Dikir & another v Kimary (Civil Appeal 316 of 2013)
[2022] KEHC 12733 (KLR) (Civ) (30 August 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 316 OF 2013

DAS MAJANJA, J

AUGUST 30, 2022

BETWEEN

SAMMY NKINGI DIKIR ..... 1ST APPELLANT

DICKSON ORUKO KHAINGA ..... 2ND APPELLANT

AND

STEPHEN KAMARU KIMARY ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Wanjala, RM dated 9th May 2013 at the Magistrates Court at Milimani Commercial Courts, Nairobi in Civil Case No. 5316 of 2009)

JUDGMENT

1. This is an appeal against the judgment and decree of the Subordinate Court's finding that the Appellants are jointly and severally liable for the Respondent's injuries following a road traffic accident that took place on 23rd March 2009. On the material day, the Respondent was a passenger in motor vehicle registration number KAQ 113H owned by the 2nd Appellant and driven by the 1st Appellant. In addition, the trial magistrate apportioned liability in the ratio of 40% against the Appellants and 60% against the third parties and ordered that, "The entire decretal sum to be paid by the defendants to the plaintiff and 60% thereof to be indemnified to the defendants by the 3rd parties upon judgment being entered against the 3rd parties." The Respondent was awarded KES. 120,000.00 and KES. 2,500.00 as general and special damages respectively, costs and interest thereon.

2. It is the judgment against the Appellants that has precipitated this appeal. The grounds of the appeal are set out in the Memorandum of Appeal dated 6th June 2013. The thrust of the appeal is that the trial magistrate erred in law and in fact in apportioning liability in view of the testimony of DW 1 and DW 2, the evidence on record and the submissions. The Appellants further complain that the trial

magistrate reached a decision that was against the weight of the evidence. They urge the court to set aside the judgment, assess the evidence and absolve them from any liability.

3. The parties have filed written submissions in support of their respective positions and it is clear that the issue in contention is whether the Appellants or the third parties are liable for the accident. In deciding this issue, it is important to outline the pleadings and the process leading up to the judgment.

4. The Respondent's case is set out in the plaint dated 15th July 2009. The Respondent pleaded that he was a passenger in the 2nd Appellant's motor vehicle registration number KAQ 113H driven by the 1st Appellant. The Respondent claimed that on 23rd March 2009, the motor vehicle was driven in negligent manner, lost control, veered off the road and was involved in accident causing him to suffer injuries. The Respondent blamed the Appellants for the accident.

5. The Appellants filed a Statement of Defence dated 20th February 2010 in which it denied liability as alleged. They alleged that the Respondent was solely or substantially to blame for the accident. In the alternative, they pleaded that the accident was caused solely and or contributed to substantially by the driver of motor vehicle registration number KTQ 530. They stated that the shall seek leave to join the owner and driver of motor vehicle registration number KTQ 530.

6. By an application dated 27th May 2010, the Appellants moved the court under Order 1 rule 14 of the *Civil Procedure Rules* for leave to issue a third party notice to claim indemnity and or contribution from Mathew Matata Kimani, the driver of motor vehicle registration number KTQ 530 on the ground that it caused the accident when it collided with the 2nd Appellant's motor vehicle registration number KAQ 113H. The court allowed the application on 28th June 2011. On 29th March 2012, the Appellants applied for judgment in default of appearance and defence under Order 1 rule 19 of the *Civil Procedure Rules*.

7. The third party did not enter appearance or file defence and the matter proceeded for hearing. The Respondent (PW 2) testified on his own behalf and called Dr Theophilus Wangata (PW 1). The 1st Appellant (DW 2) and PC David Chumba (DW 1) testified on the Appellants' behalf. After analysing the evidence, the trial magistrate held that the 1st Appellant and the third party driver were to blame for the accident. The third party driver for stopping on the road to pick passengers instead of doing so at a designated bus stop and the 1st Appellant was blamed for failing to keep a safe distance and driving recklessly hence the apportionment. The trial magistrate held that the Appellants were at liberty to apply for judgment against the third parties as directions were not taken before the commencement of the suit.

8. This is an appeal on the issue of liability. Whether and to what extent the Appellants are liable is a question of fact hence the court is called upon to appraise the evidence on record in light of the principle in *Selle v Associated Motor Boat Company Ltd* [1968] EA 123. In that case the court held that the duty of the first appellate court is to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify.

9. PW 2 recalled that on the material day he was a passenger in motor vehicle registration number KAQ 113H. He was seated at the back when the vehicle was knocked from behind. He states that the driver wanted to enter the stage but there were other vehicles so he could not enter. He stated that he blamed the driver as he stopped the vehicle on the road. When cross-examined, he stated that vehicle had not entered the stage when it was hit and was moving very slowly.

10. Although he was not the investigating officer, DW 1, a police officer, confirmed that he was summoned to produce the Occurrence Book ("OB") with regard to the subject accident. He told the court that the accident involved several motor vehicles; KAY 007H, KAK 636W, KAT 281D, KAQ 113H and

KTQ 530. He stated that KAQ 113H was rammed from the rear by KTQ 530. According to the OB, the driver of KTQ 530 was to blame for the accident because it rammed into the rear of 4 motor vehicle including KAQ 113H and failing to keep a safe distance. He stated that the driver of KTQ 530 was charged and convicted of the offence of careless driving and fined KES. 5,000.00 and in default 3 months' imprisonment. In cross-examination, DW 1 admitted that he could not tell the court how the KTQ 530 hit the other motor vehicles.

11. DW 2, the driver of KAQ 113H, testified that on the material day he was ferrying passengers. Upon reaching the stage, he stopped for some passengers to alight and to pick up others whereupon a lorry came from the rear and rammed into several vehicles. He denied that he was on the road and that his vehicle was the last to be hit. He stated that he never saw the lorry come and just heard a bang. In cross-examination, DW 2 stated that he was picking passengers when KTQ 530 rammed into 3 vehicles and his was the fourth. He could not however recall the chronology of events. He also denied that he was picking passengers on the road.

12. It must be recalled that the plaintiff bears the burden of proving that the facts that constitute negligence on a balance of probabilities based on the pleadings. In *Treadsetters Tyres Ltd v John Wekesa Wepukhulu* MSA HCCA No. 57 of 2006 [2010] eKLR, Ibrahim, J (as he then was) cited *Charlesworth & Percy on Negligence* (9th Ed), p. 387 in which it is stated that:

> In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, 1) whether on that evidence, negligence may be reasonably inferred and 2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.

13. Before I turn to the evidence, the trial magistrate correctly noted that the version of events set out in the Plaint differed from what was stated in the oral testimony from both sides. The Respondent's case as pleaded was that the 1st Appellant was driving too fast which was not the case prosecuted. It is the law that that parties are bound by their pleadings and a court cannot be called upon to make a determination on unpleaded issues (see *IEBC and Another v Stephen Mutinda Mule and 3 Others* NRB CA Civil Appeal No. 219 of 2013 [2014] eKLR). The plaintiff is therefore required to prove the particulars of negligence it has pleaded unless the parties through their conduct deal with issues that are not pleased (see *Odd Jobs v Mubia* [1974] EA 476). This issue of pleadings was not pressed by the parties before the trial court or in this appeal hence the court will proceed to resolve the issue based on the evidence.

14. There is no dispute that the Respondent was a passenger in the Appellants' motor vehicle and an accident took place on the material date resulting in the Respondent's injuries. There is also no dispute that Appellants' motor vehicle registration number KAQ 113H was rammed from the rear by the third party motor vehicle registration number KTQ 530. The point of departure from the testimony of PW 2 and DW2 was whether the Appellants' motor vehicle was at the stage or was along the road when it was hit from the rear.

15. The learned magistrate placed a premium on the OB as corroborating the PW 2's testimony that all the vehicles were on the road at the time of the accident and that motor vehicle KTQ 113H was picking passengers along the road. Since the Investigating Officer was not called as testify as to the circumstances of the accident, the reports produced amount to hearsay evidence and cannot be proof of how the accident took place. At the very least, the report is only proof that the accident involving several motor vehicles took place on the material date (see *Peter Kanithi Kimunya v Aden Guyo Haro* NRB HCCA

No. 307 of 2008 [2014] eKLR). As to which party was to blame for the accident is a question of evidence and the remarks in the OB about blameworthiness is hearsay as the investigating officer was not called a witness. The conclusion therein are matters of opinion which are inadmissible to prove facts. This leaves the direct testimony of PW 2 and DW 2 for consideration.

16. The clear testimony PW 2 is that the Appellants' motor vehicle wanted to enter the stage but could not do so as there were other vehicles. It was at this point that it was knocked from behind. Based on this testimony I fail to see how the 1st Appellant was at fault. The Appellants' motor vehicle was hit from the rear and could not be blamed for the accident. If I accept PW 2's testimony that the 1st Appellant was waiting to enter the stage, then what could he have done to avoid the accident? Would it have slowed down? Would it have swerved? Would it have stopped? The Respondent did not testify on this issue and the is no basis laid from the facts that the 1st Appellant would have driven the motor vehicle differently to prevent the accident.

17. The conclusion by the trial magistrate was that, "The driver of KAQ 113H is to blame for slowing down and stopping on the road to disembark instead of doing so at a designated stage." This finding is inconsistent with the testimony of PW 2 who stated the 1st Appellant could not enter the stage as there were other vehicles waiting to enter the bus stage. This is not a situation where there were no vehicles on the road hence the 1st Appellant could enter the stage or otherwise avoid the accident.

18. Having considered the totality of the evidence and in particular the direct evidence of PW 2 and DW 3, I find and hold that the Respondent did not prove that the 1st Appellant was negligent. The Appellants' vehicle was hit from behind by the third party vehicle and the Respondent did not show or demonstrate by evidence how the 1st Appellant could have avoided the accident in order to render him liable. The accident, I find and hold, was wholly caused by the third party motor vehicle.

19. Having analysed the evidence, I hold that the Respondent failed to prove its case against the Appellants. I therefore allow the appeal on liability only to the extent that the judgment of the Subordinate Court against the Appellants is set aside and the suit against them dismissed with costs. The third party before the subordinate court shall bear full liability and costs of the suit.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF AUGUST 2022.

D.S. MAJANJA

JUDGE

Kairu and McCourt Advocates for the Appellants

Muyundo and Associates Advocates for the Respondents