Nduda v Hakika Transport Services Ltd (Civil Appeal 199 of 2019)
[2023] KEHC 22012 (KLR) (27 June 2023) (Judgment)

Neutral citation: [2023] KEHC 22012 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 199 OF 2019

DKN MAGARE, J

JUNE 27, 2023

BETWEEN

PIUS KYALO NDUDA ..... APPELLANT

AND

HAKIKA TRANSPORT SERVICES LTD ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment of Honorable G Kiage Senior Resident Magistrate in Mombasa Civil Case No. 1353 of 2016 delivered on the 12th September 2019. It is an appeal of part of liability.

Appellant's Submissions

2. The appellant wrote 9-page submissions to the effect that the court had no basis for finding the appellant 40% liable in contributory negligence without evidence to that effect. They reiterated the 4 grounds of appeal they had filed. They posit that there is no appeal on quantum. They submitted that the subject accident occurred o 12/7/2015.

3. It is their submission that the Respondent's contention in the lower court was that the accident did not occur. The Appellant's view was that contributory negligence was neither pleaded nor proved. They were of the view that one cannot be held contributorily liable without evidence to that effect. They relied on two decisions. The first one was *IRS Group Limited v Kennedy Odhiambo Andwak* [2016] eKLR, where Justice D S Majanja, held as follows: -

> "This means that the Court will assess all the evidence advanced by each party and decide which case is more probable. In *Palace Investments Ltd v Geoffrey Kariuki Mwenda and Another* NRB CA Civil Appeal No. 127 of 2007 [2007] eKLR, the Court of Appeal

adopted the dictum of Denning J., in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing that burden of proof as follows;

> " That 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 probable than not', the burden is discharged, but, if the probabilities are equal, it is not.
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> Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

4. They question the holding by the court below that the Appellant contributed to the accident by his conduct. They state an analysis of the Defence does not show the conduct complained of and the particulars of contributory negligence were not pleaded. They state that the evidentially burden placed on the Respondent remained un-discharged. Reliance was placed on sections 107-109 of the *Evidence Act*.

5. The said sections provide as doth: -

> " 107. Burden of proof
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> (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.
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> (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.
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> 108. Incidence of burden
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> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
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> 109. Proof of particular fact
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> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

6. The Appellant relied extensively on the case of *Antony Francis Wareham T/a AF Wareham & 2 others v Kenya Post Office Savings Bank* [2004] eKLR, where the Court of Appeal, O'kubasu JA, Onyango-Otieno & Ringera AG JJ A made itself clear that: -

> " Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the *Civil Procedure Rules*. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of

facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

7. The Appellant urged me to allow the Appeal.

Respondent's Submissions

8. The Respondent filed its submissions on 22/2/2023. The identified one issue, that is whether the trial court erred in finding the Appellant 40% liable for the accident.

9. The Respondent relied on the case of *Peter v Sunday* (1958)EA 124 on the duty of the appellate court and the court's jurisdiction to review the evidence of the court below. Their lordships rendered themselves as thus: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

10. They state that PW1, the police officer, did not come to court with the police file, and instead only came with the OB register. It is their submission that PW1 was not the investigating officer and that the OB entry was by a village elder who was an eye witness to the accident. The Respondent submits that the eye witness as per the OB entry stated that the Plaintiff was drunk at the time of the accident.

11. They also question the police abstract which they state was issued more than 2 years after the accident had occurred. Further, when the Police Officer was testifying, the file was pending under investigation and the Defendant driver had not been charged. They state that no one was found guilty for the accident.

12. With regards to negligence, the Respondent submits that the Appellant did not plead res ipsa loquitor and as such, the court cannot make an inference of negligence in absence of such a pleading. They state that the appellant's conduct being referred to was being drunk. They urge the court to dismiss the Appeal in limine for being bereft of merit.

13. They deny the occurrence of the accident all together. However, they submit that if the accident did occur then it was not proved that the same was as a result of the negligence of the Defendant driver.

14. They submit that the Defendant driver was simply reversing his vehicle and the Plaintiff, being drunk, failed to move out of the way.

15. They further submitted that the evidence of the Plaintiff in the lower court did not prove his case on a balance of probabilities. They state that PW-4, who testified to have witnessed the accident did not give a statement to the police concerning the witnessing of the accident. The submit that the aforementioned village elder who both witnessed the accident and made an OB entry was not called upon to testify. They state that the Plaintiff did not mention the alleged eye witness PW4 in his statement nor evidence in court. It is their submission that PW4 was only meant to plug the holes in the case of the Plaintiff, particularly the entry in the OB that the Plaintiff was drunk at the time of the accident.

16. They submitted that the Plaintiff's testimony also did not go towards proving the Plaintiff's allegations. They state that the Plaintiff's allegation that he was knocked down when the vehicle was reversing and that prior to that he had been assisting the driver to offload firewood does not hold water because then, the driver couldn't possibly not have been aware of the presence of the Plaintiff when reversing

the lorry. Further they question how it could be that the driver did not pay the Plaintiff if indeed the Plaintiff left his kiosk to assist with the offloading.

17. They conclude that it is possible that due to the Plaintiff's drunken state, he did not offload any firewood nor did he know of his whereabouts. Further, he had no proof of any business he was running.

18. They further submitted that the evidence of PW4 was inconsistent with that of the Plaintiff as PW4 in examination in chief stated that it was the owner of the vehicle who offloaded the firewood from the vehicle only to change his story during cross-examination that it was the Plaintiff who was doing the offloading. They question PW4's evidence that he went to the police station right after the accident instead of accompanying the Plaintiff to hospital. Further, PW4 even after going to the police station did not record a witness statement and was never mentioned by the Plaintiff or by the eye witness village elder.

19. All in all, the Respondent states that there were a lot of inconsistencies and contradictions between the evidence Plaintiff, the village elder and PW4.

20. The Respondent concludes its submissions by faulting the court's finding of 60% liability on the part of the Respondent. They state that the court did not explain this finding of liability.

21. The Respondent urges the court to find that there is no merit in the Appeal and to find the Appellant 100% liable for the accident.

Duty of the first Appellate court

22. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

23. In the case of *Mbogo and Another v Shah* [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

24. The duty of the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows: -

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

25. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

26. I agree with the Respondent on the holding in the locus classicus case of *Peters v Sunday Post Limited* [1958] EA 424. The holding was reiterated in the case of *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) IKAR 278 , where the Court of Appeal stated that:

> " A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have alter on wrong principles in reaching the findings he did"

27. The Appellant raised a 4-paragraph memorandum of appeal. The grounds are prolixious and repetitive. It raised only one issue. Under Order 42 Rule, 1 the law provides are doth: -

> " 1. Form of appeal –
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> 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

28. The court of Appeal had this to say in regard to rule 86 (which is pari mateira with order 42 Rule 1) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:
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> > " We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

29. Further in *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the court of appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In

William Koross v Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:

> " The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

30. The memorandum of appeal raises only one issue, that is,

> " whether the court could find contributory negligence without pleading and evidence to that effect."

31. In the defence filed, the defendant denied negligence on their part and denied the occurrence of the accident. There was no pleading of contributory negligence. Therefore, the court could only find if the accident occurred and if so who's to blame? It could not find contributory negligence on the Appellant in absence of pleadings to that effect.

32. Order 2 rule 10 of the *Civil Procedure Rules* provide as doth: -

> " 10. Particulars of pleading
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> (1) Subject to sub rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
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> (a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and
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> (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.
>
> (2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.
>
> (3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of subrule (2), the court may, on such terms as it thinks just, order that party to serve on any other party—
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> (a) where he alleges knowledge, particulars of the facts on which he relies; and
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> (b) where he alleges notice, particulars of the notice.

(4) An order under this shall not be made before the filing of the defence unless the order is necessary or desirable to enable the defendant to plead or for some other special reason.

(5) No order for costs shall be made in favour of a party applying for an order who has not first applied by notice in Form No. 2 of Appendix B which shall be served in duplicate.

(6) Particulars delivered shall be in Form No. 3 of Appendix A which shall be filed by the party delivering it together with the original notice and shall form part of the pleadings."

33. It is therefore necessary that the defence pleads particulars of negligence. Indeed, if it is true that they intend to blame the Appellant they not only need to plead but also prove particulars of negligence. By purporting to find the Appellant liable in contributory negligence, the court surprised the Appellant. Order 2 rule 4 provides as follows: -

" 4. Matters which must be specifically pleaded

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

(3) In this "land" includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land.

34. Contributory negligence was not pleaded in the plaint. If the Respondent wished to rely on the same, they needed to plead the same, otherwise they will ambush the Appellant.

35. The law of contributory negligence is settled. In the case of *Moi's Bridge Quarry Limited v Martin Omuse Edoan* [2022] eKLR Justice E K Ogola posited as doth: -

" The law on contributory negligence is to apportion proximate cause and blameworthiness where appropriate. In *De Frias v Rodney* 1998 BDA LR 15 it was held as follows:

" Contributory negligence required the foreseeability harm to oneself. A person is guilty of contributory negligence, if she ought reasonably to have foreseen

that if she did not act as a reasonable prudence person she might be hush and in reckoning must take into account the possibility of others being careless. All that is required here is that the plaintiff should have failed to take reasonable care for her own safety. I do not find that the plaintiffs conduct was in any way contributory negligence. In the agony of the circumstances she made an unsuccessful attempt to avoid the conclusion."

36. In the decision of *Fidelity Commercial Bank Limited v Fazila Shariff-Tejpar* [2015] eKLR, the court of Appeal stated as doth: -

> " We find that the evidence of PW1 and PW2 was supported by the statements issued by the appellant. We are also in agreement with Mr. Sehmi's submission that a litigant who alleges contributory negligence must so plead. In any event we do not think that the respondent contributed to the loss. The respondent had no reason to doubt the appellant's employees, more so it's Chief Manager. As admitted by the appellant's witness (Philip Muoko), Mr. Abbas was reported to the Anti- Banking Fraud Unit and had since disappeared. The Respondent cannot be blamed for negligence if the bank retained as its employee a person who had questionable integrity and who was less than honest. It was not anticipated that the respondent would be dealing with a potential fraudster. We therefore find that there was no contributory negligence on the part of the respondent."

37. Again, it is not enough that contributory negligence be pleaded. It must also be proved. A party cannot throw particulars of negligence to the court and ask for judgment. There must be cogent evidence tendered in support of contributory negligence. Without such proof, the court had no jurisdiction to find contributory negligence. The Court of Appeal held in *Embu Public Road Services Ltd v Riimi* [1968] EA 22 that: -

> " ...where the circumstances of the accident give rise to the inference of negligence then the defendants, in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence."

38. The Defence witness was of the considered view that there was no accident. He gave a story that the court below did not believe. There was no appeal against the finding of 60% liability. There was no basis both from the pleadings and evidence to find the Appellant 40% liable. Accordingly, the court enters a finding of 100% liability against the 1st and 2nd Defendants, jointly and severally.

39. It is true that the defence witness testified. However, he did not testify on the occurrence of the accident. The court did not believe him. Having failed to explain how the accident occurred, the Appellant's evidence remained uncontroverted. The appellant tendered uncontroverted evidence, that the defendant was to blame for the accident. The evidence, on a prima facie basis, was believable and cogent.

40. The Respondent had a duty to unsettle that evidence. Without defence evidence, a court properly and judiciously considering the evidence is bound to find the Respondent liable. This can only be displaced by other cogent evidence from the Respondent. This was not forthcoming.

41. The court of appeal in the case of *Nandwa -v- Kenya Kazi Ltd* [1988] KLR 488 restated the position of such evidence as: -

> " In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in favour of the plaintiff unless the defendants' evidence provides some answer adequate to displace that inference.."

42. The Respondent was handicapped in two aspects. They had not pleaded negligence on one part and had not tendered evidence on negligence on the other. The court could thus believe them and dismiss the suit or disbelieve them and find the Respondents 100%. There is no middle ground.

43. The court below thus fell into error of prefabricating between the two parties and appeased them by taking a middle ground. In matters of this mature there is nothing in the middle. This enables parties to tell their legal advisers the true position.

44. In the end I have said enough to state that the Appellant's Appeal is merited. It is begging me to allow it and I oblige.

Determination

45. The upshot of the forging is that I make the following orders: -

a. I allowed the appeal in its entirely. I set aside the judgment on liability at 40: 60 and substitute therein a finding of l00% liability in favour of the Appellant against the Respondent.

b. General and special damages remain as per the judgment of the court below, that is: -

i. General damages for pain, suffering and loss of amenities Ksh. Ksh. 2,000,000/=

ii. Loss of earning capacity Ksh 600,000/=

iii. Future medical expenses Ksh 100,000/=

iv Special damages Ksh 3,000/=

v Total Ksh 2,703,000/=

a. The Appellant shall have costs of Ksh. 135,000/= for the appeal.

b. The Appellant shall have costs in the lower court.

c. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 27TH DAY OF JUNE, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the Appellant

Mr. Shikey for the Respondent

Court Assistant - Brian