Macharia v Kirimi & another (Civil Appeal 60 of 2019)
[2023] KEHC 24185 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24185 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 60 OF 2019

FN MUCHEMI, J

OCTOBER 26, 2023

BETWEEN

MARTIN MACHARIA ..... APPELLANT

AND

MARTIN MWENDA KIRIMI ..... 1ST RESPONDENT

RUNGA KAGWIRIA FRIDAH ..... 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. P. M. Mugure (SRM) delivered on 22nd July 2019 in Wang'uru PMCC No. 126 of 2018)

JUDGMENT

Brief facts

1. This appeal arises from the judgment in Wang'uru PMCC No. 126 of 2018. The claim arose from a road traffic accident whereas the court found that the appellant failed to discharge the required burden of proof and dismissed the suit.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 6 grounds summarized as follows:-

    a. The learned trial magistrate erred in law and in fact in finding that the appellant did not discharge the burden of proof and thus dismissed the suit;

    b. The learned trial magistrate erred in law and in fact by imputing liability on a non-existent party (motor cycle rider) who was not a party to the case;

    c. The learned trial magistrate erred in law by disregarding Order 1 Rule 15 of the Civil Procedure Rules in respect of third party claims as advanced by the defendant blaming the motor cycle rider for the accident.

3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant relies on Section 107 of the *Evidence Act* and the cases of William Kabogo Gitau vs George Thuo & 2 Others [2010] eKLR and Miller v Minister of Pensions [1947] 2 ALL ER 372 and submits that he proved his case on a balance of probabilities. The appellant submits that it is not disputed that an accident occurred between himself as a pillion passenger and motor vehicle registration number KCF 393M belonging to the respondents and that as a result of the accident, the appellant sustained bodily injuries.

5. The appellant submits that on the material day he was a pillion passenger on board a motor cycle when motor vehicle registration number KCF 393M hit and knocked him down from behind the said motor cycle. He further submits that the said motor vehicle was being driven carelessly and was over speeding and further that the respondents failed to keep a safe distance from the motor cycle. The appellant further denies the allegation by the respondents that the motor cycle joined the road abruptly from a junction as there was no junction at the scene of the accident.

6. The appellant submits that the 1st respondent DW1 testified that he was driving motor vehicle registration number KCF 393M destined for Meru and on reaching the scene of the accident, he hit the motorcycle and consequently, the appellant sustained bodily injuries. The appellant further submits that DW1 stated that on reaching Kimbimbi area, he noticed the subject motor cycle with one adult and 2 minors and the rider. The witness confirmed that the motor cycle was approximately 20 metres from his vehicle and that the impact was on the left side mirror and left side bumper. The appellant thus argues that the 1st respondent was at a better position to slow down or apply emergency brakes to avoid the accident. Further, DW1 was a professional driver, trained to handle the subject motor vehicle on a public road and thus he could have easily avoided the accident by utilizing skills acquired. Moreover, he ought to have hooted, applied his brakes or stopped the motor vehicle to avoid the accident.

7. The appellant further submits that the 1st respondent admitted that the motor cycle was on the extreme left side of the road which clearly indicates that the rider was cautious of his safety. Furthermore, the impact was on the left side mirror and left side bumper which clearly indicated that the motor cycle was not in the middle of the road as alleged by the 1st respondent.

8. The appellant further submits that the 1st respondent was negligent and reckless as he saw the motor cycle before the accident and proceeded to hit and knock him down with the left side of the mirror and bumper despite driving at a moderate speed of 50 km/hr, which speed the appellant argues was moderate enough to allow the 1st respondent to slow down or apply emergency brakes.

9. The appellant argues that the allegations that the motor cycle swerved into the middle of the road abruptly is untrue as the impact was on the left side mirror and bumper of the 1st respondent's motor vehicle. The appellant further argues that the point of impact clearly shows that the rider was on the extreme left side of the road and that it is the 1st respondent who failed to keep a safe distance from the motor cycle. The appellant further argues that the allegations that the motor cycle was overloaded is not paramount as he was in the company of his two minors aged 10 months and 3 years. Moreover, the appellant argues that there is no indication or allegation that the rider lost control of the motor cycle due to the alleged number of pillion passengers.

10. The appellant relies on Order 1 Rule 15 of the Civil Procedure Rules and the case of James Gikonyo Mwangi vs D. M. (Minor suing through his mother and next friend I. M. O) [2016] eKLR and argues

that the respondents ought to have instituted third party proceedings if they blamed the rider of the motor cycle for the accident, as he was not a party to the current suit.

11. The appellant submits that as a result of the accident he sustained the following injuries:-

    a. Laceration on the right knee;

    b. Bruise on the right elbow

    c. Blunt chest injury

    d. Blunt injury to the hip.

12. The appellant submits that an award of Kshs. 350,000/- was reasonable and sufficient compensation and he relies on the following cases to support his contentions:- Mogaka Sydney t/a Kenya Bus v Faith Ndunge Nyundo [2018] eKLR where the plaintiff sustained similar injuries and the court awarded him damages at Kshs. 300,000/-; Catherine Wanjiku Kingori & Another vs Gibson Theuri Gichubi Civil Suit No. 320 of 1998 where the court awarded the plaintiff Kshs. 350,000/- for similar injuries; Amal Hauliers Limited v Abdulnassir Abubakar Hassan [2018] eKLR where the court awarded the plaintiff Kshs. 250,000/- for similar injuries and Kitale Hauliers Limited v Emmanuel Soita Simiyu [2013] eKLR where the court awarded the plaintiff Kshs. 200,000/-.

The Respondents' Submissions

13. The respondents submit that the appellant's testimony was contradictory in itself and further contradicted his pleadings as in his witness statement and pleadings stated that motor vehicle registration number KCH 393M caused the subject accident yet the respondents' motor vehicle was registration number KCF 393M. Furthermore, the appellant submitted that the accident occurred on 15th September 2017. Additionally, the injuries sustained by the appellant as indicated in the plaint and medical records produced do not have any injury to the backbone yet the appellant testified that he was hit on the backbone. Moreover, the treatment note from Our Lady of Lourdes Mwea Hospital dated 6th November 2019 indicated that the appellant sustained injuries after a fall when riding a motor cycle and therefore they do not include a back injury.

14. The respondents further argue that the appellant testified that he was involved in an accident at Samson Corner (a junction) while he denied that there was a feeder road. Furthermore, he testified that he was the only pillion passenger yet his documents as produced, confirmed that there were two pillion passengers. The appellant repeatedly testified to falsehoods as he maintained that he was the only pillion passenger yet the police abstract he produced indicated the names and contacts of the 2nd pillion passenger.

15. The respondents submit that the appellant called a police officer as his witness who produced the police abstract and on cross examination, she confirmed that the case was still pending under investigation and she could not tell who was to blame for the accident. The witness further testified that she was not the investigating officer and that she did not bring the police file to court.

16. The respondents contend that their witness DW1, the driver of the motor vehicle testified that the motor cycle carrying two pillion passengers, appeared from a feeder road and crossed the road abruptly.

17. The respondents argue that the appellant's case was filled with falsehoods and raised a lot of queries as to the reason why the rider of the motor cycle disappeared from the scene after the accident occurred instead of waiting for the police to record his statement. Further, the appellant did not call the 2nd pillion passenger as a witness despite the fact that her details were clearly indicated in the police

abstract. Furthermore, DW1 was not charged with any offence and thus could not be in the wrong. The respondents further contend that the police officer witness did not have any sketch map or the police file yet she was not the investigating officer. Thus, the respondents argue that the appellant failed to prove his case on a balance of probabilities as held by the trial court. The respondents contend that the trial court made its findings based on the appellant's failure to discharge the burden of proof and not that the court blamed an absent party as alleged by the appellant. Moreover, the respondents contend that if the rider was never found even by the police how could they trace the third party for service. To support their contention, the respondents rely on the case of Helle Sejer Hansen & 2 Others v Julius Kakungi Mukavi [2020] eKLR. The respondents contend that the appellant failed to sue the right party and also convince the court that the respondents were liable and therefore cannot fault the trial magistrate for applying common sense to the facts presented to the rule that the case was not proved on a balance of probabilities. To support their contentions, the respondents rely on the case of Michael Hubert Kloss & Another v David Seroney & 5 Others [2009] eKLR.

Issue for determination

18. The main issue for determination is whether the appellant proved his case on a balance of probabilities.

The Law

19. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another v Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " .....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 allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

20. It was also held in Mwangi v Wambugu [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

21. Dealing with the same point, the Court of Appeal in Kiruga v Kiruga & Another [1988] KLR 348, observed that:-

> " An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

22. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the appellant proved his case on a balance of probabilities.

23. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & Another v Mahithi & Another [1968] EA 70 it was held that:-

It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

24. The appellant testified that he was a pillion passenger on a motor cycle which he could not give the details of the registration number, when he was knocked from behind by motor vehicle registration number KCF 393M. PW2, the appellant testified that the accident occurred a Samson corner and that the respondents' motor vehicle was being driven at a high speed. The witness further testified that he was the only pillion passenger on the motor cycle. PW1, a police officer testified that she was not the investigating officer and further that she did not visit the scene of the accident nor did she have the police file. She further testified that the case was pending under investigation and that she could not tell who was to blame for the accident.

25. DW1, the driver of motor vehicle registration number KCF 393M, testified that on the material day he was travelling from Nairobi to Meru when at Karuri market, a motor cycle appeared from a feeder road and crossed the road abruptly. DW1 further testified that he applied his brakes but he hit the motorcycle a bit. He further testified that the motor cycle had two pillion passengers. The witness testified that he called the police at Wang'uru police station and the traffic police went to the scene by which time the motor cycle had been moved from the scene and the driver of the said motor cycle had run away. He further testified that he was not charged with any traffic offence. The driver of the said motor vehicle stated that he did not hit the motor cycle from behind as alleged and that the appellant was injured because they were three on the motor cycle which made it unmanageable for the rider of the motorcycle.

26. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-

    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.

27. In Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:-

    As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.

28. From the evidence on record, it is not disputed that an accident occurred on 17/10/2017 between a motor cycle of unknown registration number and motor vehicle KCF 393M. According to the appellant the driver of motor vehicle registration number KCF 393M was to blame for the accident as he was driving at a high speed and he failed to take precautionary measures to avoid hitting the appellant. The driver of the said motor vehicle stated that the motor cycle appeared from a feeder road and crossed the road abruptly. He further stated that he applied his brakes but hit the motor cycle slightly. In support of the appellant's case, he called a police officer who was neither the investigating officer nor did she visit the scene of the accident. As far as it goes, the said police officer could not tell who was to blame for the accident. However she produced the police abstract which indicated that the said motor cycle was carrying two pillion passengers, the appellant and one Catherine Wanjiku. Despite the details of the said passenger in the police abstract, the appellant did not call her to testify and shed light on how the accident occurred. Furthermore, it is strange that the rider of the motor cycle

ran away and did not wait for the police to come to the scene so that he could record his statement. Moreover, if the police officers did find that DW1 was on the wrong, they could have charged him for a traffic offence. The evidence as given by the appellant raised more queries than giving sufficient evidence on how the accident occurred. As such, it is my considered view that the appellant failed to discharge the required burden of proof. Accordingly, the appellant failed to prove negligence on the part of the driver of the said motor vehicle and therefore there is no material before me to apportion liability to the respondents. This appeal must therefore, fail.

29. The trial court proceeded to address the issue of quantum of damages and held that if the appellant had proved his claim on a balance of probabilities, an award of Kshs. 120,000/- would have been sufficient compensation for pain, suffering and loss of amenities. According to the plaint dated 29th July 2018, the appellant sustained the following injuries:-

    a. Laceration on the right knee

    b. Bruise on the right elbow

    c. Blunt chest injury

    d. Blunt injury to the hip.

30. These injuries are confirmed by Dr. Cyprianus Okere in his medical report dated 7/2/2018. The appellant underwent a second medical examination and Dr. Wambugu filed a medical report dated 27th February 2019 in which the injuries sustained by the appellant were said to be blunt trauma right knee and hip and multiple bruises. The doctor classified the injuries as soft tissue injuries.

31. Looking at the decisions relied on by the appellant, it is evident that the injuries therein are more severe than the injuries sustained by the appellant. It is therefore my considered view, that had the case been successful, the sum of Kshs. 120,000/- as assessed by the court below would have been adequate compensation for pain, suffering and loss of amenities.

32. In view of the foregoing, I find that the appeal lacks merit and is hereby dismissed with costs to the respondents.

33. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 26TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 26th day of October, 2023.