Osir v Wells Oil Limited & 2 others (Civil Appeal E090 of 2022) [2023] KEHC 26803 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26803 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E090 OF 2022

RE ABURILI, J

DECEMBER 20, 2023

BETWEEN

ALOYCE ONDIEK OSIR .... APPELLANT

AND

WELLS OIL LIMITED .... 1ST RESPONDENT

STEPHEN OKELLO OKUMU .... 2ND RESPONDENT

ASERE TRADING COMPANY LIMITED .... 3RD RESPONDENT

(An appeal arising out of the Judgement of the Honourable F.M. Rashid in the Senior Principal Magistrate's Court at Winam delivered on the 26th August 2022 in Winam SPMMC 28 of 2017)

JUDGMENT

Introduction

1. The appellant herein Aloyce Ondiek Osir sued the respondents herein for general damages vide an amended plaint dated 8.5.2019 for injuries sustained in a road traffic accident that occurred on the 2.11.2015 along the Kisian – Kisumu road.

2. It was the appellant's case and he testified as PW1 that he was riding his motorcycle registration number KMDL 876V while keeping to his left at around Kicomi area moving towards Kisumu area when the defendants' motor vehicle registration number KAK 078J which was moving from the opposite direction swerved on to his lane and collided with his motorcycle leading him to fall down and sustain injuries.

3. PW4 George Mwita, a clinical Officer testified that he examined the appellant at JOOTRH and noticed that the appellant sustained injuries of the swollen forehead, laceration of the neck, backache, injuries on the knee joint, dislocated big left toe and fracture of the left ulna bone where a plaster was applied.

4. In cross-examination PW4 stated that he only examined the appellant for purposes of filing the P3 form and that his examination was based on treatment documents availed by the appellant.

5. The 1st and 2nd respondents filed a joint statement of defence dated 19th March 2019 denying the averments in the amended plaint and stating that if at all any accident happened th same was caused by the appellant's negligence.

6. The 2nd respondent testified as DW2 stating that he was the 1st respondent's director and that by a vehicle hire agreement dated 3rd January 2014, he had hired out the motor vehicle registration number KAK 078J to the 3rd respondent for a period of 10 years at a monthly rate of Kshs. 120,000 and further that the 3rd defendant was liable during the term of the agreement to insure the said motor vehicle.

7. The 3rd respondent filed its statement of defence dated 3rd July 2019 in which it denied the allegations made by the appellant and put him to strict proof of the same and further alleged that the accident was occasioned by the plaintiff's negligence.

8. DW1, Stephen Omondi Okelo testified on behalf of the 3rd respondent and stated that he was the driver of the motor vehicle registration number KAK 078J on the date of the accident. He testified that on the material date he was driving along Obote road along the Kisumu – Busia road heading towards Kenya Pipeline from Kisumu Town.

9. DW1 testified that the road was being constructed and so vehicles were using the right side of the road and that as he approached the diversion he saw a motorcycle approaching while on the right side of a car that was also approaching and as the motorcyclist passed the front cabin of his car, while he, DW1 was still stopping, he saw the motorcyclist hit the left side of the tanker between the front and rear tyres on the ladder. It was his testimony that the motorcycle had carried two passengers. He testified that he then stopped and helped the injured who were taken to hospital.

10. In cross-examination DW1 testified that the rider and passenger did not have any helmet though he did not have evidence of the same.

11. In the impugned judgement, the trial magistrate found that the appellant failed to prove his case on a balance of probabilities and thus dismissed his claim. The trial magistrate held that had the appellant proved his case, she would have awarded general damages of Kshs. 200,000.

12. Aggrieved by the trial court's judgement, the appellant filed the instant appeal vide a Memorandum of appeal dated 30th August 2022 and filed on the 6th September 2022 raising the following grounds of appeal;

    a. The learned trial magistrate erred in fact and in law in finding and holding that the appellant failed to prove his case on a balance of probabilities despite the appellant having tendered direct evidence on the circumstances of the suit accident as an eye witness.

    b. The learned trial magistrate erred in fact and in law by holding that the appellant failed to call another pillion passenger who was also at the scene of the accident to testify meant the appellant failed to prove his case on a balance of probabilities thus ignoring the evidence of the appellant and instead taking into account extraneous circumstances which were clearly out of the appellant's control.

    c. The larnd trial magistrate erred in law and in fact by ignoring the appellant's evidence and version of the circumstances lading to the accident and basing her decision only on the respondent's witnesses evidence.

d. The learned trial magistrate erred in law and in fact in awarding the appellant damages which were inordinately low as to represent an erroneous estimate and not commensurate with the injuries suffered by the appellant.

e. The learned trial magistrate erred in fact by failing to appreciate the degree, extent and long term effect of the appellant's injuries thereby awarding the appellant damages that were inordinately low/little taking all the relevant factors into consideration.

f. The learned trial magistrate erred in law by failing to critically analyse the evidence and submissions on liability on quantum together with the authorities submitted by the parties consequently coming to a wrong conclusion on the same.

g. The learned trial magistrate erred in law and in fact in writing a judgement which is at variance with the pleadings, against the weight of evidence and contrary to the principle as established by precedent.

13. The parties filed submissions to canvass the appeal.

The Appellants' Submissions

14. The appellant's counsel submitted that by requiring him to produce the other pillion passenger who was at the scene of the accident, the trial magistrate applied the higher standard of proof normally applied in criminal cases, beyond reasonable doubt, and thus came to a wrong finding. Reliance was placed on the case of Sammy Ngugi Mugo v Mombasa Salt Lakes Ltd & Another [2014] eKLR where the court stated that the standard of proof in civil cases was on a balance of probability unlike for criminal/traffic cases which is beyond reasonable doubt.

15. It was submitted that the appellant was given a receipt at JOOTRH and not treatment notes from JOOTRH but that he availed further treatment documents from other facilities corroborating the injuries suffered. The appellant further submitted that the respondent failed to adduce evidence in rebuttal. The appellant submitted that an award of Kshs. 1,000,000 would have been reasonable for quantum of damages.

The 3rd Respondents' Submissions

16. It was submitted that this court should examine and re-evaluate the evidence, and not to differ from the finding, on a question of fact, of the trial magistrate who tried the case, and who has had the advantage of seeing and hearing the witnesses, and interfere only when the finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of the evidence, or the trial magistrate is shown demonstrably to have acted on wrong principles in reaching the finding he did as was held in the case of Simon Taveta v Mercy Mutitu [2014] eKLR.

17. The 3rd respondent submitted that that the burden of proof in this case rested on the Appellant in accordance with Sections 107,108,109 and 112 of the *Evidence Act*. It was thus submitted that for the Appellant to succeed, he was required to prove the particulars of negligence alleged in the plaint which he failed to do as there was no evidence presented to support the allegations of negligence made against the 3rd Respondent and thus the appellant's suit was properly dismissed.

18. On quantum of damages that would have been awarded to the appellant had he proved his case, it was submitted that an award of Kshs. 300,000 would have been sufficient for the soft tissue injuries and fracture of the ulna suffered by the appellant.

Analysis and Determination

19. 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 in 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. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows-

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

20. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

21. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions, it appears to this court that the issues that had been placed before it for its determination: -

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

    b. If the answer to (a) above is in th affirmative, what award should the court grant for quantum of damages.

22. On the first issue, it is prudent to consider the appellant's case in the trial court. The appellant testified as PW1 that he was riding his motorcycle registration KMDL 876V while keeping to his left at around Kicomi area moving towards Kisumu area when the defendants' motor vehicle registration number KAK 078J which was moving from the opposite direction swerved on to his lane and collided with his motorcycle leading him to fall down and sustain injuries.

23. PW4 George Mwita, a clinical Officer testified that he examined the appellant at JOOTRH and noticed that the appellant sustained injuries of the swollen forehead, laceration of the neck, backache, injuries on the knee joint, dislocated big left toe and fracture of the left ulna bone where a plaster was applied.

24. In cross-examination, PW4 stated that he only examined the appellant for purposes of filing the P3 form and that his examination was based on treatment documents availed by the appellant.

25. Further to the above, the respondents during the hearing on the 5.4.2022 agreed to have the Police Abstract produced as PEX6.

26. I must point out however, that the contents of the police abstract as extracted from the records held by the police is merely evidence that a report of an accident was made. It is prima facie evidence of the occurrence of the accident and the particulars of those involved. It can however be rebutted. It was therefore held in Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR:

> " A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station."

27. In the instant case, there was no dispute as to whether an accident occurred. DW1, the driver of motor vehicle registration number KAK 078J testified as much. To this extent, the appellant had proved on a balance of probabilities that an accident occurred. The question is whether the appellant proved that it was the respondents or their agent who were negligent leading to the accident.

28. The 2nd respondent testified as DW2 stating that he was the 1st respondent's director and that by a vehicle hire agreement dated 3rd January 2014, he had hired out the motor vehicle registration number KAK 078J to the 3rd respondent for a period of 10 years at a monthly rate of Kshs. 120,000 and further that the 3rd defendant was liable during the term of the agreement to insure the said motor vehicle.

29. In his testimony, the appellant conceded that there was a vehicle hire agreement between the 1st respondent and th 3rd respondent. Accordingly, the issue of liability is to be determined between the appellant and the 3rd respondent.

30. DW1, Stephen Omondi Okelo testified on behalf of the 3rd respondent and stated that he was the driver of the motor vehicle registration number KAK 078J on the date of the accident. He testified that on the material date, he was driving along Obote road along the Kisumu – Busia road heading towards Kenya Pipeline from Kisumu Town.

31. DW1 testified that the road was being constructed and so vehicles were using the right side of the road and that as he approached the diversion he saw a motorcycle approaching while on the right side of a car that was also approaching and as the motorcyclist passed the front cabin of his car, while he, DW1 was still stopping, he saw the motorcyclist hit the left side of the tanker between the front and rear tyres on the ladder. It was his testimony that the motorcycle had carried two passengers. He testified that he then stopped and helped the injured who were taken to hospital. In cross-examination DW1 testified that the rider and passenger did not have any helmet though he did not have evidence of the same.

32. In Khambi and Another v Mahithi and 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 cases, 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."

33. That was the position in Isabella Wanjiru Karangu v Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde v George M Angira Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

34. The law is clear that he who alleges must proof. The question therefore is whether the appellant herein discharged the burden of proof that the 3rd respondent was liable in negligence for the occurrence of the accident and if so, to what extent.

35. From the testimony of DW1, it was uncontroverted that the appellant rode his motorcycle on the right side of the car that approached the 3rd respondent's vehicle. It was also evident that the appellant had illegally carried two pillion passengers on a motorcycle that is supposed to carry one pillion passenger.

36. It is also not lost on this court that DW1 testified that as he approached the diversion and saw the oncoming vehicle and appellant's motorcycle, he was still in motion as he was still stopping when the accident occurred.

37. Both the appellant and the 3rd respondent had a duty of care whilst approaching the diversion as they were likely to be aware of each other considering they were both coming from different directions. The fact that they both did not stop at the diversion points towards negligence on both their part, the 3rd respondent because he controlled a bigger, deadlier vessel capable of causing greater harm and the appellant because he was responsible for two other lives.

38. In my view, both parties were liable equally for the accident. The trial court held that the appellant failed to discharge the burden of proof of the 3rd respondent's negligence.

39. It is trite that whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist. See Section 107 of the *Evidence Act*

40. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 and 112 of the same Act as follows:

> 109. 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 the fact shall lie on any particular person.
>
> 112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

41. The two provisions were interpreted in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where 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."

42. The general rule is that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the defendant, the respondent in this appeal depending on the circumstances of the case and that the said burden is on a balance of probabilities.

43. In the instant case, I disagree with the trial magistrate's finding because, the appellant herein demonstrated through his testimony the negligence of the 3rd respondent to some degree, and the burden then shifted to the 3rd respondent to rebut the same.

44. On his part, the 3rd respondent similarly demonstrated that the appellant was negligent in his operation of his motorcycle to some degree and that he took no part in avoiding the accident. In my view, therefore, there was no absolute need for the appellant to call the pillion passenger as his witness to prove details of negligence. This is so because both the appellant and the 2nd respondent were eye witnesses to the accident and were in a better position to say what they saw. A pillion passenger may not necessarily see what the rider or driver saw firsthand. In addition, the court observes that the pillion passenger testified in HCCA E091 of 2022 and her case was dismissed but that testimony was never brought into this court for adoption by the court to assist the 3rd respondent.

45. Therefore, based on the testimonies of the parties in this case, I find that both parties, the appellant and 3rd respondent, were liable for the accident and I thus apportion liability at 50% each.

46. Turning to the issue of quantum, the appellant in his amended plaint pleaded that he suffered soft tissue injuries to the forehead, neck, chest, back, big toe, knees as well as a fracture of the radius/ulna bones.

47. Albeit the appellant did not produce the initial treatment notes, he availed further treatment documents from other facilities corroborating the injuries suffered. The injuries sustained were also corroborated by the testimony of PW4 who examined the appellant about 2 weeks after the accident.

48. I have considered the authorities cited by both parties and find those relied on by the appellant to contain far more serious injuries than those suffered by the appellant herein whereas those cited by the 3rd respondent have comparable injuries.

49. This Court in P. J. Dave Flowers Ltd v David Simiyu Wamalwa Civil Appeal No. 6 of 2017 [2018] eKLR rendered itself on the matter of assessment of quantum as below:

> "… it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter."

50. In the case of Narkiso Nyandara v John Nganga Mwaura HCC 5152/88 Mbogholi J awarded Sh. 100,000 general damages for a cut wound on the left supra orbital region, deformed subleen left wrist and deep cut on the wrist, fracture of the left ulna and radius lower third.

51. In the case of Patrisia Adhiambo Omolo v Emily Mandala [2020] eKLR this court upheld an award of Kshs. 180,000 as general damages where the plaintiff suffered injuries fracture of the radio-ulna bones.

52. In the case of Simon Mungai Kariuki v Fatma Hassan [2017] eKLR The first respondent sustained a hairline fracture of the styloid process on the radius of the right forearm and cut wounds on the anterior aspect of both legs and the High Court upheld an award of Kshs 230,000.

53. I thus find that an award of Kshs. 300,000 as proposed by the 3rd respondent is sufficient as general damages.

54. The appellant did not plead any special damages despite attaching receipts and thus the same is denied as special damages must be specifically pleaded and strictly proven.

55. The upshot of the above is that the appeal herein is found to be merited to the extent that Judgement of the trial court delivered on the 26th August 2022 in Winam SPMMC 28 of 2017 is hereby set aside and substituted with and order that both the appellant and the 3rd respondent were liable for the accident in the ration of 50:50. The appellant is awarded general damages of Kshs. 300,000 less 50% contribution as well as costs of this appeal assessed at kshs 20,000 less 50% contribution.

56. The appellant shall also have ½ costs of the suit in the lower court. General damages shall attract interest at the rate of 14% per annum from date of judgment in the lower court until payment in full.

57. This file is closed.

58. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2023

R.E. ABURILI

JUDGE