Samwel v Agroline Hauliers Ltd (Civil Appeal 56 of 2017)
[2022] KEHC 10367 (KLR) (27 May 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 56 OF 2017

WM MUSYOKA, J

MAY 27, 2022

BETWEEN

YVONNE ATIENO SAMWEL ..... APPELLANT

AND

AGROLINE HAULIERS LTD ..... RESPONDENT

(Appeal from judgment and decree of Hon. MI Shimenga, Resident Magistrate, in Butere PMCCC No. 88 of 2015, of 4th May 2017)

JUDGMENT

1. The appellant had sued the respondent, at the primary court, seeking compensation for injuries that she had suffered, following a traffic road accident on 6th May 2013, along Bungoma-Mumias Road. She was a pillion passenger aboard a motorcycle registration mark and number KMCX 564U, when it got involved in a collision with a motor vehicle registration mark and number KAR 166S/ZB 7491, said to have belonged to the respondent, and liability attributed to the respondent on account of negligence. The respondent filed a defence, denying the accident, and everything else pleaded in the plaint. In the alternative, the respondent pleaded that if any accident occurred, it must have been due to negligence on the part of the respondent, or was outside its scope and control. A trial was conducted, and the court found in favour of the respondent, on grounds that the appellant had failed to prove negligence on the part of the respondent.

2. The appellant was aggrieved, hence the appeal. She has raised several grounds: that the court dismissed the appellant's case yet there was no traffic case where liability had been attributed to the her or the rider of the motorcycle, went outside the pleadings and laid blame on the appellant and the rider yet the rider was not a party in the suit, believing the testimony of the witnesses called by the respondent on the matter of the tractor not having a headlamp, finding that the collision occurred on the left lane without any sketch map being produced, and dismissing the matter when a case had been made out against the respondent.

3. Directions were given on 28th September 2021, for written submissions. The only written submissions that I have seen had been filed by the appellant.

4. In her written submissions, the appellant submitted only on the issue of liability. It is submitted that the trial court did not consider the testimony of the appellant on how the accident occurred, and paid more attention to the fact that the motorcycle was overloaded. Secondly, that liability was apportioned partially on the appellant and on the rider of the motorcycle, yet the rider of the motorcycle was not a party to the suit. Thirdly, and with regard to the testimony of DW2, it is submitted that the defence statement made no allegations of negligence on the part of the rider of the motorcycle, yet the said rider was not a party to the proceedings. Fourthly, and finally, it is submitted that the testimony of DW1 was over relied upon, yet the traffic officer was not an eyewitness of the accident, nor was he the investigating officer.

5. Let me start with considering the testimony of the appellant, which it is submitted was not considered. She was a pillion passenger on the motorcycle, and stated that they were involved in a head-on collision with the tractor. She blamed the tractor driver for speeding and driving carelessly, saying that he moved from his lane to the lane for the motorcycle, as he was trying to join a feeder road on that side of the road. She said that the motorcycle rider could not see the tractor as it was dark, and the tractor did not have headlights. Was that testimony considered by the trial court? Yes, it was. Part of considering evidence of witnesses, lies with merely reciting it. It was recited in the judgment, in words similar to those used by the appellant herself in her statement at the oral hearing. In the analysis, by the court, on liability, the oral statement of the appellant and the pleadings by the appellant, which attributed negligence on the respondent, were considered. In the end, the court found that negligence had not been established. That it did by juxtaposing the oral statement by the appellant as against the testimony of DW1, the traffic police officer.

6. The allegations of negligence in the plaint, against the respondent, were that the tractor was driven at excessive speed, turned without notice, and overtook when it was not safe to. The appellant, in her witness statement, did not make a single allegation of negligence against the respondent. She merely said that the motorcycle collided with the tractor. It was her case against the respondent, and it was incumbent upon her to establish that the tractor was being driven at a speed that was excessive, it turned without notice and it was overtaking when it was not safe to do so. Firstly, other than saying that the tractor was speeding, she did not narrate why she thought that was so. She said that it was 4.00 AM, and the tractor had no headlights, and the rider of their motorcycle could not even see it. So, how could she tell that the tractor was speeding, if they could not see it because it was dark, according to her, and the tractor had no headlights, which would have given an indication of its approach, whether slowly or at speed? Secondly, she was a pillion passenger, one among three. In both her oral and written statements, she did not state where she sat on the motorcycle, whether just behind the rider, or way at the back, for the trial court to assess whether she could see the road ahead of them clearly enough to be able to judge whether the tractor was being driven at speed or turning or overtaking or otherwise being driven negligently. I am not persuaded, therefore, that she had proved negligence against the respondent. She appears to rely only on the fact that there was a collision between two vehicles, but that is not good enough. First, because the owner or rider or driver of the second vehicle was not a party to those proceedings, which, in itself, was not necessarily fatal, but crucial, where negligence could not be proved against the defendants, for the court can, in the circumstances, still presume negligence on both, and apportion liability equally between the persons in control of the two vehicles, where it is not immediately apparent as to who, between the two, was responsible for the accident. Second, the appellant did not plead res ipsa loquitor, which would have thrown the matter of liability open, as

between the driver of the tractor and the rider of the motorcycle. There was a duty to prove negligence against the party that the appellant was attributing negligence to, that duty was not discharged.

7. Let me turn to the matter of the rider of the motorcycle not being made a party to the suit, and the court attributing liability to him. The appellant was a passenger on the motorcycle. It was the rider of the motorcycle who owed her a greater duty of care, as against the driver of the tractor. So that in the event of an accident, between the motorcycle and another vehicle, the passenger would be expected to first of all go after the rider or driver of the motor vehicle in which she was a passenger, for it is easier to prove liability as against that person, compared with attributing liability to a third party. In this case, the appellant did not sue the party against whom it would have been easier to attribute liability, and chose to sue the third party. That was a risky manouvre, a gamble that the appellant took, perhaps, expecting that the respondent would bring the rider into the matter by way of third party proceedings. Risky, because, where a plaintiff is unable to prove negligence on the defendant that she has sued, she then loses everything. The converse is also true, that a defendant who fails, to have the other contributor to the accident brought in as a third party, risks bearing full liability, where there is flimsy evidence on contribution.

8. Can liability be attributed on a party who was party to the accident, but was not made a party to the suit? Yes, where there is evidence placed on record, showing the involvement of that other party to the accident, and their contribution, the court can quite properly determine that that other party was to blame for the accident, in cases where there was evidence of their contribution, including where that other party was shown to be solely to blame. Of course, where the party who has not been joined is found to be wholly to blame, and no liability attached to the defendant, the result would be that the suit is dismissed as against the defendant; but the court cannot apportion liability against a person who has not been named a party in the suit, and in such cases the defendant would have to bear full liability. However, the mere fact that the defendant fails to bring into the suit a third party, who is in fact solely to blame for the accident, does not mean that the plaintiff is absolved of the duty or obligation to establish their case of negligence as against the defendant sued. The burden of proof of negligence, as between the defendant and the presumptive third party, only shifts to the defendant, after the plaintiff has established negligence against the defendant whom she had sued. If she fails to proof negligence as against that defendant, the suit would be dismissed.

9. The trial court is faulted for attributing liability to a person who was not a party in the suit. My view is that the trial court is completely blameless. The appellant submits on this point as if the said rider did not exist and had nothing to do with the matter. Yet, she was riding on his motorcycle, and the accident occurred when the motorcycle collided with the tractor. The rider was not a stranger in the suit. The appellant pleaded, in her plaint, that she was a pillion passenger on that motorcycle, and that the tractor lost control and rammed the said motorcycle. A similar averment is made in her witness statement. The liability of the respondent could not be considered without considering the role of the rider in the accident, for the appellant could not be blamed for the collision, as it was not a collision between a pedestrian and the tractor. She was not in control of the motorcycle, being a mere passenger, and the liability of the respondent could only be considered alongside that of the rider. If any liability was to be attributable to the respondent, even just an iota, then the respondent would have been found 100% liable, in the absence of the rider as a party to the suit. As intimated above, the appellant ought to have sued the rider, as the primary defendant, for she was a passenger on his vehicle. She should have sued the respondent, as the sole defendant, only, if she was confident that she could present a watertight case against it, in which case the burden of proof would shift to the respondent, who would then cite the third party, for the court to work out the liability between them, if at all the same was to be shared. Things did not work that way. The appellant presented a weak case, and the burden of proof did not shift to the respondent, and she lost it.

10. It was submitted that the trial court should not have considered the liability of the rider, given that the respondent did not even attribute liability to him, in its statement of defence. It is true that the defence statement did not attribute liability or contribution on the rider of the motorcycle, rather it attributed it on the appellant herself. The particulars of negligence point to her negligence for boarding a defective vehicle, urging the rider to drive at excessive speed, engaging the rider in conversation, causing the accident, among others. Of course, at the oral hearing, the witnesses called by the respondent did not lead any evidence on any of those grounds, which would have pointed to the appellant's contribution to the accident. However, I would reiterate what I have stated above, that for liability to be established against the respondent, the court had to first consider the facts as pleaded in the plaint. The principal pleading was that the appellant was a passenger on a motorcycle, when the same was in collision with the tractor, and liability of the tractor driver had to be considered alongside that of the vehicle on which the appellant was a passenger. The fact that the respondent had not pleaded so, or even made the rider a party to the suit, did not matter before liability was established against it. If negligence were to be established against the respondent, then it, the respondent, would not have been heard to say that the rider contributed to the accident, because the said rider was not party to the suit, and the respondent had not pleaded contributory negligence by the said rider, and, therefore, there would have been no basis for apportioning liability. The appellant had to discharge her burden of proof first, before the respondent could be called upon to defend itself. If the onus on the part of the appellant had been discharged, then the respondent would have been called upon to defend itself on liability, and it would have been at that juncture that it would have pointed at the rider as the cause of the accident. Unfortunately, as the rider was not party to the proceedings, the respondent would not have had anyone to share contribution with.

11. On the court believing the witnesses of the respondent, who had failed to controvert the testimony by the appellant, that the tractor had no headlights, I would reiterate what I have stated above, that the appellant failed to establish negligence against the respondent. It was not established that the tractor was driven at excessive speed, that there was a sudden unsafe turning, dangerous overtaking, among others. I have dealt with this at length elsewhere. The appellant testified that it was dark, as it was 4.00 AM, and the tractor did not have lights. So, if that was so, how was she able to assess that the tractor was being driven at excessive speed or was turning suddenly or was overtaking dangerously. She was a pillion passenger, seating behind the back of the rider of the motorcycle, and issues as to her ability to have seen what was happening in front of her must, of necessity, arise. The whole case against the respondent was built on these allegations of negligence. They were not proved at all. The burden was on her to establish negligence, and the respondent was only required to lead counter evidence upon negligence being proven. As that was not done, the burden of proof did not shift, and whatever the defence witnesses said on the matter was of little moment.

12. The last point is about the sketch plan. The trial court did not say that it relied on the sketch plan, but recited evidence where the police witness made reference to it. I appreciate the concern by the appellant, that the trial court appeared, in its judgment, to place some reliance on the alleged sketch plan, yet that sketch plan was not produced in evidence, and it is, therefore, not part of the record before me. However, given that the appellant had not established her case against the respondent, whatever error, if at all, the court might have made, with respect to the sketch plan, did not affect the final outcome.

13. Overall, I find no merit in the appeal. The same is hereby dismissed. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 27th DAY OF MAY 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Oloo, instructed by LG Menezes & Company Advocates, for the respondent.

Mr. Otinga, instructed by Otinga Ochume & Company, Advocates, for the appellant.