Ombeka t/a Ombeka Enterprises v Mboga (Suing as the legal representative of the Estate of the Late Emmanuel Mauti Thomas) (Civil Appeal 81 of 2020) [2023] KEHC 3957 (KLR) (30 March 2023) (Judgment)

Neutral citation: [2023] KEHC 3957 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 81 OF 2020

REA OUGO, J

MARCH 30, 2023

BETWEEN

JULIUS OMBEKA T/A OMBEKA ENTERPRISES .... APPELLANT

AND

CATALINA GESARE MBOGA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE EMMANUEL MAUTI THOMAS) ... RESPONDENT

(Being an appeal against the whole of the judgment and decree of the honourable Nathan Lutta, CM, delivered on the 25th November 2020 in Kisii CMCC No 482 of 2016)

JUDGMENT

1. The suit before the subordinate court was filed by the respondent after a traffic accident that occurred on April 10, 2016 between a motor cycle and motor vehicle registration No KBS 464D owned by the appellant along Kisii Hospital Road. The respondent physical injuries and sued the appellant for general and special damages. The respondent also sought for interest and costs of the suit. The respondent claimed that he sustained bruises on the left wrist and the right hip as well as contusion of the right hip and pelvis. The respondent in his plaint pleaded that he would rely on the rule of res ipsa loquitor, the Highway Code and provisions of the *Traffic Act* Cap 403, Laws of Kenya.

2. The appellant in its defence denied the occurrence of the accident and that he or its driver acted negligently. In the alternative, he pleaded that if at all the accident occurred, then the same occurred despite the exercise of due and reasonable care, skill and diligence in the driving of motor vehicle registration No KBS 464D. The appellant faulted the minor plaintiff or the rider of the undisclosed motor cycle.

3. The trial magistrate after considering the evidence tendered before him awarded the respondent Kshs 150,000/- compensation for general damages together with special damages of Kshs 35,970/-, interest

and costs of the suit. The finding of the trial magistrate has led to the filing of the memorandum of appeal dated December 22, 2020 on the following grounds:

1. The learned trial magistrate erred by failing to consider and to hold that the respondent did not lead any or cogent evidence on account of which the appellant could be liable in negligence for the accident of April 10, 2016.
2. The learned trial magistrate erred by failing to absolve the driver of the impugned motor vehicle registration number KBS464D of negligence in the causation of the accident sued.
3. The learned trial magistrate erred by holding that the respondent had proved her case on a balance of probabilities when she had in fact not done so.
4. The learned trial magistrate took extraneous factors/matter into account in determining the appellant's culpability for the accident.
5. The learned trial magistrate misapprehended the appellant's witness' evidence and failed to give due consideration for the same.
6. The learned trial magistrate erred by awarding special damages which had neither been pleaded nor proved and which could not be awarded.
7. The learned trial magistrate failed to consider the tenor, meaning and purport of submissions and legal authorities relied upon by the appellant.
8. The quantum of damages awarded by the learned trial magistrate was so high as to be wholly erroneous estimate of damages.
9. The learned trial magistrate erred by failing to dismiss Kisii CMCC No 482 of 2016 with costs to the appellant.

4. The appeal challenges the trial magistrate's finding on liability and quantum.As the first appellate I have to re-evaluate the evidence before the trial court as well as the judgment and arrive at my own independent judgment bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand (see *Selle & another v Associated Motor Boat Co Ltd & others1* [1968] EA 123). The crux of the appeal hinges on whether the respondent proved that the appellant was liable for the accident on a balance of probabilities.

5. Catalina Gesare Mboga (Pw2) adopted her witness statement as her evidence in chief. She testified that on April 10, 2016 the deceased was a pillion passenger with his son Samwel Mauti. When they were at the gate of Kisii Hospital, the applicant's vehicle was coming from the direction of deliverance church. The vehicle left its lane and without indicating entered the path leading to Nakumart and thereby knocked the respondent who fell in a ditch.

6. No 86103 John Mwanja (Pw4) testified that on the material day an accident occurred between the appellant's vehicle and a motor cycle with two pillion passengers. The driver of the vehicle suddenly turned right and knocked the motor cyclist injuring them. He produced the police abstract as Pexh12. He testified that he is the one who investigated the accident and visited the scene of accident. He blamed the appellant's driver for causing the accident. On cross examination, he testified that when he arrived at the scene the motor cycle had been removed and did not find the motor cyclist at the scene. He also testified that he did not have a sketch plan.

7. The appellant submitted that the respondent did not meet the evidential burden to prove his case as no evidence was tendered to discharge its burden of proof. It relied on the case of *Eunice Wayua Munyao v Mutile Beatrice & 3 Others* [2017] eKLR where the court held that:

> "It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991 where it was held 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."

8. The appellant also relied on the case of *M'Mbula Charles Mwalimu v Coast Broadway Co Ltd* (2012) eKLR where the only witness was the administrator of the deceased's estate, no negligence had been established against the defendants as the mere fact that there was an accident involving a pedestrian does not in itself ipso facto mean that the driver is automatically to blame.

9. The respondent on the other hand submitted that it adduced evidence before the trial magistrate that the accident occurred as a result of negligence on the part of the appellant. It was confirmed that the appellant was driving at high speed, carelessly and without due care and attention. It was also proved that the respondent did not in any way contribute to the accident and therefore, the appellant was wholly liable for the accident. They supported the trial magistrate's finding that the appellant was 100% liable for the accident.

Analysis and determination

10. In civil cases, the burden of proof lies on the person making the allegation. Section 107 of the *Evidence Act* provides as follows:

    "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

    (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

11. The respondent was required to prove its claim on a balance of probabilities. He was requiredto establish his case to a percentage of 51% as opposed to 49% of the opposing party for him to have established his case on a balance of probabilities [see *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526].

12. The fact that the accident occurred between the appellant's vehicle and unknown motor cycle is not in dispute. However, the respondent was also required to show by evidence facts of negligence on the part of the appellant. Pw2 adopted her witness statement as her evidence in chief. She testified that on the material day the deceased and his son were heading to Deliverance Church. Although she blames the appellant for the accident, it is not clear whether she witnessed the same. Her evidence paint the picture that the deceased was at the scene with his son and that she was not present when the accident occurred. The Court of Appeal in *Mary Wambui Kabguo v Kenya Bus Services Limited* (1997) eKLR stated:-

> "The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she looked for her husband who had not been seen for three days and found

him admitted at Kenyatta National Hospital with multiple injuries and in critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the appellant did not on a balance of probabilities prove her case."

13. In the case of *Sally Kibiii and Another v Francis Ogaro* [2012] eKLR, the court was faced with such a scenario and noted the following: -

"The Plaintiff in the trial only produced two witnesses who admitted that they did not witness the accident and could not tell how it happened. The police abstract showed that the accident was caused by collusion of two vehicles and investigation were underway. The failure of the police to determine from the scene of the accident which motor vehicle was to blame and the absence of an eye witness diminishes the appellant's chance to prove a case of negligence against the defendant….to successfully apply this doctrine (res ipsa loquitor) there must be proof of facts that are consistent with negligence on the part of the defendant as against any other cause…….can safely presume that the mere fact that two cars being KAK 746J and KAG 331K collided, negligence was on the part of the defendant's cause and not the other. The plaintiff must prove fact which give rise to what may be called res-ipsa loquitor situation."

14. Pw4 did not also witness the accident. Although he was the investigating officer, he testified that by the time he arrived at the scene the owner of the motor cycle had fled from the scene. He also failed to avail the sketch maps that would have shed more light to the case. Having considered the totality of the evidence that was before the subordinate court, I am inclined to agree with the submissions of the appellant that the respondent failed to prove its case on a balance of probabilities as there was no evidence of an eye witness. The only eye witness was Bernard Nyakundi William (Dw1) who testified that he was near Oasis hospital and that there was a feeder road to his right. He indicated before turning. He then heard a bang and stopped. He found the motor cycle on the side and it appeared that he applied emergency brakes. On cross examination he testified that he kept to his lane and that the motor cycle knocked his rear wheel.

15. The evidence of Dw1 is the only evidence of the eye witness to the accident. Having considered both the evidence led by the appellant and respondent, it is my finding that the scales do not tilt in favour of the respondent.

16. The upshot is that the appeal before me is meritorious and the finding of the trial magistrate is therefore set aside. The appellant shall have the costs of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA VIA MICROSOFT TEAM THIS 30TH DAY OF MARCH 2023.

R.E. OUGO

JUDGE

In the presence of:

Miss Kebungo Appellant

Respondent Absent

Aphline C/A