Gakuru v Wangungu & 2 others (Civil Appeal 1 of 2021)
[2022] KEHC 15500 (KLR) (18 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15500 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CIVIL APPEAL 1 OF 2021

CM KARIUKI, J

NOVEMBER 18, 2022

BETWEEN

GEORGE MUTHII GAKURU ..... APPELLANT

AND

KENNEDY WANGUNGU ..... 1ST RESPONDENT

PETER THIUNGU WANYOIKE ..... 2ND RESPONDENT

NOAH KIPROP KANGOGO ..... 3RD RESPONDENT

JUDGMENT

1. The Appellant instituted Nyahururu CMCC 154A of 2016 and sought for the following prayers: -
    i. Special damages of Kshs. 1,023,900/-
    ii. General damages for pain, suffering and loss of amenities
    iii. Loss of use motor vehicle registration number KBY XXXR at a rate of Kshs 8,000/- per day from 6.4.2015 up to the date of judgement
    iv. Costs of the suit
    v. Interest on (a), (b) and (c).
2. On February 2, 2021, the trial court found that the 1st Respondent was not liable for the accident and dismissed the suit with costs to be borne by the Plaintiff. Being aggrieved with the decision of the trial Court, the Appellant filed his Memorandum of Appeal dated February 4, 2021 based on the following grounds:
    i. The learned magistrate erred in law and fact in holding that there was no sufficient evidence to prove on a balance of probabilities that the 1st Respondent wholly contributed to the road

traffic accident on 6th April 2015 involving motor vehicle registration numbers KBY XXXR and KBL XXXS.

ii. The learned magistrate erred in law and in fact dismissing the evidence of an independent witness (traffic officer) and instead relied on evidence of DW2 who was not documented at the first instance by the police as being an eyewitness.

iii. The learned magistrate erred in law and fact in relying on the evidence of DW2 who gave evidence that was contradictory to the facts that led to the accident as stated by the Appellant and the traffic officer.

iv. The learned magistrate erred in law and fact in holding that the 1st Respondent was not liable for the road traffic accident on April 6, 2015 involving motor vehicle registration numbers KBYXXXR and KBLXXXS.

v. The learned magistrate erred in law and fact in dismissing the Appellant's claim with costs.

3. Reasons wherefore the Appellant prays for: -

4. The appeal be allowed and the finding made in the judgement be delivered on February 2, 2021 absolving the 1st Defendant from liability for the road traffic accident on April 6, 2015 involving motor vehicle registration numbers KBY848R and KBL896S be set aside.

5. The 1st Defendant be held wholly liable for the road traffic accident on 6th April 2015 involving motor vehicle registration numbers KBY XXXR and KBL XXXS.

6. The judgement entered in Nyahururu CMCC No. 154A of 2016 on quantum payable as general damages and special damages be upheld.

7. The Respondents be ordered to pay the costs of this appeal and the costs in Nyahururu CMCC 154A of 2016.

8 Background to the appeal

9. The Appellant alleged that he was driving his motor vehicle registration number KBY XXXR from Nyahururu heading to Nakuru when the 1st Respondent caused his motor vehicle registration number KBL XXXS which was heading to Nyahururu to collide with his motor vehicle swerving to his lane at Chemi Chemi area.

10. The Appellant testified that he had been stopped by traffic police officers manning the Nakuru-Nyahururu road. He stopped, and after he was cleared to leave, he started joining the road. Before his motor vehicle was fully on the road, he saw an oncoming motor vehicle registration KBL XXXS which lost control as it was trying to avoid potholes and ended up on his lane and collided with his vehicle.

11. On the other hand, the 1st Respondent stated that he driving motor vehicle no. KBL XXXS heading to Nyahururu from Nakuru when the Appellant who was driving motor vehicle No. KBY 848R swerved to avoid hitting a pot hole at Chemi Chemi area and hit his motor vehicle.

12 Appellant's Submissions

13. The Appellant submitted that the court failed to put into consideration the testimony of PW2 and the documents he produced clearly proved the liability of the 1st Respondent and that the sketch plans produced showed that the point of impact prove that the Defendant was to blame for the accident.

14. It was argued that DW2 could not explain how motor vehicle registration number KBY 848R was left lying on its side and yet the photos showed that it did not overturn. Further despite DW2 taking the

1st Respondent to hospital and traffic police officer coming to hospital and noting his presence at the scene, he did not record a statement with the police.

15. The Appellant contended that DW2's testimony was contradictory on the facts that led to the accident as testified by the Appellant and PW2 and his evidence ought to have been disregarded by the learned magistrate

16 1st Respondent's Submissions

17. The 1st Respondent asserted that save for the Appellant's testimony there was nothing to back his position that it was the 1st Respondent who veered off his lane and hit his motor vehicle. That PW2, a traffic police officer never witnessed the accident and thus most of what he said was hearsay. That the court noted that PW2 was not present at the scene on the day of the accident thus could not explain the content of the sketch maps.

18. The court was invited to peruse the ruling in Nyahururu Traffic Case No. 599 of 2015 where the 1st Respondent stated that the Appellant contradicted the officer's testimony given therein when it came to the instant matter by stating that the accident occurred 20 metres from where the officers were and that the officer were the first to arrive at the scene. That such contradictions puncture the credibility of the Appellant's testimony.

19. The 1st Respondent asserted that it was not true that the trial court dismissed the evidence of the traffic police officer as is evident in page 7 of the judgement where the magistrate noted that the evidence of DW2 threw mud at the evidence of the traffic police officer thus leaving the court speculating on who was to blame for the accident.

20. It was averred that DW2 witnessed the accident and thus his evident was cogent. That the issue of whether the motor vehicle was lying on its side or not was clarified by DW2 during reexamination when he stated that the vehicle was leaning on its side and not lying on its side. Reliance was placed on *Kamwenya Odiara & Another (Suing as the Administratix of the Estate of the Late Timothy Odiara Ndege) v Kiprono Chemwono* [2019] eKLR.

21 Analysis and Determination

22. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. (See *Selle & Another v Associated Motor Boat Co. Ltd. & Others* [1968] EA 123). As was held by the Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] E.A. pg. 424:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

23. The issue emerging from this appeal is basically; whether the trial court was right in its finding on liability.

24. The Appellant alleged that the trial court failed to put into consideration the testimony of PW2 and the documents he produced clearly proved the liability of the 1st Respondent and that the sketch plans produced showed that the point of impact process that the Defendant was to blame for the accident.

25. On the other hand, the Respondent contended that there was nothing to back the Appellant's position that it was the 1st Respondent who veered of his lane and hit his motor vehicle. That PW2, a traffic police officer never witnessed the accident and thus most of what he said was hearsay.

26. Evidently, from the trial court proceedings, PW2 who produced the sketch maps that are the basis of the Appellant's case did not witness the accident. He testified on behalf of the investigation officer who also did not witness the accident. The question that crops up is whether his evidence and consequently the sketch maps could be said to be conclusive as to the occurrence if the accident and who was to blame for the same? I think not.

27. According to *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) citing *Santosh Hazari vs. Purushottam Tiwari (Deceased)* by L. Rs [2001] 3 SCC 179, the court stated that: -

> While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

28. PW2 was not at the scene at the time of the occurrence of the accident and therefore cannot be said to be an eyewitness. I therefore find that his opinion alone cannot be conclusive as to who was to blame for the accident nor can it be said to be binding to the court as such evidence is but an opinion which the court is mandated to test and accept or reject for various reasons.

29. Additionally, the Appellant contended that the court failed to put into consideration the testimony of PW2 however the judgement of the trial court particularly page 97 of the Record of Appeal indicates otherwise.

30. It appears that DW2 was the only eye witness to the accident and his evidence was consistent with the 1st Respondent's narration of what happened on the material day. He corroborated the 1st Respondent's testimony but contradicted PW2's testimony and sketch maps on several details including the point of impact, and where the vehicles lay after the accident. Notably, the Appellant did not appeal against the judgement of the traffic case; Nyahururu Traffic Case No. 599 of 2015. In that case, the Appellant laid a foundation for the accident having being a head on collision however the evidence if the inspection report contradicted the same.

31. In the present case, it is my view that the Appellant cannot succeed when the cause of the damage is left in doubt or is attributable with equal reason to some cause other than the Respondent's negligence. I find that the Appellant did not adduce sufficient evidence to prove on a balance of probabilities that the1st Respondent caused the accident. In totality, his evidence was also full of contradictions that I cannot ignore. Further, as stated by the learned trial magistrate: -

> "It is clear that the fact of an acquittal having occurred does not rule out an element or question of contributory negligence. This would happen on the facts of each case. In this case the Plaintiff called an independent witness who corroborated his evidence against the 1st Defendant. But on the flip side, the Defendant also called an eye witness whose evidence has thrown a lot of mud on the evidence of PW2. The mud having been thrown has created a speculative assumption which may not be used to conclusively decide this case. This being a civil case, the same ought to be decided on balance of probability. Balance of probability in this case is equally distributed between the Plaintiff and the 1st Defendant. This court may therefore not conclusively place liability on either of the parties herein. I find that there is no

case against the 1st Defendant. That's the reason why it would be unreasonable to apportion blame for the accident between the two drivers herein"

32. Accordingly, it is my finding that the Appellant did not adduce sufficient evidence in the Court to entitle the me to conclude that the 1st Respondent was solely to blame for the accident under the legal threshold of preponderance of evidence.

I. The upshot is that the appeal fails and is hereby dismissed.

II. Parties to bear their costs.

DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 18TH DAY OF NOVEMBER 2022

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CHARLES KARIUKI

JUDGE