Mukhwana v Murule (Civil Appeal 81 of 2021)
[2023] KEHC 24226 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24226 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 81 OF 2021

DK KEMEI, J

OCTOBER 27, 2023

BETWEEN

PETER WABWOBA MUKHWANA ..... APPELLANT

AND

SETH ASWANI MURULE ..... RESPONDENT

(Being an appeal arising from the judgment delivered on 6/12/2021 by Hon. E.N. Mwendwa (P.M) in Bungoma CMCC No. 87 of 2021)

JUDGMENT

1. The appellant herein had filed his suit before the subordinate court seeking general damages, future medical expenses, special damages, costs and interest. According to his plaint dated 6th April, 2021, he pleaded That on 12/2/2021 he was lawfully riding motorcycle registration No. KMEU 363R along Mumias- Bungoma road when the respondent's motor vehicle registration No. KBZ 439N lost control, veered off its lane and knocked the motor cycle thereby occasioning him severe bodily injuries which he described as soft tissue injuries.

2. The respondent opposed the allegations contained in the plaint. He filed his memorandum of appearance and statement of defence dated 18/5/2021 wherein he denied the contents of the plaint and pleaded in the alternative That if the accident occurred, then the same was not in any way due to his negligence but That the same was caused by the negligence of the appellant. He denied the applicability of the doctrine of res ipsa loquitor and the provisions of the *Traffic Act* and Highway Code.

3. The trial magistrate, after considering the evidence and submissions before him, dismissed the suit. The court found That the respondent's narrative on the occurrence of the accident was more accurate than That of the appellant and found That the balance of probabilities had tilted in favour of the respondent.

4. The appellant, being dissatisfied with the finding of the trial court, preferred the present appeal vide his memorandum of appeal dated 20th December 2021 wherein he raised the following grounds:

    1. That the learned magistrate erred on both law and fact when he dismissed the Appellant's suit without considering the testimony and documentary evidence placed before him by the appellant and hence occasioning a miscarriage of justice.
    2. That the learned magistrate failed to find That the Appellant had proved his case on a balance of probability and hence entitled to the reliefs sought in his plaint.
    3. That the learned magistrate erred on law and fact when he failed to analyse and consider the submissions and case law put forth by the appellant.
    4. That the learned trial magistrate erred in both law and fact when he failed to find That the respondent was the sole author of the accident.
    5. That the learned magistrate erred in law and fact when he took into consideration matters That were not before him hence occasioning a miscarriage of justice,
    6. That the judgment is poorly reasoned and hence occasioning a miscarriage of justice.

5. The appeal was canvassed by way of written submissions. Both parties duly complied. The appellant abandoned his appeal on quantum as he made no submissions on the same and is only challenging the issue of liability in his submissions. The appellant submits That the trial magistrate having found That the court was faced with two diametrically opposed narratives of what transpired at the material time, then he erred when he dismissed the appellant's case. In Ndatho v Chebet (Civil Appeal 8 of 2020) (2022) KEHC 346 (KLR) (6MARCH 2022) the court held as follows:

> "Justice Majanja stated That where the court is unable to determine who is to blame, it has to apportion liability equally as illustrated by the Court of Appeal in Hussein Omar Farar v Lento Agencies C.A Nairobi, Civil Appeal No.34/2005 [2006] eKLR where it observed That-
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> > "In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions That if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

6. The appellant submits That the respondent was 100% liable for the accident. He also placed reliance on the case of Kennedy Macharia Njeru v Packso Githongo Njau & Another (2019) eKLR.

7. The respondent in his submissions dated 1st August 2023 argues That the appellant was the principal witness and did not call any eye witness or the investigating officer to shed light on how exactly the accident occurred. The respondent also testified That he was driving in his lane and That the point of impact was in his lane. The onus of proof fell upon the appellant to prove his case and shift the balance of probabilities in his favour. He maintained That the appellant failed to discharge the standard of

proof set out in sections 107 and 109 of the *Evidence Act*. In Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001, the court held as follows:

> " It is trite That where a party fails to call evidence in support of its case, That party's pleadings remain mere statements of facts since in so doing the party fails to substantiate its pleadings."

8. In Sally Kibii and Another v Francis Ogaro (2012) eKLR the court stated:

> " The Plaintiff in the trial court only produced two witnesses who admitted they did not witness the accident and could not tell how it happened. The Police Abstract showed That the accident was by collusion of two vehicles and investigations were underway. The failure of the police to determine from the scene of the accident which motor vehicle was to be blamed and the absence of an eye witness evidence diminishes the Appellant's chance to prove a case for negligence against the Defendant."

9. The respondent submits That apart from the fact That the accident took place, in the absence of any corroborative evidence of an independent eye witness, the evidence of the appellant as to how the accident took place, has been controverted by the evidence of the respondent who witnessed the accident. He also relied on the case of Nzoia Sugar Company Limited v David Nalyanya [2008] eKLR where the court observed:

> " From the evidence on record, I do not see any evidence adduced on the manner in which the lorry in question was being driven. The issue of excessive speed, failing to keep any proper look out for other motor vehicles etc. was not even advanced in the plaintiff's evidence. Indeed, the plaintiff's evidence is only to the effect That the accident occurred."

10. He also urged the court to strike out the appeal on the grounds That the appellant did not include a copy of the decree in the record of appeal. He cited the decision in Kilonzo David t/a Silver Bullet Bus Company v Kyalo Kituku & another eKLR where the court held as follows:

> " 12. Despite the provisions of Article 159 (2) (d) of *the Constitution* of Kenya, 2010 That mandates courts to administer justice without undue regard to procedural technicalities, this court took the firm view That omission to include the decree or order to be appealed from in the Record of Appeal was not a procedural technicality for the reason That the word "shall" in Order 42 Rule 2 of the Civil Procedure Rules contemplates That the furnishing of the decree or order is mandatory and cannot be wished away."

Analysis and determination

11. This being a first appellate court, the role of this court is provided for under section 78 of the *Civil Procedure Act* and espoused in the case of Kenya Ports Authority vs Kushton (K) Ltd (2009) 2 EA, 212 wherein the Court of Appeal stated;

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusion through it should always bear in mind That it has neither heard the witnesses and should make due allowance in That respect. Secondly, That the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

12. Sections 107 and 108 of the *Evidence Act* stipulate the party who bears the burden of proof with respect to a matter in issue. The burden of proof in civil cases is on a balance of probabilities. Peter Wabwoba Mukhwana (Pw1) adopted his witness statement as his evidence in chief. He testified That the vehicle was on the right side of the road as one faced Mumias and That he was heading to Mumias on the left side of the road. Another motorcycle was in front of the vehicle. At Sibembe area, the vehicle started overtaking the motorcycle ahead of it without regard That Pw1 was approaching from the opposite direction thereby causing the accident. The accident occurred on the left side of the road. He stated That he was wearing a helmet and a reflector jacket when the accident occurred. On cross-examination, he testified That there was no other vehicle in front of him.

13. Seth Aswani Murule (Dw1) adopted his witness statement dated 3/8/2021 as his evidence in chief. He testified That while driving along the Mumias-Bungoma highway a careless boda boda rider who was recklessly overtaking a lorry rammed into his vehicle. He was driving at 50km/hr when the rider overtook without checking for oncoming vehicles. Dw1 veered off the road in an attempt to avoid knocking Pw1 but he had already come very close and was on Dw1's lane. Pw1 rammed onto the right front side of his vehicle damaging the headlamp, bumper and grill. He reported the accident at the police station and That Pw1 was blamed for the accident.

14. The trial court in dismissing the suit stated as follows:

> " The plaintiff says That the defendant was overtaking a motorcycle. The court takes judicial notice of the width of a motorcycle as opposed to the width of a vehicle. The plaintiff testified That there was no vehicle ahead of him. The road was clear. Presuming That he was keeping to his extreme left (this being the rule of the road) and presuming That the motorcycle being overtaken was also being driven on its extreme left. Then the likelihood of the plaintiff not being able to veer to his extreme left to avoid an oncoming motor vehicle straying onto his path is less likely than a motorcycle emerging from behind a vehicle thereby impacting itself on the right-hand side of an oncoming vehicle. Therefore, the balance of probabilities tilts in favour of the defendant."

15. The trial magistrate in his judgment considered That the appellant was keeping to his extreme left, however, this did not emerge from his testimony during his evidence in chief or cross-examination. Pw1 was clear That he was on the left side of the road as one faces Bungoma. Therefore, the trial magistrate's reliance on presumptions rather than the available factual evidence was a misdirection on his part.

16. The trial court correctly stated in its decision That the appellant and respondent had offered two diametrically opposing narratives. In my view, it was not possible to decide which party was at fault. In such cases the Court of Appeal in Hussein Omar Farah v Lento Agencies [2006] eKLR observed as follows:

> " In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions That if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.....
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> The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted That the fault lay with the other side. As no side could establish the fault of the opposite party, we would think That liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."

17. I therefore find the two drivers to be equally at fault considering That the appellant and respondent gave two opposing accounts of how the accident occurred and That each claimed That the other party was at fault. It transpired That none of the parties called any eyewitness and hence it was the story of the appellant as against That of the respondent.

18. The trial court found That if the appellant had been successful, he would have awarded him general damages of Kshs 250,000/- on account That the appellant lost consciousness and sustained moderate soft tissue injuries. The appellant having succeeded in this appeal, I find That an award of general damages in the sum of Kshs 250,000/- is appropriate in the circumstances. On special damages, it is noted That the appellant had pleaded a total sum of Kshs 8, 290/ and That the requisite receipts were produced in evidence. I award the said sum. The said awards will of course attract 50% contributory negligence. Towards That end, it is thus clear That the finding of the learned trial magistrate was in error and must therefore be interfered with.

19. In view of the foregoing observations, it is my finding That the appeal has merit. The same is allowed. The judgement of the trial court dated 6/12/2021 is hereby set aside and substituted with a judgement being entered in favour of the appellant as against the respondent at 50% liability, General damages of Kshs 250, 000/ and special damages of Kshs 8, 290/. As the appeal has succeeded, the appellant is awarded half costs of the appeal as well as full costs in the lower court.

DATED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF OCTOBER 2023.

D.KEMEI

JUDGE

In the presence of :

Kinoti for Appellant

Mechi for Bw'Onchiri for Respondent

Kizito Court Assistant