Walekhwa v Ogoye (Civil Appeal 118 of 2019)
[2022] KEHC 16476 (KLR) (28 November 2022) (Judgment)

Neutral citation: [2022] KEHC 16476 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 118 OF 2019

DK KEMEI, J

NOVEMBER 28, 2022

BETWEEN

ANDREW LUKHALE WALEKHWA ..... APPELLANT

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. 390 of 2018)

JUDGMENT

Background

1. This appeal is against liability established 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. Vide a plaint dated August 17, 2018 it was pleaded that on July 3, 2018 at Zero Zero Junction along Malaba-Eldoret Highway while the respondent so negligently drove or managed motor vehicle registration number KBY 800 P that lost control, and knocked the motorcycle that ferried the appellant as a pillion passenger thereby causing him to sustain serious bodily injuries tabulated as: a concussion, laceration on the right forearm and lacerations on the right knee joint and on the thigh. The appellant prayed for orders against the appellants 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, sustained injuries and being guilty of the alleged negligence and in the alternative attributed the accident to the negligence of the appellant.

3. The matter proceeded to full hearing on liability and quantum.

4. PW1, Andrew Lukhale Walekhwa, adopted his recorded statement as his evidence in chief. He recalled that on July 3, 2018 at about 3.00 pm while travelling as a pillion passenger on motorcycle registration number KMD 687R along Malaba-Eldoret Highway on the left-hand side, a motor vehicle registration number KBY 800 P which emerged from Shreeji Petrol Station joining the road that heads to Chwele, knocked the motor cycle that he was aboard injuring him and the rider. He lost consciousness and on waking up, he found himself at Bungoma West Hospital. He told the court that he sustained severe bodily injuries and was examined by one Dr Ekesa Mulianga. He blamed the driver of the motor vehicle registration number KBY 800 P as he drove at a high speed and failing to apply brakes or make any manoeuvre to avoid the accident. The incident was reported to Bungoma Traffic Base where he was issued with a P3 form and police abstract. He produced in court the report prepared by Dr Mulianga Ekesa dated July 13, 2018 as Pexh 4; the receipt for payment of Kshs 3, 500/= as Pexh 5; demand letter dated July 19, 2018

5. At the close of the Appellant's case the Respondent called DWI, Fredrick Omondi Ogoye, who adopted his recorded witness statement dated October 8, 2018 as his evidence in chief. He told the court that the motor cyclist was riding on the reserved road not the main road and that he was the first person to enter the junction. The motor cyclist did not indicate and he could not tell whether the motor cycle was turning towards Chwele Road and the point of impact was at the junction on the main road. He told the court that the motor cycle did hit his motor vehicle on the left side passengers' side and that the police did not blame him for the accident. According to him, the motor cyclist was to blame for the accident as he was speeding and that he had a right of way at the junction. On cross-examination, he told the court that his motor vehicle was hit on the left front side door and that it was from Malaba and he was from Kanduyi turning right to Chwele road. The motor cyclist did not indicate that he was turning towards Chwele and as he was on the right lane he had the right of way as at that time.

6. On consideration of the matter as a whole, the learned trial magistrate held that the failure of the appellant to enjoin the owner of the motorcycle registration number KMD 687R in the suit resulted to him shouldering 50% liability and awarded general damages of Kshs 120,000/=, spec1ial damages of Kshs 3,500/= less 50% liability amounting to a net award of Kshs 61, 750/= plus costs and interest.

7. Aggrieved by the judgment of the trial court, the appellant filed his memorandum of appeal dated December 2, 2019. The grounds are as follows:

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

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

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

8. The appellant prayed for the appeal to be allowed, judgement of the trial Magistrate on liability be set aside and the same be substituted with an order holding the Respondent 100% liable and that the appellant be awarded costs of this appeal and interest.

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

10. Vide submissions dated January 28, 2022 it was submitted that the respondent breached his duty of care by not having a proper look out to other road users. Counsel submitted that, the trial magistrate

failed to take into account that it was an error to turn into a junction without proper lookout and overlooked the evidence and testimony of the eye witness thus should shoulder 100% liability. He relied on the cases of *Heaven vs Pender and Hay or Bourhill v Young* (1942) 2 ALL ER 396

11. The respondent vide submissions dated June 9, 2022 submitted that the appellant failed to prove his case on liability on a balance of probability and thus did not demonstrate that the appellant owed him any duty of reasonable care. It was submitted that the appellant who was then a pillion passenger and who sat behind the rider could not have seen exactly what happened. It was also submitted that the police officer who investigated the case was not called to testify and further the respondent had not been blamed for the accident as the matter was still pending investigation. It was finally submitted that the appeal should be dismissed and the lower court's apportionment of liability at 50% to 50% be upheld.

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

13. 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 appellant 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 has given evidence before him."

14. 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 appellant. That is the issue which stood out throughout the trial before the learned magistrate.

15. I have given due consideration to the evidence tendered before the trial court and the submissions. It is not in dispute that the issue in contention is on apportionment of liability. I find the only issue for determination is whether the trial court's finding on liability was appropriate. 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 appellant 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."

16. 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."

17. 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 appellant's 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."

18. 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 appellant had proven the existence of a fact demonstrating the respondent's negligence. If there is a prima facie case, the appellant 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.

19. 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; -

20. 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, ie 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."

21. As a matter of fact, to begin with, these were the ingredients of the Appellant's claim.

22. What was the implication on the finding on liability apportioned at 50% contributory negligence on the part of the appellant? In the strict and proper sense, it means the respondent raised rebuttal and presumptive evidence on the pleaded facts that the appellant 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.

23. The applicability of contributory negligence against the appellant 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.

24. I must decide whether there was credible evidence establishing a causal connection between the respondent's and appellant's 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.

25. What transpired at the trial court, was a demonstration by the appellant that he kept onto his lane but 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 aboard. The respondent contending the evidence of the appellant testified that the motorcycle the appellant boarded carelessly encroached into his lane and that the motor cycle rider was operating the motor cycle at an excessively high speed.

26. 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".

27. 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 Plaintiff in this case being the appellant 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 knocking down the appellant. The question confronting the learned trial magistrate when considering whether the appellant was negligent was whether the appellant had acted in breach of duty of care in a situation which ultimately gave rise to contributory negligence.

28. 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 appellant was on board a motor cycle which 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.

29. 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".

30. My re-evaluation of the trial court record indicates that there was no independent witness. The evidence by the plaintiff (appellant herein) who was a pillion passenger did not help the court and rightly so because he was not an independent witness. He was a party to the suit and would naturally give evidence only favourable to his side.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 appellant to enjoin the owner of the motorcycle resulted in him shouldering the 50% liability. Accordingly, I find no justifiable reason for interfering with the trial court's assessment of the evidence before the trial court and the apportionment of liability. The learned trial magistrate arrived at a reasonable finding which I hereby uphold. As there was no dispute on the issue of quantum of damages, the same shall remain undisturbed.

31. Consequently, for the reasons stated above, this appeal is the 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 Appellant

Osino for Respondent

Kizito Court Assistant