The upshot of the above is that I find the appeal herein and in all the four series appeal files merited. I find and hold that the learned Adjudicator erred in law in apportioning liability at 20% against the appellants. I set aside the judgment and decree in the Small Claims Court in SCCC E186 of 2023, E185 of 2023, E182 of 2023 and E184 of 2023 on liability as apportioned against the appellants and substitute it with a finding and holding that the 2nd respondent was 100% and wholly liable for causing the accident wherein the respective claimants were injured.

56. This judgment further applies to all the suits in this series being Kisumu Civil Appeal Nos.E022 of 2024, Civil Appeal E026 of 2024 and Civil Appeal E025 of 2024.

57. On costs, I order that each party bear their own costs of the appeals listed herein.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF SEPTEMBER, 2024

R.E. ABURILI

JUDGE