Asava & 2 others (Suing as Administrators and personal representatives of the Estate of Rodgers Wanjala Mulongo (DCD)) v Ogoye (Civil Appeal 119 of 2019) [2022] KEHC 16584 (KLR) (28 November 2022) (Judgment)

Neutral citation: [2022] KEHC 16584 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 119 OF 2019

DK KEMEI, J

NOVEMBER 28, 2022

BETWEEN

SUSY SAYO ASAVA & 2 OTHERS ..... APPELLANT

SUING AS ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF RODGERS WANJALA MULONGO (DCD)

AND

FREDRICK OMONDI OGOYE ..... RESPONDENT

(Being an Appeal against the judgement and decree of the Principal Magistrate in Bungoma by the Honourable S.O Mogute delivered on 28th November, 2019 in Bungoma CMCC No. 394 of 2019)

JUDGMENT

Background

1. This appeal is against liability by the trial court in respect of an accident involving motor vehicle registration number KBY 800 P and a motor cycle registration number KMDX 687R. which took place on the July 3, 2018 at Zero Zero Junction along Malaba-Eldoret highway while the respondent is alleged to have so negligently driven or managed motor vehicle registration number KBY 800 P that he lost control, and knocked the motorcycle that the deceased was riding thereby causing him to sustain serious bodily injuries resulting in his death. The appellants prayed for orders against the respondent for general and special damages; interest and costs of the suit.

2. Upon service of summons, the respondent entered appearance and filed a defence seeking the dismissal of the appellant's suit with costs and denied the occurrence of the alleged accident, the alleged injuries sustained as well as the alleged particulars of negligence and in the alternative attributed the death of the rider to his negligence.

3. A perusal of the trial court record reveals that the counsel for the appellant requested the court to make a determination of liability based on the determination of liability in Bungoma CMCC No 390/18 and apply the same and be adopted in Bungoma CMCC No 394/18.

4. The trial court in its judgement held that liability was determined in Bungoma CMCC No 390/18 in the ratio of 50:50 and it proceeded to adopt the same.

5. The matter proceeded to full hearing based strictly on liability.

6. Aggrieved by the judgment of the trial court, the appellants filed their memorandum of appeal dated December 2, 2019. The grounds are as follows:

    i. Thatthe learned trial magistrate erred in law and in fact by holding the deceased 50% liable on negligence which finding was not supported by evidence that was tendered thereby occasioning miscarriage of justice.

    ii. Thatthe learned trial magistrate erred in law and in fact by not holding the respondent 100% liable.

    iii. Thatthe finding by the trial magistrate on liability was biased.

7. By directions of this court, parties canvassed the appeal by way of written submissions. Both parties duly filed and exchanged submissions.

8. Vide submissions dated January 28, 2022 the appellants submitted that they requested the trial court to apply the determination on liability in Bungoma CMCC No 390 of 2018 (now BGM HCA No 118 of 2019) where the eye witness one Andrew Lukhale Walekhwa, who was a pillion passenger on the motor cycle testified that while travelling on the motorcycle along Malaba-Eldoret Highway heading towards Kanduyi, upon reaching Zero Zero junction at Shreeji petrol station a motor vehicle registration number KBY 800P which was being driven by the respondent herein from Kanduyi towards Malaba suddenly turned to the right lane to join Chwele road which was on the opposite side of Shreeji petrol station and knocked the motorcycle he was aboard.

9. It was submitted that the respondent breached his duty when he turned onto the right lane to join a feeder road without due diligence and by failing to have a proper look out to other road users.

10. Counsel submitted that the trial magistrate failed to take into account that it was an error for the respondent to turn into a junction without proper lookout and that the trial court overlooked the evidence and testimony of the eye witness and thus the respondent should shoulder 100% liability.

11. The respondent vide submissions dated June 9, 2022 submitted that parties in this matter consented that testimonies and evidence on liability in Bungoma CMCC No 390 of 2018 be applied to this sister suit respectively and that the trial court in its judgement held that liability was already determined in Bungoma CMCC No 390 of 2018 in the ratio of 50%:50%.

12. It was submitted that the respondent testified as DWI in Bungoma CMCC No 390 of 2018. He told the court that he was driving motor vehicle registration number KBY 800P on the material day of the accident and on intending to take a turn at zero-zero junction and head to the general direction of Malakisi, the deceased joined the junction from the service lane and as a result of that careless move he rammed into the front left door of the respondent's motor vehicle. He reiterated that the deceased was on the service lane before the accident and upon arriving at the junction he did not slow down and that the point of impact was at the junction.

13. It was submitted that during the evidence hearing of the appellant's witness during cross-examination, he confirmed that he was a passenger at the back of the motor cycle and this placed him in a difficult position to witness the occurrence of the accident ahead of him with clarity. The witness confirmed that the respondent was not to blame for the accident. Counsel urged this court to find the appeal is without merit and have the same dismissed with costs to the respondent.

14. I have considered the grounds of appeal, the submissions and the evidence adduced before the trial magistrate. This is a first appeal and as such the role of the court is to re-evaluate, re-assess and re-analyze the evidence which was tendered before the trial court and arrive at its own independent conclusions. This has been stated in various authorities and in *Abok James Odera Trading as Odera & Associates v John Patrick Muchira & Company Advocates* (2013) e KLR, the Court of Appeal re-stated the duty of the first appellate court which is that court has to re-evaluate the evidence and come up with its own finding and also determine whether the conclusions reached by the trial court are to stand or not, and give reasons either way.

15. The main issue cropping up in this appeal is basically whether the trial court was right in its finding on liability.

16. This being a first appeal, I am entitled to rehear the dispute, but must remember that the learned trial magistrate had the advantage of hearing and seeing witnesses testify before him which advantage is not availed this court (See *Peters v Sunday Post Limited* [1958] EA 424.)

17. The court also in the cases of *Bundi Murube v Joseph Omkuba Nyamuro* [1982-88]1KAR 108 had this to say; -

> " However, a court on appeal will not normally interfere with a finding of fact by the trial court unless, it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably, to have acted on wrong principles in making the findings he did." And also, in *Rahima Tayabb & another v Ann Mary Kinamu* [1982-88] 1KAR 90 Law JA also stated; -
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> "An appellate court will be slow to interfere with a judge's findings of fact based on his assessment of the credibility and demeanour of witnesses who have given evidence before him."

18. There is no doubt that these principles lie at the heart of this appeal. Whereas it is true that the accident involved a motor cycle and a motor vehicle, the burden of proof that the accident was caused by the negligence on the part of the respondent lay squarely with the appellants. That is the issue which stood out throughout the trial before the learned magistrate.

19. From the judgement, the learned trial magistrate had to decide on a balance of probabilities who between the appellant and the respondent caused the accident. The starting point was for the appellants under section 107 (i) of the *Evidence Act* to present admissible material evidence for the trial court to give judgement in his favour on the proven facts to support negligence on the part of the respondent. The court in *Ciabaitani M'Mairanyi & others v Blue Shield Insurance Co Ltd* CA No 101 of 2000(2005) 1EA 280 held that; -

> " Whereas under section 107 of the Evidence Act, which deals with the evidentiary burden of proof, the burden of proof lies upon the party who invokes, the aid of the law and substantially asserts the affirmative of the issue. Section 109 of the same Act recognizes that

the burden of proof as to any particular fact may be cast on the person who wishes the court to believe in its existence."

20. In my interpretation of sections 107 and 108 of the *Evidence Act*, it places the burden of proving a fact on the party who asserts the existence of any fact in issue relevant to form the onus of proof which may shift from him or her to the defendant. Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER at 374 held as follows;

> " If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to determinate conclusion the way or the other, then the man must be given the benefit of doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. The 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 the tribunal can say, 'We think it more probably than not', the burden is discharged, but, if the probabilities are equal, it is not."

21. Therefore, pleadings continue to be crucial in civil cases as the foundation upon which evidence is introduced to establish the facts in issue. Accordingly, it was the appellants' responsibility to establish that the accident actually happened and that the respondent's negligence caused it to interact as it did. Furthermore, the court must presume the presence of certain circumstances in accordance with section 109 of the Act which provides as follows: -

> " The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case."

22. This argument makes it clear that the types of proof that are required of litigating parties vary widely, as do the obligations that each type of burden of proof puts on a party. In the present instance, the learned trial magistrate had to decide whether the appellants had proven the existence of a fact demonstrating the respondent's negligence. If there is a prima facie case, the appellants must show the existence of a fact that implies the respondent now has the burden of establishing the veracity of the presumptive facts; otherwise, the trial court must uphold the inference.

23. The entire trial was basically on the law of negligence and liability on the part of the respondent. The correct statement of the test on the ingredients of this tort is as defined by *Clerk & Lindsell on Torts* 18th edition in the following passage; -

24. There are four requirements for the tort of negligence namely; -

    1. the existence of law of a duty of care situation i.e., one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.

    2. breach of the duty of care by the defendant, i.e. that it failed to measure up to the standard set by law;

    3. a causal connection between the defendant's careless conduct and the damage;

4. that the particular kind of damage to the particular claimant is not so unforeseeable as to been too remote. When these four requirements are satisfied the defendant is liable in negligence.

> " A defendant will be regarded as in breach of a duty of care if his conduct fails below the standard required by law. The standard normally set is that of a reasonable and prudent man. In the off cited words of Baron Alderson; "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do; or doing something which a prudent and reasonable man would not do". The key notion of "reasonableness" provides the law with a flexible test, capable of being adapted to the circumstances of each case."

25. As a matter of fact, to begin with these were the ingredients of the appellants' claim.

26. What was the implication on the finding on liability apportioned at 50% contributory negligence on the part of the appellants? In the strict and proper sense, it means the respondent raised rebuttal and presumptive evidence on the pleaded facts that the appellants contributed equally to the cause of the accident. The objective on contributory negligence is an aspect of assumption of risk so that the appellant is barred from the whole recovery in damages for pain and suffering.

27. The applicability of contributory negligence against the appellants had the effect of reducing the claim for damages thereby in proportion to the degree or percentage of negligence attributable to him at 50%. That indeed is the corner stone in this appeal.

28. I must decide whether there was credible evidence establishing a causal connection between the respondent's and appellants' breach of the duty of care, which would have prompted the contributory negligence element. In a case involving contributory negligence, the trial court is obligated to determine how much negligence the other person should have or should not have contributed given the circumstances of the incident. An obstacle being used by the parties and each driver's inability to exercise ordinary care to avoid it must both be present in order to sustain a finding of contributory negligence.

29. What transpired at the trial court was a demonstration by the appellants that the deceased rider kept onto his lane but that the respondent while driving from the opposite direction emerged from Shreeji Petrol Station joining the road and, in the process, knocked the motorcycle that he was riding. The respondent contending the evidence of the appellants testified that the motorcycle the deceased rode carelessly encroached onto his lane and that the motor cycle rider was operating the motor cycle at an excessively high speed.

30. In the case of *MacDrugall App v Central Railroad Co* Rbr 63 Cal 431 the court held that; -

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

31. Therefore, in my view where any person suffers damage as the result partly of his own fault and partly of the fault of the defendant, the court can only apportion contributory negligence based on the evidence. It is for the Plaintiffs in this case being the appellants who had the burden to prove that the respondent was negligent in not taking positive steps while approaching the zero zero junction as he emerged from

Shreeji Petrol Station to join the road heading towards Chwele ended up with him knocking down the deceased. The question confronting the learned trial magistrate when considering whether the deceased was negligent was whether the deceased had acted in breach of duty of care in a situation which ultimately gave rise to contributory negligence.

32. My re-evaluation of that evidence is that it is clear that the driver of the motor vehicle must have been in fact driving at a high speed for him to have been unable to control the vehicle to avoid the accident as the deceased then riding a motor cycle was on the reserved road. On the other hand, the motor cyclist should have been watchful on the road. It was the evidence of the respondent that the motor cycle rider did not indicate to notify him exactly on which lane he intended to join. The scenario led to the collision in which the rider lost his life while his pillion passenger sustained injuries.

33. In the case of *Baker v Market Harborough Industrial Co-operative Society Ltd* [1953] 1 WLR 1472 at 1476, Denning LJ (as he then was) observed inter alia as follows:

> " Every day, proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them ..."
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> The trial court also opined as follows:
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> "Many things appear to have happened at the scene from evidence given before one. The fact is no independent witness was called to testify on what side and I must state here it is not possible to decide who was completely to blame for the accident".

34. A perusal of the trial court proceedings reveals that counsel for the appellants did consent to the court's adopting the testimonies and evidence on liability in Bungoma CMCC No 390 of 2018 and that the same to be applied in Bungoma CMCC No 394 of 2018. The trial court in its judgement held that based on the decision of the trial court in the test suit the determination on liability was arrived in the ratio of 50%:50% .

35. From the above, it is evident that the appellants wished to adopt the evidence and judgment civil suit No 390 of 2018 and which is now binding before this court and that the test appeal is now Bungoma HCCA No 118 of 2019

36. Accordingly, I do proceed to adopt the finding of this court in Bungoma HCCA No 118 of 2019 that the trial court record did not indicate that there was an independent witness. The evidence by the plaintiff (appellants herein) for the motor cycle rider did not help the court and rightly so because they were not witnesses to the accident.To resolve the variance in evidence on how the collision occurred and while bearing in mind the principle that where there is collision both parties are answerable, the trial court, I believe, after listening to the evidence resolved the matter by finding both the drivers liable for the accident. The learned trial magistrate held that the failure by the appellants to enjoin the owner of the motorcycle resulted in him shouldering the 50% liability. I find no reason to disturb the finding by the learned trial magistrate on the issue of liability

37. Consequently, for the reasons stated above, this appeal is without merit. It is dismissed with costs.

It is hereby so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF NOVEMBER, 2022

D.KEMEI

JUDGE

In the presence of :

Mukisu for Appellants

Osino for Respondent

Kizito Court Assistant