Magendo v Wambui & another (Civil Appeal E708 of 2023)
[2024] KEHC 11868 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11868 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E708 OF 2023

TW OUYA, J

SEPTEMBER 30, 2024

BETWEEN

ERNEST NYANGAU MAGENDO ..... APPELLANT

AND

JACKLINE MARY WAMBUI ..... 1ST RESPONDENT

SIMON MURIITHI NGUYO ..... 2ND RESPONDENT

(Being an appeal against the judgement and decree of the Hon. H.M. Nyaberi (CM) delivered on 22nd November, 2022 in Nairobi Milimani CMCC No. 2524 OF 2019)

JUDGMENT

Background

1. Ernest Nyangau Magendo, (hereinafter the Appellant), the Plaintiff before the lower Court, initiated Nairobi Milimani CMCC No. 2524 of 2019 (hereinafter lower Court suit) as against Jackline Mary Wambui and Simon Muriithi Nguyo, (hereinafter the 1st & 2nd Respondent/Respondents), the Defendants before the lower Court by way of plaint on 9th April, 2019 claiming general and special damages in respect of a road traffic accident that occurred on or about the 30th May, 2018.

2. It was averred that at all material times to the suit the 1st Respondent was the driver of motor vehicle registration number KCA 139W (hereinafter suit motor vehicle) meanwhile the 2nd Respondent was the registered owner of the same. That on the date in question the Appellant was lawfully standing on the pedestrian lane along Mwiki Road near DHL Gate, when suddenly the driver of the suit motor vehicle drove the same so negligently and recklessly, at a high speed without regard for other road users that she lost control and veered off the road and as a result hit the Appellant. It was further averred that as a result of the incident the Appellant sustained serious injuries a consequence of which he claims general and special damages. The doctrine of Res Ipsa Loquitor was equally pleaded by the Appellant

3. The Respondents filed a statement of defence denying the key averments in the plaint and liability. They went on to aver that in the alternative without prejudice to the forestated, any such occurrence in respect of the accident as the Appellant may prove was caused solely and or substantially contributed to by his own negligence.

4. The suit proceeded to full hearing, during which only the Appellant called evidence in support of the averments in his pleadings. In its judgment, the trial Court found that the Appellant had failed to prove his case on a balance of probabilities and thus proceeded to dismiss the suit with costs to the Respondents.

5. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in his memorandum of appeal as itemized hereunder: -

> " 1. That the learned trial Magistrate erred in law and fact in holding that the Appellant did not prove his case on liability despite on ground of inconsistencies between testimony of the Appellant and the Police Officer despite knowledge that it is the Appellant who was involved in the road accident and his evidence supersedes that of the Police Officer.
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> 2. The learned trial Magistrate erred in fact and law in failing to enter judgment in favour of the Appellant in respect of the claims for general damages for pain and suffering despite the Appellant's evidence being uncontroverted by the Respondents.
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> 3. The learned trial Magistrate erred in law and descended into the arena of the disputants by stating that the testimony of the Appellant and the Police Officer was inconsistent despite the pleadings showing the Appellant was a pedestrian as though she spoke for the Respondents.
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> 4. The learned trial Magistrate misapprehended the fact that the Appellant had proved his case on the required standards and proceeded to give judgment that went against the weight of the evidence before Court.
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> 5. The learned Magistrate erred in law and fact by upholding the inconstancies of the testimonies of the Appellant and the Police officer despite knowledge that the Police Officer was not an eye witness to the accident.
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> 6. The learned Magistrate erred in law and in fact by wrongly exercising her judicial discretion against the Appellant and against reason in the circumstance of the matter by failing to award costs of the claim to the Appellant." (sic)

6. In light of aforecaptioned itemized grounds of appeal, the Appellant seeks before this Court orders to the effect that: -

> " a) This appeal be allowed.
>
> b) The honorable Court be pleased to set aside the entire judgment delivered on 22nd November, 2022 in the Chief Magistrates Civil Case No. 2524 of 2019 by Honorable H.M Nyaberi and in place thereof this Court to make appropriate orders in respect of the claim.
>
> c) The Costs of the suit in this appeal be awarded to the Appellant." (sic)

Directions were taken on disposal of the appeal by way of written submissions, of which the Court has duly considered.

Submissions

7. On the part of the Appellant, addressing the Court on liability, counsel began by contending that hat the Appellant demonstrated to the Court on a balance of probabilities that the Respondents where the authors of the accident and thus liable for the same. That the Appellant's evidence at hearing was categorical that he was standing on a pedestrian lane when the suit motor vehicle lost control, veered off the road and hit him thereby occasioning injuries. It was further contended that the Appellant was directly involved and the only eye witness to the accident whereas the Respondents failed to call any evidence on the contrary to explain how the accident occurred therefore he had established his case on a balance of probabilities. The decision in *Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021)* [2022] KEHC 7 (KLR) was cited in the forestated regard. Counsel equally posited that the Appellant ought not to be denied justice on accord of an expert witness who gave contradictory evidence despite it being apparent that the Respondents were indeed negligence and occasioned the accident. Further while citing the provisions of Article 159(2)(d) of *the Constitution*, the decision in MTG v Republic (Criminal Appeal E067 of 2021) [2022] KEHC 189 (KLR) and Davin Bett & Another v Joseph Njuguna Nganga & Another [2019] eKLR, counsel iterated that the police officer was neither at the scene of the accident nor the investigating officer as such his evidence ought not to have been solely relied on by the trial Court, as a technicality, to dismiss the Appellant's suit. This Court was thus urged to find that the Appellant had proved his case on a balance of probabilities and finding the Respondents 100% liable for the accident.

8. On quantum of damages, counsel anchored his submissions on the decision in Harun Muyoma Boge v Daniel Otieno Agulo [2015] eKLR to submit that an award on damages is not a science however a Court ought to ensure that a claimant is fairly compensated for the injuries sustained. Restating the injuries sustained by Appellant, counsel called to aid the decisions in Benuel Bosire v Lydia Kemunto Mokora [2019] eKLR, Ntulele Estate Transporters Ltd & Anor v Patrick Omutanyi Mukolwe [2014] eKLR and Charles Mathenge Wahome v Mark Mboya Likanga & Others [2011] eKLR in urging the Court to award general damages in the range of Kshs. 1,000,000/- to 1,200,000/- as fair compensation. In conclusion, while citing Section 27 of the *Civil Procedure Act*, the Court was urged to allow the appeal with the attendant costs.

9. On the part of the Respondents, responding to the Appellant's submission on liability, counsel revisited the evidence before the trial Court to assert that from the contradictory witness testimony adduced as to the occurrence of the accident, the Appellant failed to prove negligence on the part of the Respondents on a balance of probabilities. While calling to aid the provisions of Section 107 of the *Evidence Act* and the decision in *Cadama Builders Ltd v Mutamba (suing as the administrators of the estate of Philip Musei Ndolo) (Deceased) (Civil Appeal E093 of 2021)* [2022] KEHC 11029 (KLR) it was summarily submitted that from the contradictory evidence at trial, the Court cannot draw an inference as to whom was to blame for the accident therefore the trial Court was not in error for dismissing the Appellant's suit for failing to establish a case on a balance of probabilities.

10. On quantum of damages, counsel anchored his submissions on the decision in Power Lighting Company Limited & Another v Zakayo Saitoti Naigola & Another [2008] eKLR as cited in Jennifer Mathenge v Patrick Muriuki Maina [2020] eKLR to highlight the principles that ought to be considered by an appellate Court to disturb an award on damages. That in the alternative and without prejudice to the finding on liability as earlier submitted, the Court ought to award Kshs. 400,000/- as being sufficient and adequate compensation on damages. The decisions in Jackson Mbaluka

Mwangangi v Onesmus Nzioka & Another [2021] eKLR, Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR and Reamic Investment Limited v Joaz Amenya Samuel [2021] eKLR were cited in the forestated regard. Counsel surmised by equally citing the provision of Section 27 of the *Civil Procedure Act* to submit that the appeal be dismissed with costs and in the alternative damages be awarded as submitted by the Respondents.

Disposition And Determination

11. The Court has considered the record of appeal, the pleadings and original record of the proceedings. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate Court in Selle –Vs- Associated Motor Boat Co. [1968] EA 123. Further, it is trite that an appellate Court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278. That said, a revisit of the memorandum of appeal and submissions by the respective parties before this Court it is evident that the appeal turns on the twin issue of liability and awardable damages.

12. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties' respective cases before the trial Court. See; - Court of Appeal decision in Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91. This Court had earlier outlined the gist of the respective parties' pleadings, as such it serves no purpose restating the same at this juncture. Further, having equally identified what the dispute before the trial Court gyrated on, the key question for determination is whether the trial Court's findings on the issues falling for determination therein were well founded. To contextualize the latter, it would be apposite to quote in extenso the relevant facets of the impugned judgment. The trial Court after restating the evidence tendered before it addressed itself on liability as follows; -

> " ....I have carefully gone through the parties rival submissions and the following issues arise for determination: -
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> i) Whether the Plaintiff has proved his case on liability upon the Defendant?
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> The Plaintiff pleadings are quite clear.....
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> The learned counsel for the Defendant submits that the PW2 testified by bringing out how the accident was reported by the Plaintiff. That he fell down while alighting from the motor vehicle and the matter is pending under investigations. They rely on the authority in HCCA No. 3720 of 1995 Farida Kimotho v Ernest Maina.....
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> I have no doubt that the evidence presented by PW2 is absolutely at variance with the Plaintiff evidence and pleadings.
>
> It is trite law that the burden of proof lies upon the Plaintiff to prove his case on a balance of probability. In the instant case, it is undoubtful that indeed the Plaintiff was a pedestrian when he was knocked down by a motor vehicle. The evidence by PW2 points out that the Plaintiff was alighting when he fell down from a motor vehicle which drove off. It is the view of this Court that although the Defendant has not presented any evidence, the Plaintiff has failed to prove his case on a balance of probabilities hence the Plaintiff suit is dismissed with costs to the Defendant." (sic)

13. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. Whereas, it is well trodden that the same is on a balance of probabilities meaning that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is

more probable. See Court of Appeal decision in Mumbi M'Nabea v David M. Wachira [2016] eKLR. Hence, the duty of proving the averments contained in the plaint lay squarely on the Appellant vice versa with respect to the averments contained in the Respondent's statement of defence. In Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

14. Further, this Court has repeatedly observed that the mere occurrence, of an accident, without more, cannot be proof of negligence. As the Court of Appeal stated in Eastern Produce (K) Ltd V. Christopher Atiado Osiro [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant. The Court in that case cited the famous decision of Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing stated that:

> " There is, as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

15. In Gideon Ndungu Nguribu & Another v Michael Njagi Karimi [2017] eKLR the Court of Appeal stated that "determination of liability in a road traffic case is not a scientific affair" and proceeded to quote Lord Reid in Stapley vs Gypsum Mines Ltd (2) [1953] A.C. 663 at p. 681 as follows:

> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...
>
> The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

16. Before the trial Court, the Appellant testified as PW1. He began by adopting his witness statement as his evidence in chief and adduced into evidence the documents as they appear in his list of documents dated 25th February, 2019 as PExh.1 – 9, 11, & 14. On cross-examination he stated that he was standing on the left side of the road and that he did not recognize the registration of number of the suit motor vehicle as it came from behind and knocked him unconscious. That he was admitted at Kenyatta

National Hospital for three (3) months meanwhile his medical bill was settled by a social worker with the balance thereof to the tune of Kshs. 83,000/- being paid by his family.

17. PC Yudilas Mutahi - No. 92679, testified as PW2. He adduced the police abstract issued to the Appellant as PExh.10. On cross-examination he confirmed having the Occurrence Book (O.B) before Court, and proceeded to read the contents of the same as follows: ... "The accident was reported by Nyangau Magendo Tel: 017******0 that he boarded a matatu Reg, No. KCA 139W orange in colour at town. When alighting at DHL along Mwiki Road, he fell down and the matatu drove away leaving him down on the ground. A Samaritan assisted and reported to KNH where he was admitted for four (4) months". He further stated that the Appellant was not a pedestrian and that he was alighting from the suit motor vehicle when he fell down and the matatu moved meanwhile as at his testimony the matter is still pending under investigation.

18. Evidently, from the above, PW2 did not witness the accident. He equally was not the Investigating Officer nor did he adduce the Police file nevertheless read into evidence the contents of the O.B in respect of the accident in question. He went on to state that the matter was still PUI. It can thus be purposefully stated that his evidence was entirely garnered from the contents of the Police Abstract and the O.B. It is certain from his evidence that he categorically contradicted the Appellant's version of events in respect of the accident. Either by design or default neither the O.B extract nor the police file were exhibited before the trial Court. Thus, PW2's testimony merely lent credence towards confirming the occurrence of the accident. The Appellant's evidence on the other hand through his adopted witness statement was to the effect that he was lawfully standing on the pedestrian lane along Mwiki Road near DHL Gate when suddenly the suit motor vehicle lost control veered off the road and knocked him down. That he was knocked unconscious only to find himself at Kenyatta National Hospital.

19. It appears the totality of the Appellant's evidence in support of his pleadings was at variance if not conflicting and or contradictory as to how the accident occurred. The Appellant's submissions before this Court appears to be an attempt to disavow PW2's evidence on the premise that the Appellant was directly involved and the only eyewitness to the accident and given that the Respondents failed to call any evidence on the contrary to explain how the accident occurred, the Appellant had established his case on a balance of probabilities. The trial Court upon being faced with such evidence at variance, arrived at the conclusion that the Appellant failed to discharge his burden of proof. That said, a detailed inspection of the of the record reveals that the Appellant's evidence and pleadings were aligned on the fact that he was a pedestrian whereas the cause of the accident was as a result of the Respondent's negligence. However, PW2 being the Appellant's other witness to shore up his evidence on liability, the former was categorical that the Appellant was not a pedestrian and was injured while alighting from the suit motor vehicle.

20. Curiously, PW2 who rendered his evidence based on the OB entry stated that the accident was reported by the Appellant. It is a practice within our jurisdiction that an OB serves as an initial incident and or activity report, by a reportee, at a police station. Therefore, ordinarily the OB entry is more than often the version of the events of the reportee or the police officer making the said entry. In this case, the Appellant being the reportee as stated by PW2, the entry must have been made as per his version of events. By PW2's evidence, the Appellant appears to have reported that he fell down while alighting from the suit motor vehicle contrary to his evidence and his pleadings before the trial Court. Ordinarily, in accident claims, entries in the OB, reasonably cannot form the sole and foundational basis towards apportioning liability on accord that they are usually made after the fact and more often than not are the version of events of the reporter.

21. A cursory perusal of the Police Abstract, the OB No. is captured as OB 28/23/11/2018. Meaning that the accident was reported some six (6) months after the accident, with reasonable deduction that the same was made by the Appellant. Further, the same Police Abstract which ordinarily captures the "class of persons" injured in accident claims, as often seen being either being pedestrian or passenger, here there appears to be no entry in respect class. Therefore, despite the assertation that the Appellant was the only eye witness to the accident, juxtaposing the same alongside PW2's evidence, which was garnered from the OB on the reasonable deduction that the same was reported by the Appellant, it is difficult to fault the trial Court's finding on liability.

22. To the foregoing end, notwithstanding the Appellant's reliance on the decision in *Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021*) [2022] KEHC 7 (KLR), the same is non-binding upon this Court whereas the facts and subject issue presenting therein differed from the instant appeal. The question for consideration in the afore captioned decision appertained "direct evidence" to infer liability meanwhile in present appeal in the face of "direct evidence" from the Appellant as to how the accident occurred, there similarly exists a conflicting account from the Appellant himself based on the OB entry. Interestingly, there was equal no pressed interrogation of the entry by counsel for the Appellant in examination-in-chief or re-examination, even upon realization of PW2's conflicting evidence. Thus, the decision Bwire (supra) does not aid the Appellant's cause on appeal. Lastly, the Appellant's contestation that failure on the part of Respondents to call evidence rendered his evidence uncontroverted correspondingly cannot sustain in light of the dicta in Karugi & Another (supra).

23. In conclusion, the Appellant failed to establish on a balance of probabilities that the Respondents were blameworthy and liable for the accident and this Court cannot fault the trial Court for arriving at the decision it did on liability. Under Section 107 of the *Evidence Act*, the burden of proof lay with the Appellant and if his evidence did not support the facts pleaded, he failed as the party with the burden of proof. See the case of Wareham t/a A.F. Wareham (supra). It therefore would be inconsequential to consider the trial Court proposed award on damages in light to the forestated finding. Consequently, the appeal herein lacks merit and ought to be dismissed with costs.

Determination

i. This Appeal is hereby dismissed with costs to the Respondent.

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

ROA 14 days.

HON. T. W. Ouya

JUDGE

For Appellant Miss Nambalu

For Respondent N/a

Court Assistant Martin Korir