



REPUBLIC OF KENYA



**Obwoge v Muema & 2 others (Civil Appeal 69 of 2018)
[2022] KEHC 12307 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12307 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 69 OF 2018
GWN MACHARIA, J
JULY 25, 2022**

BETWEEN

JAMES ONGERA OBWOGE APPELLANT

AND

MBAI MUEMA 1ST RESPONDENT

GOTA RACHEL 2ND RESPONDENT

KELVIN OMBUL 3RD RESPONDENT

*(Being an appeal from the judgment and decree in the Chief Magistrate's Court at Naivasha
CMCC No. 700 of 2014 delivered by Hon. E. Kimilu (PM) on 27th November 2018)*

JUDGMENT

1. This is an appeal against the trial court's finding on liability only. It arises from Naivasha CMCC No 700 of 2014 in which the appellant sued the respondents for general and special damages arising out of a road traffic accident that occurred on May 31, 2014 along South Lake Road at Sanctuary area in Naivasha. According to the plaint, on the said date, the 3rd respondent negligently drove, managed and/or controlled motor vehicle registration number KAX xxx Y and as a result knocked the appellant who was a pillion passenger aboard a motorcycle causing him serious injuries. The appellant held the 1st and 2nd respondents vicariously liable for the accident since they were the registered owners of the said motor vehicle.
2. Only the 3rd respondent filed a statement of defence in which he denied the appellant's claim and alleged substantial contributory negligence on the part of the appellant. The 1st and 2nd respondents did not participate in the trial court proceedings.
3. Upon trial, the learned magistrate apportioned liability in the ratio 40:60 with the respondents bearing 60% thereof. She then awarded the appellant net damages in the sum of Kshs 488,400/- comprising of



general damages of Kshs 800,000/- and special damages of Kshs 14,000/- less 40% contribution. She also awarded the appellant costs of the suit and interest.

4. Being dissatisfied with the apportionment of liability, the appellant filed the present appeal vide a memorandum of appeal dated December 7, 2018 and raised the following grounds of appeal:
 1. That the learned trial magistrate erred in law and fact in apportioning liability between the plaintiff and the defendant yet the defendant did not tender any evidence to advance their case.
 2. That the learned trial magistrate erred in law and fact in apportioning liability in the ratio of 60:40 against the defendant in favour of the plaintiff yet there was overwhelming evidence to hold the defendants 100% liable.
5. The appellant sought the following orders from this court:
 - a. That the appeal herein be allowed.
 - b. That this honourable court be pleased to find the respondents 100% liable for the accident.
 - c. That costs of this appeal to be borne by the respondents.
6. The appeal was canvassed by way of written submissions.

Appellant's submissions

7. The appellant faulted the trial court for apportioning liability despite having appreciated the fact that the 3rd respondent did not call any witness to rebut the appellant's evidence on liability. He also took issue with the fact that the trial magistrate apportioned liability yet she stated in her judgment that the appellant had proved his case on a balance of probabilities. In his view, it was improper for the trial magistrate to apportion liability in the ratio of 40:60 in the circumstances.
8. The appellant argued that his evidence remained uncontroverted since the 3rd respondent failed to adduce any evidence in support of his defence. He relied on *Interchemie E A Limited v Nakuru Veterinary Centre Limited* [2001] eKLR where Mbaluto, J held a similar view. Reliance was also placed on *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)* Kisumu HCCC No 68 of 2007 where it was held that where a defendant fails to adduce any evidence in support of his defence, the assertions therein remain mere allegations. In the premises, he urged this court to set aside the trial court's finding on liability and find the 3rd respondent 100% liable for the accident.

3rd Respondent's submissions

9. On his part, the 3rd respondent submitted that notwithstanding that he did not adduce any evidence in support of his defence, the evidence adduced by the appellant did not prove his case to the required standard. He contended that the documentary evidence adduced by the appellant did not corroborate his allegation and testimony that the 3rd respondent was entirely to blame for the accident. He submitted that the evidence reveals that the rider of the motorcycle on which the appellant was a pillion passenger was guilty of traffic offence as he removed the motorcycle from the scene of accident before reporting the accident and/or before proper investigations were done. Further, he submitted that there was no evidence that he had ever been charged in any court of law with a traffic offence relating to the subject accident. He also faulted the appellant for conveniently failing to sue the rider of the motorcycle.



10. The 3rd respondent relied on *Benter Atieno Obonyo v Anne Nganga & another* [2021] eKLR where Chemitei, J in dismissing an appeal stated as follows:

“The accident involved a motorcycle, a tuktuk and a motor-vehicle and from the evidence adduced, nothing attributes liability to any of the defendants. There cannot be an assumption of liability as the Plaintiff failed to prove facts which give rise to what may be called the *res ipsa loquitor* situation”

Analysis and Determination

11. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In *Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates* [2013] eKLR, the court stated as follows in this regard-

“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.”

12. PW1 James Ongera Obwoye, the appellant herein, testified that on May 31, 2014, while aboard a motorcycle from DCK to Karagita, at Sanctuary Area, they were hit by the subject motor vehicle which was heading to DCK. They were on the left side of the road but the 3rd respondent who was the driver of the motor vehicle swerved to their lane and hit the motor cycle. He sustained a fracture of the right femur and right lateral malleolus as well as bruises on the forehead as a result of the accident and was taken to Naivasha District Hospital for treatment. The accident was reported at Naivasha Police Station.
13. In cross examination, he stated that he reported the accident at the police station after being discharged from hospital over a month later. He also stated that the 3rd respondent was charged in court but confirmed that he had never been summoned to give evidence in respect to any traffic case involving the 3rd respondent. He also stated that he could not recall the registration number of the motor cycle he had boarded because the accident occurred at night. In reexamination, he stated that he did not know the whereabouts of the rider of the motor cycle.
14. In his testimony, PW3, No xxxxx PC Paul Muthengi of Naivasha Traffic Base testified that he was not the investigation officer but confirmed that the accident was booked *vide* Occurrence Book No 15/31/5/2014. He stated that the accident involved motor vehicle registration number KAX 643I Subaru Legacy and an unknown motor cycle and the pillion passenger, the appellant herein, sustained serious bodily injuries. PW3 produced the police abstract issued to the appellant and the occurrence book extract in evidence.
15. In cross examination, he stated that the motorcycle rider escaped after the accident and that no sketch plans of the accident scene were drawn as the police file was never compiled fully. Further, he stated that the accident was reported by the 3rd respondent who was the driver of the motor vehicle registration number KAX 643I. According to the occurrence book, the rider was overtaking an unknown motor vehicle when he collided with the subject motor vehicle. However, in reexamination, he stated that investigations were never completed.
16. The 3rd respondent closed his case without calling any witness.



17. The general rule is that a trial court's finding on apportionment of liability should not be interfered with except in exceptional cases since it is an exercise of discretion. In *Khambi and Another v Mabithi and Another* [1968] EA 70, it was held thus:

“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.”

18. This court has examined the police abstract tendered in evidence by PW3. It merely confirms that the accident in question occurred but does not indicate who was to blame for the same. However, this court has not had sight of the occurrence book extract which contains the report made to the police by the 3rd respondent herein. It was not part of the record of appeal and neither is it in the lower court file which I have carefully perused. Be that as it may, it is clear from the trial court's judgment that the learned magistrate considered its contents. In arriving at her decision on liability, the trial magistrate stated as follows:

“The defendant did not call any witness to rebut the evidence on record. The accident was made by the driver of the accident motor vehicle. The rider escaped after the accident. The report of the accident remained as per the report made by the driver of KAX 643Y who never came to court as a witness. The defendant submits that the liability should be apportioned in the ratio of 10:90 in favour of the 3rd defendant. The defendant having not rebutted the evidence on record, I find submissions on apportionment of liability cannot be evidence. The plaintiff has proved his case on a balance of probability. It is the finding of the court that liability should be apportioned in the ratio of 40%:60%. The defendant shall bear 60% liability.”

19. It is evident that the learned magistrate took note of the failure by the 3rd respondent to rebut the appellant's evidence. However, the court duly noted that the occurrence book adduced by the appellant's own witness put blame on the rider of the motor cycle. In the premises, it is clear that the appellant's evidence did not support his allegation that the 3rd respondent was fully to blame for the accident. What this means is that the appellant has not demonstrated that there were any exceptional circumstances or error in principle that would warrant this court's interference with the trial court's apportionment of liability.

20. Consequently, I find that the appeal lacks merit and is hereby dismissed with costs to the 3rd respondent.

21. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 25TH DAY JULY, 2022

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Miss Sitati h/b for Ms.Kiberenge for the Appellant.
2. Mr.Kairu h/b for Ms.Chelule for the Respondent.

