Awale Transporters Limited v Mwangi & another (Civil Appeal 85 of 2020) [2023] KEHC 3582 (KLR) (26 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3582 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 85 OF 2020

HM NYAGA, J

APRIL 26, 2023

BETWEEN

AWALE TRANSPORTERS LIMITED ..... APPELLANT

AND

ANTHONY MWANGI ..... 1ST RESPONDENT

MAGHARIBI INVESTMENT MACHINERIES LTD ..... 2ND RESPONDENT

(Being an appeal from the judgment of Hon. W.Kitur (R.M.) delivered on 13.5.2020 in Nakuru CMCC No. 153 of 2017)

JUDGMENT

1. The appellant herein, who was the Plaintiff in the lower court, had filed suit in the Chief Magistrate's Court at Nakuru seeking Judgment against the respondents herein for Kshs. 4,639,740/=, costs and interest.

2. The claim arose out of a road traffic accident that occurred on 30th September 2015 involving Motor vehicle registration number KAY 613 L/ZD 1085 and motor vehicle registration number KBH 030 L/ ZC 2339.

3. The Plaintiff's case was that it was the registered owner of Motor Vehicle Registration Number KAY 613 L/ZD 1085 while the 2nd respondent was the owner of Motor Vehicle Registration Number KBH 030 L/ZC 2339 Mercedes Benz which was being driven by the 1st Respondent as a driver, servant and or agent while in the normal course of employment.

4. The appellant/plaintiff had averred that on or about 30th September, 2015 its said Motor Vehicle was lawfully parked on the right side of the Road at Salgaa Trading Centre when the 1st Respondent/1st defendant, acting as an agent of the 2nd respondent/2nd defendant, negligently controlled Motor Vehicle Registration Number KBH 030L/ZC 2339 Mercedez Benz that it violently hit the Appelllant/

Plaintiff's Motor Vehicle and as a result its Motor Vehicle and a container No. MSKU427955-8 were extensively damaged.

5. The amount sought by the appellant in the said suit was for the repair costs, assessor's fees and investigation fees.

6. The Respondents denied the entire claimand any negligenceraised against them vide their statement of defence dated 11th April, 2017. They averred, without prejudice, that the accident was solely caused or substantially contributed to by the negligence of the drivers of Motor Vehicle Registrations number KBH 518 T/ZD 1235 and KAY 613L/ZD 1085 respectively for whose tortious actions the registered owners thereof were vicariously liable and that at the opportune time they would seek leave of the court to join the said drivers/owners as the third parties. However, the record shows that the Respondents never took out any third party Notice.

7. The case went to full hearing where the parties adduced their respective evidence then proceeded to file their submissions. Upon consideration of the pleadings, the evidence on record and the said submissions, the trial court found that both the plaintiff's and defendants' motor vehicles contributed to the occurrence of the accident and that given the Plaintiff's Motor Vehicle was stationary, its input was lesser than that of the Defendants' Motor Vehicle which was in motion. Consequently, it apportioned liability in the ratio of 60:40 in favour of the plaintiff as against the defendants.

8. On quantum; the trial court entered judgement in favour of the Plaintiff on the following terms:-

    a. Investigators fees Kshs. 69,300.00

    b. Assessors fees nil

    c. Repair charges Kshs.410,640.00

    d. Costs of Repair of Motor Vehicle Registration No. KAY 613 L Volvo Truck- Kshs. 1,500,000.00

    Total Kshs. 1, 979,940.00

    a. Less 40 % contribution = Ksh.791,976.00

    Grand total= Ksh.1, 187,964.00

    b. Costs and interest of the Suit.

9. It is this judgment which provoked the appeal herein. In their Memorandum of Appeal dated May 22, 2020 the appellant set out the grounds of appeal as follows:

    1. That the Learned Trial Magistrate erred in Law and in fact in apportioning liability.

    2. That the Learned Trial Magistrate erred in law and in fact in awarding damages.

    3. That the Learned Trial Magistrate erred in Law and in fact by disregarding the Appellant's submissions and therefore arriving at a wrong decision.

10. The Appellant sought for orders: -

    1. That the Appeal be allowed.

2. That the judgement of the trial magistrate be set aside and be substituted by a judgement of this Court allowing the Appellant's case against the Respondents in Nakuru CMCC NO. 153 of 2017.

3. That costs of the Appeal and costs of the Nakuru CMCC NO. 153 of 2017 be borne by the Respondent.

11. At the hearing of the appeal, directions were taken that the appeal be canvassed by way of Written Submissions and subsequently, the parties herein filed their rival submissions.

Appellant's Submissions

12. The Appellant Counsel submitted on only one issue. i.e. whether the trial magistrate was right in apportioning liability.

13. The Counsel argued that section 107 of the *Evidence Act* provides that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

14. It was also argued that the Appellant pleaded that the 2nd Respondents' Driver was negligent and called two witnesses to prove this fact. He contended that PW2 and PW3 testified that the Appellant's Motor Vehicle was parked off the road when the 2nd Respondent's motor vehicle which was being driven from Eldoret towards Nakuru lost control, collided with the third party Motor Vehicle then veered off its lane and hit the Appellant's motor vehicle which was stationary and off the road.

15. It was submitted that the investigation report which was detailed was produced as exhibit 7 (a) and similarly PW3 corroborated the evidence of PW2.

16. The Counsel further submitted that the speed limit at the location where the accident occurred is 50.

17. KPH and visibility was clear and therefore if the 1st respondent was driving within the speed limit he would have been able to control the 2nd respondent's motor vehicle and avoid causing the accident herein.

18. The Counsel further submitted that parties are bound by their pleadings. Reliance was placed on the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR where the court held inter alia that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings ought to be rejected.

19. On this point counsel averred that the respondents pleaded that the Appellant's Motor Vehicle was parked and therefore the evidence that the Appellant's motor vehicle was in motion should be disregarded as it was at variance with their pleadings.

20. The Counsel further submitted that the trial court correctly held that the Appellant's Motor Vehicle was parked but erred in its finding on liability since it presumed facts which were not pleaded and proved by the Respondents.

21. It was the Appellant's submissions that the respondents failed to prove that they were not negligent and further failed to enjoin(sic) a third party Motor Vehicle, which they blamed its driver for negligent driving.

22. The Counsel also submitted that failure to enjoin(sic) a third party should not be visited upon the Appellant. In support of this position, the Counsel cited the case of *David Katana Ngomba v Shafi Grewal Kaka* [2014] eKLR- where the court stated:

> " The appellant was well aware of the need to join ICDC in the suit but failed to do suit. It is a cardinal rule of evidence that where a party fails to call a critical witness, the court is free to draw an inference that the witness if called would have given adverse evidence against the party who failed to call the witness."

23. The appellant's counsel urged this court to allow the appeal to the extent that the respondents were jointly and severally 100% liable for the occurrence of the accident.

Respondents' Submissions

24. The Respondent concurred with the trial court's finding on liability.

25. It was submitted that the Appellant in making its case on liability relied on the evidence of PW2 who confirmed that he was not the investigating officer and did not visit the scene of the accident and that the Respondents' driver was not charged for any offence.

26. The Respondents argued that PW3 did not produce the police file which would have demonstrated how the said accident took place.

27. It was submitted that there was no evidence that the brakes of the 2nd respondent's motor vehicle KBH 030 L/ZC 2339 failed as no inspection certificate was produced to demonstrate pre -accident defects in the said motor vehicle.

28. They contended that the police abstract produced showed that the matter was pending under investigation. The counsel for the respondents cited the case of *Lochab Brothers Ltd & another v Johana Kipkosgei Yegon* [2017] eKLR where the court stated:

> " Their failure to even produce the investigation report and police file smacks of serious lack of interest in their work which unfortunately has forced me to come to the unenviable conclusion that no sufficient evidence was tendered to connect the 2nd appellant, the driver of the alleged accident motor vehicle Registration KAL 665K to the accident on a balance of probability..."

29. The respondents faulted the Appellant for failing to call the investigating officer to produce the police file. Reliance was placed on the cases of *Kennedy Nyangoya v Bash Hauliers* [2016] eKLR where the court found that the evidence of a Police officer who was not the investigating officer did not assist to build the plaintiff's case since he neither visited the scene of the accident nor produced any sketch plan. Also cited was *Samuel Irungu Njuguna v Francis Kibe & another* [2016] eKLR where the court held that trial magistrate rightfully dismissed the suit for lack of sufficient evidence for reasons that the police officer having not been the investigating officer, and without the police file he could not help the court to determine which party may have caused the accident.

30. The respondents further faulted the appellant for not enjoining(sic) the driver/owner of Motor Vehicle Registration Number KBH 518T/ZD 1235B to testify on occurrence of the accident given it alluded to the motor vehicle being involved in the Subject accident.

31. They submitted that the evidence of DWI that the Appellant's Motor Vehicle Registration number KAY 613L/ZD 1085 unlawfully encroached onto the respondent's motor vehicle lane subsequently causing the occurrence of the accident was uncontroverted.

32. They thus urged this court to uphold the trial court's judgement on liability.

Issues For Determination

33. Having considered the record of appeal, parties' submissions and authorities relied on, it is my view that the only issue that arises for determination is whether the trial court's apportionment of liability was proper. Although the Memorandum of Appeal did refer to the award of damages the appellant's submissions seemed only to address the apportionment of liability by the trial court.

Analysis

34. As an appellate court, this court is guided by the provisions of section 78 of the *Civil Procedure Act*. This being a first appeal, this court is enjoined to re-assess and re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that unlike the trial court, it neither saw nor heard the witnesses as they testified. This legal principle was pronounced in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the Court of Appeal stated that;

> " [A]n 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"

35. Similarly in *Abok James T/A A. J. Odera and Associates v John Patrick Machira T/A Machira and Company Advocates* it was held that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the Learned Trial Judge one to stand as not and give reasons either way."

36. It follows that this court is not being asked to analyse the findings of the trial court and poke holes into it or agree with it. It is only after this court has made its own independent determination that can it can conclude that the trial magistrate's decision is to be upheld or set aside.

37. It is trite that he who alleges must prove. The authors of *Charlesworth and Percy on negligence*, 9th Edition at page 387 stated that; -

> " 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 acts 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 (i) Whether on the evidence, negligence may be reasonably inferred and (ii) Whether assuming it may be reasonably inferred, negligence is in fact inferred. "

38. In the instant case, it is not disputed that the accident did occur and it involved three motor vehicles, namely: Motor Vehicles Registration numbers KAY 613L/ZD 1085; KBH 030L/ZC 2339; & KBH 518T/ZD 1235.

39. The first Motor vehicle belonged to the Appellant; the second belonged to the 2nd respondent while the third one belonged to a third Party.

40. The 1st Respondent was the driver of the 2nd Respondent's Motor Vehicle on the material date.

41. It is also not in dispute that the owner of the third party motor vehicle was not joined in this matter, either as a co-defendant or a 3rd party.

42. According to the Appellant, the evidence of PW2 and PW3 established that the 1st respondent negligently drove the 2nd Respondent's Motor Vehicle and as a result, he caused the accident.

43. In order to address the issue of liability, it is important to look at the evidence of PW 2, PW3 and DW1. The other witnesses did not tender any evidence that would affect my determination on liability.

44. PW2 was Benson Mbuvi Leli, an investigator with Smart Race Loss Assessor. It was his testimony that they were instructed by the plaintiff to investigate the subject accident. He visited the scene at Salgaa Trading centre and noted the road at the site was straight and slightly descends towards Eldoret. He said he took photographs of the scene and that as per the information captured in the OB, on the material date at 12.45 p.m. Motor Vehicle Registration Number KBH 030L/ZC 2339 was coming from Eldoret side and it veered to the right side lane and collided with an oncoming Motor Vehicle Registration number KBH 518 T/ZD/235 and after the impact it veered to its left side and rammed into Motor Vehicle Registration number KAY 613L/ZD/1085 which was parked off the road. He further testified that according to the inspection Report Motor Vehicle Registration Number KAY 613 L/ZD/085 was stationary at the time of the accident. He said their investigation established that Motor Vehicle Registration Number KBH 030L/ZC 2339 was to blame for the accident. He produced the investigation report as Exhibit Number 7(a).

45. In cross examination, he confirmed he did not have a certificate to show he was a trained investigator and he did not witness the accident. He admitted that he never interviewed any eye witnesses. He did not know who reported the accident to the Police. He said he visited the scene of the accident and saw the Appellant's Motor Vehicle was parked about 5 meters off the road within the shopping centre. He said according to photograph no.4 the point of impact was on the left side of the road. He conceded that the Sketch plan was not drawn to scale.

46. PW3 was Obadiah Miyoko Arani, a Police Officer based at Salgaa Police Station. He testified that they received a report of the subject accident at 12.45 hours. He confirmed that the accident happened at Salgaa Trading Centre along the Eldoret- Nakuru Highway ,and that the 1st Respondent was driving the 2nd respondent's Motor Vehicle Registration Number KBH 030L. He further averred that the report they received was that the 1st defendant/respondent lost control after his brakes failed and collided with Motor Vehicle Registration Number KBH 518T/ZD 1235, then he swerved and hit a stationary Motor Vehicle Registration number KAY 613L/ZD 1085. As a result of the impact the said Motor Vehicle Registration number KAY 613L/ZD 1085 overturned and killed its driver who was inside. He said the driver of Motor Vehicle Registration Number KBH 030L was to blame for the accident.

47. In cross examination, he said Motor Vehicle Registration Number KAY 613 L was being parked on the left side of the road. He confirmed he never visited the scene and that no sketch map had been produced. He said the speed limit at trading centre is 50 KM/HR and the road was very clear.

48. DW1 was John Nyongesa. He was a conductor of the 2nd Respondent's Motor Vehicle. He testified that on the material day, they were travelling from Eldoret heading to Nakuru. On nearing Salgaa, an oncoming truck Registration Number KAY 613L/ZD 1085 crossed into their lane and 2nd Appellants Motor Vehicle hit it. He said the stationary truck was KBH 518T/ZD 1235 and it was hit by the oncoming truck, namely Registration Number KAY 613L/ZD 1085 .

49. He stated that the accident occurred on their left lane as you head to Nakuru. He blamed the Appellant's Motor Vehicle for leaving its lane and causing the accident.

50. In cross examination, he stated that he erroneously stated in his statement that Motor Vehicle Registration Number KBH 030 L was not stationary. He said Motor vehicle Registration number KBH 518 T was not moving. He disputed that Motor Vehicle Registration Number KAY 613 L was parked.

51. In civil cases, a plaintiff is required to prove his claim against the defendant on the balance of probabilities. This position was clearly stated in the case of Kirugi & Anor. vs Kabiya & 3 Others [1987] KLR 347 wherein the Court of Appeal stated that the burden was always on the plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof.

52. The burden of proof in civil cases on the balance of probability was defined in the case of Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

53. It is my considered view that this is a case where the plaintiff/appellant ought to have aided the trial court by availing the evidence of the turn boy, who was in its vehicle at the time of the accident. It is not known why he did not testify, despite filing a witness statement.

54. That said the court still has a duty to determine who was to blame for the accident. PW2 stated that he visited the scene of the accident and according to their investigation, the Appellant Motor Vehicle was hit while it was parked off the road by the 2nd respondent's motor vehicle. With all due respect PW2 cannot be an authority on what transpired on the material day. He was commissioned by the plaintiff to do the investigations so his evidence must be taken with a pinch of salt. Further, he did not find the vehicles at the scene. Therefore he cannot purport to tell the court how the accident occurred. That was the work of the police investigators.

55. PW3, a police officer admitted that he was not the investigating officer but he was from the same police station. Even though the respondents challenged his evidence, it is clear that he was referring to the reports made to the station, and not his own opinion. From those reports, it is clear that the appellant's truck was parked off the road. The respondents' witness purported to claim that the appellant's truck was moving in the opposite direction but this is not the case. Even in their defence, the respondents did aver that the said truck was parked but on the wrong side of the road.

56. DW1 testimony that the Appellant's Motor Vehicle encroached to the 2nd respondent's Motor Vehicle lane was clearly a departure from the defence filed and as correctly submitted by the Appellant the same should be disregarded. The said witness went as far as claiming that the appellant's vehicle was hit by the 3rd party's vehicle which is not the position. This is more reason to dismiss the evidence of DW1. The trial court also rightly found that the Appellant's Motor Vehicle was parked.

57. The driver of the 2nd respondent's motor vehicle was driving at a straight stretch of the road. The appellant's vehicle was parked off the road. There is no law requiring the appellant to park on a

particular side of the road. All that he was required was to be clear of the road to avoid obstructing other motorists. There is no suggestion that the appellant's truck was on the road. Therefore there is no way it could have been held liable for the accident. Even assuming that the 1st respondent hit the the 3rd party motor vehicle, he cannot blame the appellant's driver for the accident. If the 3rd party's driver was encroaching on his lane as alleged, it was incumbent upon them to join the said third party in this matter Pursuant to order 1 rule 15 of the *Civil Procedure Rules,* 2010. Order 1 rule 15 provides for an elaborate procedure to be undertaken by a defendant claiming against a person not already a party to the suit. Order 1 rule 15 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."

58. That did not happen. The plaintiff/appellant was entitled to sue the driver/owner of the vehicle that actually hit its vehicle and that was the respondents. A court of law can only determine the case or issues between the parties who are before it and not those parties who should have been or are yet to appear before it.

59. In its judgment, the trial court did point out that the owners of motor vehicle registration number KAY 613L/ ZD 1085 were not joined as 3rd parties. Clearly the trial magistrate forgot that the owners of the said vehicle were the plaintiffs in the suit. The court then proceeded to analyse the case on that basis. I am of the opinion that the court made an error in asking that the plaintiff be joined as a 3rd party.

60. Further, despite clearly confirming that the appellant's vehicle was stationary, off the road and that it was not the one being driven in the opposite direction, the trial magistrate went ahead to find that it contributed to the accident . If it did appreciate this fact, it could not have apportioned liability in the manner it did. I suspect that the apportionment was based on the incorrect conclusion that the appellant's vehicle was moving and went into the path occupied by the 2nd respondent's vehicle.

61. After looking at the circumstances surrounding the occurrence of the accident, I do opine that the 1st respondent was negligent as he failed to control the vehicle. That was also the finding made by the police, according to PW3.

62. In addition, the 1st Respondent must have been over speeding since the impact led to the death of the Appellant's driver and extensive damage of the Appellant's motor vehicle. This was a built up area,

whose speed limit, as stated by PW3 was 50 KPH. If that speed was maintained there would have been less damage to the appellant's vehicle.

63. This court finds that there are valid grounds to interfere with the lower court's determination on liability and for the reasons advanced above hold the respondents 100% liable for the accident.

64. As stated earlier, the appellant did not really contest the trial court's finding on quantum, although the Memorandum of Appeal casually mentions the same. No submissions were made on the same. That being the case, the court will not interfere with that finding.

65. Since the Appeal was only on liability, this court orders that each party should bear their own costs.

DATED AT NAKURU THIS 26TH DAY OF APRIL, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

N/A for parties

Ms Kamau from Murimi Ndumia & Co. Adv. for Respondent