



**Maranga & another v Maranga (Civil Appeal 4 of 2018)
[2022] KEHC 17178 (KLR) (Civ) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 17178 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 4 OF 2018

DO CHEPKWONY, J

NOVEMBER 24, 2022

BETWEEN

OLIVER WAKARI MARANGA 1ST APPELLANT

ARCHDIOCESE OF NAIROBI 2ND APPELLANT

AND

RICHARD OMWENGA MARANGA RESPONDENT

(An appeal against the whole Judgment delivered by the Senior Resident Magistrate's Court of Kenya at Milimani (The Hon. D. O. Mbeja) on 1st May, 2017 in the Milimani Civil Case No.428 of 2014 and the subsequent decree arising from therefrom)

JUDGMENT

Introduction

1. This appeal arose from the Judgment of Hon. D.O. Mbeja (SRM) issued on 1st May 2017 in Milimani Civil Case No. 428 of 2014. Being aggrieved by the Judgment and decree of the trial court, the Appellants preferred this appeal challenging the whole Judgment by the trial court vide a Memorandum of Appeal dated 21st December, 2017 raising the following grounds That;
 - a. The Learned Magistrate erred in fact and in law in finding and holding that both the Defendants and the Plaintiff were liable for the accident while the evidence adduced blamed the Plaintiff.
 - b. The Learned Magistrate erred in law and fact in disregarding the evidence presented by the Plaintiff through PW1 in which he stated that the Plaintiff was to blame for the accident.



- c. The Learned Magistrate erred in law and fact by making a decision that was not supported by evidence on record.

The Appellants prayed:-

- i. The appeal be allowed and an order be made to the extent that the Appellants are not liable to the Respondent in the sum of Kshs.250,000.00 plus costs and interest thereon at all.
- ii. In the result, the Judgment and orders made by the Learned Magistrate be set aside.
- iii. In the result, this Honourable Court be pleased to order and declare that:-
- a. The Respondent's claim be dismissed with costs.
- iv. The costs of this appeal be granted to the Appellant.

Background

2. The background of this appeal is that vide a plaint dated 3rd February, 2014 and filed in court on 4th February, 2014, the Respondent instituted a suit against the Appellants seeking General damages for pain and suffering, interest and costs of the suit.
3. The facts leading to the cause of action are that on 6th June 2012, the Respondent was driving Motor Vehicle Registration Number KAX 718C, make Isuzu Minibus along Kenyatta/Koinange street when by reason of the negligence on the part of the 1st Appellant in the manner he managed, controlled and drove Motor Vehicle Registration Number KBL 755W, make Isuzu Bus, as a consequence of which the said motor vehicle collided with Motor Vehicle Registration Number KAX 718C which was being driven by the Respondent. That as a result of this, the Respondent sustained injuries to wit, fracture of the right femur for which he holds the Appellants liable for .
4. The Appellants filed a defence dated 1st November, 2014 and filed in court on 13th November, 2014, wherein they denied the allegations contained in the Plaint and averred that if such accident occurred, the same was caused by the negligence of the Respondent.

Evidence

5. The Respondent called two witnesses who testified before the trial court. PW1-PC Benjamin M. Ego stated that on 6th June 2012 an accident occurred involving Motor Vehicle Registration Number KAX 718C, which was being driven by Richard Omwenga and Motor Vehicle Registration Number KBL 755W which was being driven by Oliver Wakaria.
6. He testified that the accident occurred at 6.30am at the junction on Kenyatta avenue and Koinange street. He produce an OB extract as Exhibit1 and police abstract issued on 26th March, 2013. He went on to state that accident was attended to by PC Mwalikwa, who blamed Motor Vehicle Registration Number KAX 718C, which was being driven by Richard Omwenga for failing to give way. On cross examination, PW1 stated that the investigations were concluded and Motor Vehicle Registration Number KAX 718C, which was being driven by the Respondent was found to blame for the accident.
7. PW2-Richard Omwenga Maranga testified that he sued Motor Vehicle Registration Number KBL 755W for causing the accident along Kenyatta Avenue/Koinange street junction. He stated that he was driving Motor Vehicle Registration Number KAX 718C, Kenya Bus Company and a 33 passenger seater from New Stanley towards GPO at 40kph. He went on to tell court that the vehicle which knocked him was coming from Koinange Street. He blamed the driver of Motor Vehicle Registration



- Number KBL 755W for causing the accident by failing to observe traffic lights and also driving at high speed.
8. He testified that he was treated at Kenyatta National Hospital, where he was examined by Dr. Okere who prepared a medical report and issued him a P3 Form. He said that he was injured on the right leg that sustained a fracture and a metal plate was inserted.
 9. The defence closed their case before the trial court without calling any witness to testify.
 10. Upon considering the evidence before it, the trial court on 2nd May 2017, entered a Judgment in favour of the Respondent against the Appellants jointly and severally of Kshs.500,000/= as general damages for pain and suffering less 50% contribution on liability.
 11. The Respondent filed a Cross-Appeal dated 25th September, 2018. The Grounds in the Cross-Appeal were couched in the following manner;
 - a. The learned trial Magistrate erred in law and fact in finding that the Respondent was 50% liable for causing the accident when there was no evidence to support the holding.
 - b. The learned trial Magistrate erred in law and fact by misdirecting himself on issues of law and fact on negligence by apportioning liability without any basis.
 - c. The learned trial Magistrate erred in law and fact by awarding damages that were too low in the circumstances of the case.The Respondent prayed that;
 - i. The appeal be allowed and the learned Magistrate's Judgment delivered on 1st May, 2017 be set aside and be substituted with an order condemning the Respondents to bear 100% liability.
 - ii. The Honourable Court be pleased to enhance damages awarded to the Respondent.
 - iii. Costs of the appeal and the lower court be awarded to the Respondent.

Submissions

12. Both parties filed their respective submissions in support and in opposition to the appeal and the Cross-Appeal respectively. The Appellants' submissions are dated 27th June, 2022 while the Respondent's submissions are dated 5th May, 2022.

Analysis and determination

13. In determining this issue, I have read through and analysed the evidence that was adduced before the trial court. I find that PW1, PC Benjamin M. Ego in his testimony in chief, stated that the Investigating Officer of the accident that occurred on 6th June, 2012 was PC Mwalikwa and he blamed the Respondent (Plaintiff) in cross-appeal for the said accident. He produced an Occurrence Book No.14/6/6/2012. PW1 also produced a Police Abstract dated 26th March, 2013 which indicated that the case was still pending under investigation. And when cross-examined, PW1 said that Police Abstracts were issued on 18th June, 2012 and the Respondent (Plaintiff) was blamed for the accident for failing to give way. In re-examination, he said that he was not aware of either driver was prosecuted but confirmed that each party obtained a Police Abstract. The Respondent (Plaintiff) on the other hand had blamed the Appellant (Defendant) for the accident by failing to observe traffic lights. When cross-examined, he confirmed that he was aware that he had been blamed for the accident. An analysis of the evidence of PW1 and PW2 (Respondent) while the Respondent was blamed for causing the accident on 6th June, 2012, PW1's evidence in chief on the status of investigations into the said accident



was contradictory. According to the Police Occurrence Book No.14/6/6/2012, the investigations were complete and the Respondent found to blame for the accident. He also produced a Police Abstract issued on 26th March, 2013 in which it was indicated that case still pending under investigations. In cross-examination, PW1 confirmed that both drivers had obtained Police Abstracts. From such evidence, it is difficult to tell who was to blame for the occurrence of the said accident as the status of investigations in the case could not be confirmed.

14. This being a first appeal, this Court has a duty to re-evaluate the evidence tendered before the trial court afresh before drawing its own inference while bearing in mind that it did not have the advantage of seeing the witnesses testify. This was the position stated by the court in the case of *Selle & Another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123 in the following terms;

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270)”

15. Having read through and considered the appeal and the grounds upon which it is anchored on, the cross-appeal, the rival submissions, the record of appeal and the cited authorities, I find the following as the issues arising for determination;
- a. Whether the trial Magistrate erred in law and fact in holding both the Appellants and Respondent liable when evidence blamed the Respondent?
 - b. Whether the trial Magistrate erred in law and fact in apportioning liability at 50%:50%?

Whether the trial Magistrate erred in law and fact in holding both the Appellants and Respondent liable when evidence blamed the Respondent?

16. In determining this issue, this court makes a reference to the evidence of PW1-PC Benjamin M. Ego who testified on 11th November, 2017. In his testimony, PW1 stated that on 6th June, 2012, an accident occurred involving Motor Vehicle Registration Number KAX 718C driven by Richard Omwenga and Motor Vehicle Registration Number KBL 755W driven by Oliver Wakaria. It was attended by PC Mwalikwa. In his evidence in chief, he produced a copy of OB extract and an abstract issued on 26th March, 2013 wherein it is indicated that the case was still pending under investigations.
17. During cross-examination, PW1 stated that the investigations were concluded as per the abstract and Motor Vehicle Registration Number KAX 718C, driven by the Respondent was to blame for the accident. Clearly, while PW1 blamed the Respondent for the accident, his evidence in chief contradicted his evidence in cross-examination on whether investigations in respect of the said accident were completed. There is also a question with regard to the period it took to issue a Police Abstract from the time of accident.
18. From the foregoing summary of evidence adduced before the trial court, the court in its wisdom found it fit and held both parties liable for the accident.



19. This court will not interfere with an award unless it is satisfied the court in reaching its findings, considered extraneous factors or failed to take into account relevant factors or that it misinterpreted the evidence or applied the wrong legal principles.

20. On this issue I shall rely on the court of appeal decision in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, where the Court held that –

“... it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the Judgment of this Court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

21. The Trial magistrate was therefore within the in making the award as it was based on the evidence adduced during trial. I do not see the need to interfere with the award.

Whether the trial Magistrate erred in law and fact in apportioning liability at 50%:50%?

22. In determining this issue it is important to note that though the appellant entered appearance and filed defence before the trial court, no single witness was called to testify on behalf of the Appellant.

23. Section 107 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 dependent on the existence of facts which he asserts must prove that those facts exist”

24. By virtue of the aforementioned provision, any party who wishes the court to give Judgment or to declare any legal right dependent on a particular fact, that party has a legal obligation to provide evidence that will best prove existence of those facts.

25. The position was clearly set out in the decision of *Edward Muringa v Nathaniel D. Schulter* Civil Appeal No.23 of 1997, the court observed as follows;

“In this matter, apart from filing its statement of defence, the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the first Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains allegations sections 107 & 108 of the *Evidence Act* are clear that he who asserts or pleads must support by way of evidence. The liability of an employer towards his employee attaches once an employee is injured in the course of employment as a result of failure to ensure the



duty of care expected from the employer. The Plaintiffs evidence has not been controverted by the Defendant. In the premises, I find and hold the Defendant liable at 100%.”

26. From the evidence before the trial court and in the absence of any testimony from the appellant this court has not material placed before it to fault the Judgment of the trial magistrate on the apportionment of 50%:50% on liability. It is my view that the trial court considered all the relevant factors in reaching its determination.
27. I have also had the benefit of reading the cross appeal by and the prayers being sought and I am satisfied that the award was an adequate compensation in the circumstances of this case.
28. Based on the material placed before me, I have no reason to interfere with the learned trial magistrate’s award and I therefore dismiss both the appeal and the cross appeal for want of merit.
29. I however make no orders as to costs.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. K. A. Nyachoti counsel for Respondent/Cross Appellant

No appearance for and by Appellant

Court Assistant - Simon

