Aoro v Odinga (Civil Appeal E023 of 2022)
[2022] KEHC 14896 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14896 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E023 OF 2022

RE ABURILI, J

OCTOBER 31, 2022

BETWEEN

FREDRICK ONYANGO AORO ..... APPELLANT

AND

BENARD OMONDI ODINGA ..... RESPONDENT

(An appeal arising out of the Judgement and Decree of the Honourable S.W. Mathenge in the Principal Magistrate's Court at Bondo delivered on the 19th April 2022 in Bondo PMCC No. 36 of 2020)

JUDGMENT

1. This appeal is similar to HCCA E024 of 2022. The appellant is the same in both case. Only the respondents are different. The respondent in this appeal was the motorcycle rider wherein the respondent in HCCA E024 of2022 was a pillion passenger. The appellant herein was the defendant before the trial court whereas the respondent herein was the plaintiff. The respondent sued the appellant herein for general damages, special damages of Kshs. 1,300 and costs of the suit with interest for the injuries he sustained as a result of a road traffic accident that occurred on the 8th April 2018 when the appellant's motor vehicle registration number KCH xxxx hit the respondent's motor cycle registration number KMEC 241C.

2. The appellant filed his defence and denied the claim, putting the respondent to strict proof of all the allegations in the plaint. He denied the occurrence of the accident and blamed the respondent for negligence that resulted in him sustaining the injuries pleaded.

3. The trial magistrate after hearing the suit found in favour of the respondent to the effect that the appellant herein was found liable in negligence at 100%. She then proceeded to award the respondent general damages of Kshs. 120,000 as well as special damages of Kshs. 500 plus with costs of the suit and interest.

4. Aggrieved by the said judgment on liability alone, the appellant preferred this appeal vide a memorandum of appeal dated May 16, 2022, raising the following grounds for appeal:

   a. That the learned trial magistrate erred in fact and in law by apportioning 100% liability to the appellant (defendant) without considering the circumstances of the case.

   b. That the learned trial magistrate erred in law and in fact in finding in favour of the respondent against the appellant when there was totally no evidence of proof of negligence on the part of the appellant.

   c. That the learned trial magistrate erred in fact and in law in failing to consider the appellant's submissions on liability by completely disregarding the submissions and authorities of the appellant and as a result arrived at unjustified decision on liability.

5. The parties filed submissions to canvass the appeal, adopting submissions filed herein in HCCA E024 of 2022.

The Appellants' Submissions

6. On behalf of the appellant, it was submitted that the accident did not occur as pleaded by the respondent but that instead, it was the respondent's motor cycle that rammed into the appellant's motor vehicle. The appellant's counsel submitted that no evidence was tendered to proof the alleged over speeding of the appellant's motor vehicle and that the respondent failed to proof his case on a balance of probabilities as provided in sections 107, 108 and 109 of the *Evidence Act*.

7. It was further submitted that the testimony of PW3 amounted to hearsay as he was not the investigating officer and further, that PW3 did not have the police file in court. It was submitted that the Police abstract produced in court showed that nobody was to blame for the accident and as such, it could not be the basis upon which to apportion blame.

8. The appellant thus submitted that the respondent's testimony as well as that of PW3 could only be relied on to prove that an accident did occur and not on who was to blame for the accident.

9. It was submitted that the respondent failed to prove the facts constituting negligence on the appellant's part as required by law as was held in a myriad of cases and as such, his case should have failed as it was based on mere allegations.

10. The appellant submitted that the respondent failed to call an eye witness to corroborate his allegations of negligence on the appellant's part and thus the respondent failed to prove his case on a balance of probabilities. Reliance was placed on the case *Daniel Kimani Njoroge v James K. Kihara & Another* [2011] eKLR where the superior court upheld the trial court's finding dismissing the plaintiff's case for the reasons that the plaintiff failed to call an eye witness and/or any other evidence and thus his failure to prove negligence on a balance of probabilities.

11. t was submitted that the trial magistrate failed to consider the appellant's submissions and evidence adduced during the trial as she failed to refer to the same in her judgement in the section of analysis and determination and thus ended up making a speculative judgement that was against the evidence adduced.

The Respondent's Submissions

12. On behalf of the Respondent, it was submitted that he had proved his case on a balance of probabilities as required in civil cases and as was defined in the case of*Kanyungu Njogu v Daniel Kimani*

Maingi[2000] eKLR, and amplified in the case of *Kirugi & anor v Kabiya & 3 others*[1987] KLR 347 that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

13. The respondent further submitted that the question of liability in road traffic cases was discussed by the Court of Appeal in the case of *Michael Hubert Kloss & Another vs David Seroney & 5 others* (2009) eKLR where the court held inter alia that "a determination of liability in a road traffic accident relates to answering the question," who was responsible for the accident"?"

14. It was submitted that based on the evidence adduced before the trial court, there was no contention that the respondent was the rider of the motorcycle and further that the appellant had not demonstrated how the respondent's failure to wear a helmet or a reflector jacket would have contributed to the occurrence of the accident.

15. The respondent's counsel submitted that from the evidence on record, the appellant's driver was the one to blame for the accident as was clearly demonstrated by the respondent in his testimony and supported by documentary evidence produced in court. He further submitted that he was present at the scene of the accident and thus was the best suited person to testify in his case as to how the accident occurred as he did and that he pointed out how the appellant's driver was negligent when driving thus causing the accident herein.

16. The respondent's counsel submitted that the burden of proof in civil cases was on a balance of probability and that there was no requirement in law that the respondent was supposed to avail an eye witness to testify as to the circumstances of the accident when he was present when the accident occurred.

17. It was submitted that the respondent proved his case on a balance of probabilities as was held in the case of *Sammy Ngugi Mugo v Mombasa Salt Lakes Ltd & Another* [2014] eKLR where the court reasoned that the standard of proof in civil cases is based on a balance of probability unlike in criminal/traffic cases which is beyond reasonable doubt.

18. Counsel for the respondent submitted that that the evidence of DW3 (the appellant's driver) had glaring inconsistencies as to how the accident occurred and as such, raised doubts as to the circumstances under which the accident happened as per DW3's contradictory version depicted during the trial as was captured by the trial magistrate in the judgment and that the trial magistrate did not err in law or in fact by disregarding the evidence of DW3 which was contradictory both in the written statement and his oral testimony in court. that the appellant's driver gave inconsistent and contradictory testimony which evidence raised serious doubts as to the truthfulness of such a witness and therefore such evidence ought not to be considered by a trial court.

19. It was submitted that the trial court fully took into account the relevant factors being the pleadings, evidence on record and the submissions by the Appellant and Respondent and found that the appellant was wholly liable for the accident and that the respondent tendered sufficient evidence against the appellant on liability on a balance of probability whereas the appellant tendered contradictory and inconsistent evidence on the circumstances of the occurrence of the material accident thereby rendering the appellant's evidence hearsay with no evidentiary value attached to it.

Analysis and Determination

20. As a first appellate court, this court is under a duty to examine matters of both law and fact and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing conclusions from that analysis, bearing in mind the fact that it did not have an opportunity to see and hear the witnesses first hand.

This principle is captured undersection 78 of the *Civil Procedure Act* which espouses the role of a first appellate court which is to: '..... re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions.' The above provision was buttressed by the Court of Appeal in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR where it was held that:

> " We have also, as we are duty bound to do as a first appellate court to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui v Republic, (1984) KLR 729 and Susan Munyi vKeshar Shiani, Civil Appeal No. 38 of 2002 (UR)."

21. Having considered all the grounds of appeal, the evidence adduced before the trial court and submissions by counsel for the appellant and the respondent, I find the sole issue for determination is whether the trial court erred in law and fact in finding that the appellant herein was wholly liable for the material accident. To resolve this issue, I will set out the principles of law applicable and reassess the evidence adduced before the trial court.

22. The burden of proof lies on he who alleges and, in this case, it was upon the respondent to prove his case before the trial court on a balance of probabilities. Section 107 (1) of the *Evidence Act*, cap 80 Laws of Kenya provides 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."

23. The question is what amounts to proof on a balance of probabilities. Kimaru, J (as he then was) in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

24. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* [2015] eKLR, the Court of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

25. However, as was observed by the Court of Appeal in *Michael Hubert Kloss & Another v David Seroney & 5 others* [2009] eKLR:

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:
>
> 'To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...'"

26. Reevaluating the evidence adduced before the trial court, the evidence by the Respondent who was the plaintiff claimant was that on the 8th April, 2018 at about 5pm, he was riding a motorcycle from Usenge towards Kisumu direction whilst carrying a female passenger when at Guba stage, Bondo, he made a stop and parked his motorcycle facing Kisumu direction so that his passenger could alight.

27. It was the respondent's testimony that before his passenger could alight, the appellant's motor vehicle matatu driven by the appellant's driver arrived at the stage from the Kisumu direction and made an abrupt U-turn as if to turn back and face the Kisumu direction but the front side of the said motor vehicle went off the tarmac and knocked the respondent and his passenger who fell down with the motor cycle and sustained injuries.

28. In cross-examination, the respondent admitted that he did not have a riding license as he was in the process of acquiring his license and that he was not riding at the time the accident occurred as he had stopped. He further stated that he had removed his helmet and reflector jacket.

29. DW3, the appellant's driver adopted his witness statement in which he stated that on the material date, he was driving the appellant's motor vehicle along the Kisumu –Bondo road when at Guba, an unknown motorcycle suddenly joined the road without due care and in the process, they collided. In his sworn oral testimony, DW3 stated that the motorcycle hit him on the right side.

30. In cross-examination, DW3 stated that he was at a junction along the Kisumu-Usenge road and had stopped to give way for a motorcycle that was on the opposite side to pass. DW3 further stated in cross-examination that he was driving at 10kmp/hr.

31. When questioned by the court, DW3 admitted that he was at a junction. In re-examination, DW3 stated that the motorcyclist entered abruptly and rammed into him.

32. From the evidence adduced before the trial court, it is clear that whereas the respondent was consistent in his testimony on what happened on that material day, the appellant's witness gave several versions of how the accident occurred. The issue therefore is whether the respondent ought to have been held liable or whether he contributed to the occurrence of the accident and if so, in what proportion?

33. In this case, this court is being called upon to interfere with the trial court's finding on liability. 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."

34. The same position was taken 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 the court stated 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.

35. It is not disputed that the pleaded accident occurred or that the respondent and his pillion passenger were on the motorcycle when the accident took place. As earlier stated, the respondent in his testimony was firm that he had stopped off the road for his pillion passenger to alight. He admitted that he did not have a riding license but that he was in the process of procuring one although he did not adduce evidence of the same. Such conduct should not go un-condemned and it should not be rewarded.

36. On his part, DW3 gave several versions of how the accident occurred. In one version, he had stopped at a junction for a motorcycle to pass when the motorcycle instead rammed into him. In another version, DW3 was driving along when the motorcycle suddenly joined the road without due care and in the process, they collided. In cross-examination, DW3 stated that he was driving at 10kmp/hr.

37. In determining liability, the court must consider the facts of the case and conclude as to what mostly contributed to the cause of the accident. The court will consider the manner of driving, identify the person who was at fault and place the blame on him. Where the facts and circumstances are such that it is not clear who was at fault and who was to blame, the court will apportion liability.

38. I must however warn that the fact that the motor cycle rider had no driving licence had nothing to do with the cause of the accident. Once the plaintiff discharges the burden of proof as required under section 107 of the *Evidence Act*, that the driver was to blame for the accident for driving the vehicle in a negligent manner as pleaded in the plaint, and as per the evidence adduced in court on oath, the failure to have a driving or riding licence cannot be the reason for the accident unless there is proof that the rider drove in such a manner that the failure to have the driving licence was the contributory factor to the material accident.

39. The above position was considered in the case of *Joshua Okello Ochieng v Francis Ouko Odira* [2021]e KLR where Ochieng F.A stated that:

> "Having re-evaluated the evidence on record, I find that the accident was caused by the negligent manner in which the Defendant's vehicle was being driven. He was driving at a high speed; and he hit the Plaintiff's motor bike, which was literally off the road, on the Plaintiff's side.
>
> The trial Court held that the Plaintiff was 50% liable for the accident because:
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> "... the plaintiff was not supposed to be riding as he did not have a valid licence."

With utmost due respect to the learned trial magistrate, there is no basis for the conclusion that the failure to have a valid driver's licence caused the accident. In Elizabeth Gathoni Thuku vs Peter Kamau Maina& anotherH.C.C.A. No. 92 of2017 C. Kariuki J. stated that:

"The unlicenced motorcyclist is not automatically liable simply by virtue of being without a licence, rather it lies on who acted carelessly in some way, causing the collision."

40. As was further observed in the above *Joshua Okello Ochieng v Francis Ouko Odira* Case:

> " Liability in a civil claim is an issue to be determined on evidence which shows the person whose actions or omissions caused the accident. Therefore, whereas it amounts to a traffic offence to ride a motor cycle without a valid driver's licence, it is possible that the person who had no valid licence could have been driving so carefully that he cannot possibly be at fault for the accident. The converse is also possible; that a driver who holds a valid driver's licence could be so negligent that the accident is wholly attributable to his said negligence."

41. In *Tom Obita Ndago & Another v Alfonse Omondi Otieno* [2015] eKLR , the court considered an allegation by the defence during trial in the lower court that the fact that the driver was carrying an excess passenger could have caused the accident was refuted by the appellate court which stated:

> " Thus the rider and his passengers weight was not the reason why the riders motor cycle fell but the fact that the 1st appellant hit them".

42. In the case of *Elizabeth Gathoni Thukuvs Peter Kamau Maina& another*H.C.C.A. No. 92 of2017 C. Kariuki J. held thus and I agree that:

> " The unlicenced motorcyclist is not automatically liable simply by virtue of being without a licence, rather it lies on who acted carelessly in some way, causing the collision."

43. As was correctly observed by the learned Judge, liability in a civil claim is an issue to be determined on evidence which shows the person whose actions or omissions caused the accident.

44. Therefore, whereas it amounts to a traffic offence to ride a motor cycle without a valid driver's licence, it is possible that the person who had no valid licence could have been driving so carefully that he cannot possibly be at fault for the accident.

45. The converse is also possible; that a driver who holds a valid driver's licence could be so negligent that the accident is wholly attributable to his said negligence.

46. This is the same situation here; where the evidence by the respondent was clear that the cause of the accident was the appellant's driver (DW3) who made a U-turn and, in the process, hit the motor cyclist who was off the road. Parked and ready to let his pillion passenger alight, but not because the rider had no driving licence.

47. Accordingly, I find no merit in the claim that the trial magistrate should have found the motorcyclist liable for the accident or that he contributed to the occurrence of the accident simply because he did not have a driving licence at the time of the occurrence of the accident.

48. The appellant has also lamented that the respondent did not call any eye witness to the accident. On the question of whether in every case there must be an eye witness, the Court of Appeal in *Abbay*

Abubakar Haji v Marain Agencies Company &Another [1984]4 KCA 53 dealt with the matter where all parties to a motor accident were killed leaving no witnesses. The Court stated:

> "It is the clear duty of the court to arrive at a finding on the facts, however difficult the circumstances may be, if that is at all possible, although that duty does not extend to supplying a theory as to what happens when the inferences from the primary facts do not inevitably point that way."

49. It follows therefore, that a case cannot collapse merely on the basis that there were no eye witnesses. The court, on the basis of circumstantial evidence or evidence adduced by the defendant that tends to prove his involvement in the alleged act can infer culpability on the part of the defendant even where the victim in the material accident dies on impact. (see this court's decision in *EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School* [2018] eKLR).

50. In this case, I find that there was absolutely no factual evidence that the Respondent was to blame in any way, for the accident, considering the contradictory testimony of DW3 as to how the accident occurred, which contradictions are material and raise doubts as to its veracity and truth.

51. I also find that the trial court analyzed the evidence adduced by all the parties before arriving at her decision on liability and quantum hence the claim that she did not consider submissions is far-fetched. Furthermore, submissions could not substitute for evidence which was on record. They remain just that.

52. Therefore, having re-evaluated the evidence on record, I find that the material accident was caused by the negligent manner in which the Defendant's /appellant's vehicle was being driven, by the driver thereof making a U turn at the place where the respondent was off the road and knocking the respondent and his pillion passenger thereby injuring them. I find no fault in the findings of the trial magistrate on liability, which I uphold and dismiss this appeal with costs assessed at Kshs20,000 in favour of the respondent. I so order.

53. This file is closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 31ST DAY OF OCTOBER, 2022

R.E. ABURILI

JUDGE