



**Crown Bus v Okwaro & another (Civil Appeal 139 of 2019)
[2022] KEHC 10262 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10262 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 139 OF 2019
EKO OGOLA, J
JUNE 28, 2022**

BETWEEN

CROWN BUS APPELLANT

AND

STANSLAUS ONYANGO OKWARO 1ST RESPONDENT

MOHAMED MOHAMED 2ND RESPONDENT

*(Being an Appeal from the Judgment/Decree delivered on 20th September,
2019 by Hon. E. Kigen (SRM) in Eldoret CMCC No. 199 of 2014)*

JUDGMENT

1. This appeal herein challenges the trial Magistrate's judgment on the twin issues of liability and quantum. In the trial Court, the Appellant was the 1st Defendant wherein the 1st Respondent was the Plaintiff. The 1st Respondent claimed general and special damages in regard to personal injuries sustained in an accident that occurred along the Nakuru- Eldoret Road on December 24, 2013 at Nabkoi area. The accident involved the Appellant's motor vehicle Registration No. KBK 591J Nissan UD Bus in which the 1st Respondent/Plaintiff was travelling as passenger and motor vehicle registration No. KBC 151D/ZC 9704 Mercedes Benz Lorry.
2. At the trial the 1st Respondent testified and called two more witnesses in support of his case whereas the Appellant only called two witnesses in support of its case. After hearing the matter, the learned trial Magistrate found that the 1st Defendant was 30% whereas the 2nd Defendant was 70% liable for the occurrence of the said accident. The 1st Respondent was awarded general damages of Kshs. 450,000/- and special damages of Kshs. 1,500/- together with costs. The 1st defendant was ordered to pay Kshs. 135,450/= whereas the 2nd Defendant was required to pay Kshs. 316,050/=. Being aggrieved by the said decision, the Appellant preferred this appeal which is premised on grounds that:-



1. The learned Trial Magistrate erred in fact and in law by holding the Appellant 30% liable for the subject accident without any supporting evidence on record.
 2. The learned Trial Magistrate erred in fact and in law by making a finding that the Plaintiff (Respondent herein) had proven his case on a balance of probability against the Appellant contrary to evidence on record.
 3. The learned Trial Magistrate erred in fact and in law by failing to make a finding on the cause of accident.
 4. The learned Trial Magistrate erred in fact and in law by to consider the evidence of DW1 who was the only eye witness thus leading to an erroneous determination on liability.
 5. The learned Trial Magistrate erred in fact and in law by failing to consider the Defendant's (Appellant's) submissions and authorities supplied on the issue of liability.
 6. The learned Trial Magistrate erred in fact and in law by relying in extraneous circumstances not supported by evidence on record.
3. The Appellant urged this Court to set aside the trial Magistrate's findings on liability and quantum and replace it with its own assessment and that the costs of this appeal be provided for.
 4. The appeal was canvassed by way of written submissions.

Appellant's Submissions

5. On the issue of liability Mr. Amihanda, learned Counsel for the Appellant submitted that, the learned trial Magistrate apportioned liability in the ratio of 30:70 between the 1st Defendant/Appellant and the 2nd Defendant/ Respondent. Counsel further submitted that the basis of the said ratio was based on the testimony of PW3 PC David Kipsang who testified that both drivers were to blame for the accident. Counsel contended that on cross-examination PW3 told Court that the bus was on its rightful lane and further testified that the point of impact was on the lane of the bus and hence oncoming traffic, a position he maintains was also confirmed by DW PC Felix Anedd and DW2 Shadrack Katich Maliek. Counsel submitted that the bus was hit while on its rightful lane hence should not have been found liable for occasioning the said accident.
6. Counsel further submitted that PW3 David Kipsang and DW1 Felix Anedd were not the investigating officers in the case and as such their testimonies should be regarded as hearsay. Counsel submitted that the investigating officers, PC Sarah and PC Ngeno who visited the scene were never called to testify. Counsel contended that the Plaintiff did not discharge his burden of proof on a balance of probabilities. Counsel maintains that the 1st Respondent failed to prove that the accident was caused by the negligence of the Appellant. Counsel submitted that the trial Court completely ignored the testimony of DW2 Shadrack Katich Maliek who was the only eye witness in the case.
7. Counsel for the Appellant did not however submit on the issue of quantum.

Respondent's Submissions

8. Ms Karuga, Learned Counsel for the 1st Respondent opposed the appeal and submitted that as per the police abstract by Tarakwa Base produced as exhibit PExh5, it is evident that an accident did occur on December 24, 2013 and that the 1st Respondent got injured in the process. Counsel submitted that PW3 David Kipsang attached to the Tarakwa base told Court that KBL/ZC/ 9704 was a stationery vehicle as it had broken down when the Appellant's motor vehicle crashed into it.



9. Counsel submitted that it was due to the negligence of the Appellant and the 2nd Respondent that the said accident occurred. Counsel further submitted that 2nd Respondent wholly blames the Appellant and the 2nd Respondent for the said accident. Counsel maintained that a stationery motor vehicle cannot cause an accident unless it is on motion and thus it was the recklessness of the Appellant and the 2nd Respondent that led to the accident.
10. M/s Karuga submitted that the burden in civil cases is usually upon who alleges. It was submitted that it is not in dispute that the 1st Respondent was a passenger in the Appellant's motor vehicle. It is also not in dispute that the 1st Respondent sustained injuries as a result of the said accident. Counsel submitted that PW1 Dr. Rono testified that the 1st Respondent sustained bruises on the left lower limb, left knee and fracture of the second degree to the right leg. Counsel further submitted that the 1st respondent had produced the discharge summary, medical as well as the P3 form to further prove that he had sustained the said injuries.
11. On the issue of liability, M/s Karuga submitted that the trial Court apportioned the ratio of 30:70 between the Appellant and the 2nd Respondent due to the contradicting testimonies made by DW1 PC Felix Anedd and DW2 Shadrack Katich Maliek who was the Appellant's driver. In their testimonies, DW1 and DW2 both blamed motor vehicle registration No. KBC 151 D for the accident. However, DW1 testified that motor vehicle registration No. KBC 151 D was stationery whereas DW2 had testified stated that when the accident occurred he saw two moving lorries one trying to overtake the other moving lorry.
12. Counsel submitted that the 1st Respondent was only a passenger at the time the accident occurred. He did not in any way contribute to the negligence of the Appellant and the 2nd Respondent. Further, that 1st Respondent had proved his case on a balance of probabilities. Counsel urged Court to find the Appellant 100% liable for the negligence of its authorized driver. Counsel further submitted that no evidence was adduced to contradict the evidence by the 1st Respondent and that the ratio of 30:70 is fair and reasonable.
13. On the issue of quantum, Counsel submitted that special damages have to be proved, a burden which was discharged by the 1st Respondent.
14. Counsel further submitted that the award of Kshs. 451,500/= was fair and reasonable considering the aspect of inflation and also taking into account the nature of the injuries, passage of time and economic realities. Counsel submitted that the Appellant has not shown whether the award of damages was either inordinately high or low for this Court to assess the same.
15. Counsel urged this court to find the appeal unmerited and to dismiss it with costs to the respondent.

Determination

16. I have considered the written submissions filed on behalf of the respective parties.
17. This being the first appellate court, its duty is well expressed in *Selle v Associated Motor Boat Co [1986] EA 123* where court held as follows:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions through 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 the 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

18. In this appeal the Appellant is challenging both liability and quantum awarded by the trial Magistrate. It is not in dispute that the Appellant was the owner of motor vehicle registration number KBK 591J Nissan UD Bus and that the driver called Shadrack Katich Malik worked for it. The accident is not disputed.
19. This being a negligence claim against Appellant, the standard of proof required is on balance of probabilities hence the issue for determination is whether the Respondent proved his case on a balance of probabilities.
20. It is trite law that "whoever alleges must prove." Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya states as follows:
 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.
 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.
21. Further Section 109 in narrowing down to proof of particular facts stipulates:

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.
22. The Court of Appeal in *East Produce Kenya Limited v Christopher Atsiado Asiro, Supra*, it was reiterated who alleges negligence bears the burden of proof, court quoted with approval the case of *Kiema Mutuku v Kenya Cargo Hauling's Services Ltd* 1991 on the holding that:-

'There is yet no liability without fault in the legal system in Kenya and the plaintiff must prove some negligence against the defendant where the claim is based on negligence'.
23. In his pleading and testimony, the 1st Respondent was categorical that motor vehicle registration number KBK 591J Nissan UD Bus that he was traveling in was being driven at a high speed and as a result of which it rammed into motor vehicle registration No. KBC 151D/ZC 9704 Mercedes Benz Lorry. The Appellant did not adduce any evidence to rebut or controvert the 1st Respondent's evidence and my finding is that the evidence which clearly proves negligence against the Appellant or the driver of the Appellant's motor vehicle was availed to the trial court.
24. I am not persuaded by the Appellant's argument that because the investigating officers in this case were not called to testify then the evidence adduced by PW3 and DW1 should be regarded as hearsay evidence having produced the police abstract and police file on behalf of the said officers. It is my finding that the 1st Respondent proved negligence against the Appellant on a balance of probabilities and in the absence of evidence to attribute contributory negligence to the 1st Respondent I must agree with the trial Magistrate's finding that the Appellant's driver was careless and that the Appellant is vicariously liable for the negligent acts of his driver.



25. This appeal challenges both the trial Magistrate's judgment on liability and quantum. Counsel for the Appellant however did not submit of the issue of quantum and I therefore, find no reason to disturb the finding by the learned trial Magistrate on the issue of quantum.
26. The upshot of the foregoing is that I find the appeal lacking merit and is hereby dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH OF JUNE 2022.

E. K. OGOLA

JUDGE

