Mukundi v Wangechi & another (Civil Appeal 22, E018, E019, E020 & E023 of 2022 (Consolidated)) [2022] KEHC 16702 (KLR) (19 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16702 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL 22, E018, E019, E020 & E023 OF 2022 (CONSOLIDATED)

LM NJUGUNA, J

DECEMBER 19, 2022

BETWEEN

LAWRENCE MBOGO MUKUNDI ..... APPELLANT

AND

PAUL NDUNGU WANGECHI ..... 1ST RESPONDENT

FRANCIS MUCHANGI MUGO ..... 2ND RESPONDENT

JUDGMENT

1. The appellant herein who was the 2nd defendant in the lower court, filed the instant appeal against the respondents (who were the 1st defendant and the plaintiff) having been dissatisfied with the judgment by the trial magistrate.

2. In the plaint filed in court on December 23, 2019, the plaintiff averred that on May 19, 2019, around 9.00 pm in the evening, he was off the Ishiara- Kawanjara road around Kanjatiri area together with Emilio Njagi, Erick Muriithi Rugendo and Edwin Njagi Nyaga loading sand onto motor vehicle registration KCA 697Z when he and other loaders were knocked by motor vehicle KBS 709Z. As a result, he was injured and averred that both defendants were negligent jointly and severally for the tortuous acts committed upon them.

3. The particulars of the injuries, those of negligence are set out in paragraphs 4 and 5 of the plaint.

4. The appellant entered appearance and filed a defence on February 20, 2020 wherein he denied the occurrence of the accident on the material date. He also denied that the 2nd respondent sustained injuries as pleaded in the plaint.

5. The 2nd respondent filed his reply to defence on March 12, 2020 in which he denied every allegation of fact and law in the defence. Further, he denied every allegations of negligence attributed to him and put the appellant to strict proof thereof.

6. The matter proceeded to full hearing and the trial magistrate after considering the law and evidence adduced before him, reached a determination that the appellant was 100 % liable for the accident and further awarded the 2nd respondent an amount of Kshs 215,000/= plus costs and interest at court's rates.

7. The appellant being dissatisfied with the said judgment filed the memorandum of appeal dated April 22, 2022 wherein he has listed five (5) grounds of appeal.

8. As already noted in paragraph 2 of this judgment, the appellant herein was in the company of other loaders when the accident occurred who also sustained injuries and one of them namely James Nderi Kinyua lost his life in the accident and whose claim was filed by Jacinta Wanjiru Njeru and Kinyua Nderi as legal representatives of his estate being Civil Suit No 77 of 2020, Emilio Njagi Wawira Civil Suit No 119 of 2019, Edwin Njagi Nyaga Civil Suit No 118 of 2019 and Eric Muriithi Rugendo Civil Suit No 120 of 2019. They were all dissatisfied with the judgments by the trial court and they filed separate memorandum of appeals being Civil Appeal Nos. E018 of 2022, E019 of 2022, E020 of 2022 and E023 of 2022.

9. When the appeals came up for hearing, they were all consolidated with the lead file as Civil Appeal No E022 of 2022. The court further gave directions on filing of submissions.

10. But as a general information, all the causes of action were related in that the plaintiffs were injured in the same accident and therefore the contents of the pleadings were substantially the same save for the parties (the plaintiffs that changed). Similarly, the grounds of appeal in all the memorandum of appeals are exactly the same and the only difference are the names of the 2nd respondent in the respective appeals.

11. The appellant submitted that the trial court erred in finding that he was 100% to blame for causing the accident. That it is not in dispute that the appellant and the 1st respondent were both charged over the same accident. That the question that begs, therefore, is whether the accident was wholly caused by the obstruction caused by the appellant or, the 1st respondent also contributed to the occurrence of the said accident. That the appellant in his defence pleaded that the accident was caused by the negligent acts of the 1st respondent that included but not limited to driving without due care and attention and at a high speed and in a zig zag manner. Further that, relying on the circumstances of the accident herein, and in particular, the nature of the impact and resulting fatality is a conclusive manifestation that the 1st respondent was driving at a high speed. That like all drivers, including the appellant, the 1st respondent owed a duty to other road users to drive in a careful manner and at the appropriate speed and had a duty under the law to observe the right speed limit. Thus, in light of the foregoing, it was contended that the appellant proved his case against the 1st respondent. Reliance was placed inter alia on the cases of *Jackson N. Mutyetumo & Another v Mary Menze Mathuke & 2 Others eKLR* (2007) and *Peter Mulanda Wanje v Capture Transport Limited & 2 Others* (2022) eKLR. In the end, it was prayed that this court finds that the 1st respondent was to blame for causing the accident herein and that liability be apportioned in the ratio of 70:30 in favour of the appellant.

12. The 2nd respondent in his submissions stated that it was the appellant's contention that he is not challenging any of the subordinate's court's finding on quantum, simply his appeal lies on liability only. The 2nd respondent reiterated that at no point is the appellant blaming the 2nd respondents (3rd parties) for the accident, but only prays that liability be borne by the 1st respondent alone. That the appellant has sought that the respondents (plaintiffs) suits against him be dismissed and the 1st respondent (1st defendant) be held 100% liable. Further, it was his case that the 1st respondent in his submissions in the test suit sought that the 2nd respondent and the appellant be found to have contributed to the accident and judgment be entered in the ratio of 60% against the appellant and 20% against the

plaintiffs and himself (1st respondent) respectively. On the other hand, the 2nd respondents had prayed that the appellant be held 40% to blame and the 1st respondent 60% to blame in the test suit.

13. It was his contention that both respondents did not file any appeals but the 2nd respondent reiterates its submissions in the trial court and pray that the judgment by the trial court be varied so that the appellant be held 40% liable while the 1st respondent 60% liable for the reason that, had he not been driving at a high speed, he would have had sufficient time to slow down and he would have avoided the accident that occurred off the road; that indeed the appellant parked his vehicle in a dangerous way thus contributing to the occurrence of the said accident. On costs, it was submitted that whichever way this courts makes its finding, both 1st respondent and appellant owed a duty to the 2nd respondent and thus they should be condemned to pay the costs in a prorata basis.

14. The 1st respondent did not file his submissions despite having been given an opportunity to do so.

15. This being a first appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] EA 12.

16. The court has considered the pleadings, evidence adduced at trial, and submissions in the lower court and on appeal in support of the grounds of appeal. The sole issue for determination is whether the appeal herein has merits. The court will address its mind as to whether the appellant was liable 100% or whether liability should be apportioned between the appellant and the 1st respondent.

17. In relation to that issue, care and caution should be taken to ensure that this court does not interfere with the discretion of the trial court particularly because it did not have the benefit of hearing and seeing the witnesses as they testified. [See cases of *Mbogo v Shah* [1968] EA 93 which De Lestang V.P observed:

> "I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, or because it has misdirected itself or because, it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It would be wrong for this court to interfere with the exercise of the trial court's discretion merely because this court's decision would have been different."

18. To begin with, the plaintiffs' cases before the trial court were based on negligence and the same is defined by *Perly Chartersworth on Negligence* 5th Edition Chapter 1

> "is the omission to do something which a reasonable man, guided upon those considerations ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and a reasonable man would not do. To determine whether an act was negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage."

19. Torts are legal wrongs that persons suffer at the hands of others due to an act of negligence. In *Donoghue v Stevenson* [1932] AC, the House of Lords held that

> "a person should be able to sue another who causes them loss or damage. That is what the court referred to as the duty of care to their neighbours."

20. Therefore, the plaintiffs herein were under a duty to prove on a balance of probabilities the following elements:

(a) That the defendants owed them a duty of care.

(b) That the defendants breached that duty of care.

(c) That the claimants/plaintiffs suffered loss or damage as a direct consequence of the breach.

21. The reason for all these is that for purposes of proof the court in *Regina Wangeci v Eldoret Express Co. Ltd* [2008] eKLR held that:

> " In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts, which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference."

22. It follows that the concept of a duty of care has a correlation with the concept on proximate cause as explained in *Anns v Merton London Brownglı Council* [1977] AC in which the court observed that;

> " Proximity simply means that the parties must be sufficiently close, so that it is reasonably foreseeable that one party's negligence would cause loss or damage to the other. Fairness means that it is fair, just and reasonable for one party to owe the duty to another."

23. What does this mean to the appellant's case herein? From the record, the trial magistrate in his judgement, found that ''the 2nd defendant was rightly charged with the offence of obstruction to which he pleaded guilty given that he had parked his lorry on the opposite lane at night without a warning and so when the 1st defendant got to the scene, he suddenly saw the lorry on his lane. That the 1st defendant could not swerve on the right as there was an oncoming motor vehicle and thus the 2nd defendant swerved to the left to avoid a head on collision with the lorry. He further noted that there was no proof that the 1st defendant was driving at a high speed.

> That the 1st defendant's motor vehicle is the one that knocked down the plaintiff however, the 2nd defendant is the one who caused the 1st defendant to swerve after he obstructed the road. That had the 2nd defendant not obstructed the road, this accident would not have happened....I therefore find that the 2nd defendant was wholly to blame for the said accident.

24. Further, the evidence on causation was given by DW1 – PC Winnie Sembeyo who stated that she was not the investigating officer but the accident herein involved motor vehicles KBS 109 Z Toyota Allion and a lorry KCA 697 Z Isuzu. That at the scene, there was a lorry on its lane and therefore the driver of KBS 709 Z swerved to his left to avoid hitting the lorry which was on his lane. It was her case that the lorry was on the lane of KBS 709 Z and as result, she blamed the driver of the lorry for the occurrence of the accident. Upon cross examination by the plaintiff's counsel, the witness conceded that the record showed that the matter was pending investigation and that the driver of MV KBS 709 Z was charged in traffic case 267 of 2014 with causing death by dangerous driving and further, appellant herein, was also charged with the offence of obstruction.

25. DW3, PC Samuel Irungu on the other hand testified that the driver of motor vehicle KBS 709 Z was to blame for the accident and further, he was charged with the offence of causing death by dangerous driving. On cross examination, he reiterated that the driver of KCA 697Z was also charged with the offence of causing obstruction and was fined Kshs 15,000/= and that the persons loading the sand in the lorry were not blamed.

26. The 1st respondent in his testimony confirmed to be the one who was driving motor vehicle KBS 709 Z at the time when the accident occurred and that he saw the lorry when it was close and that he was driving at 60 kph. That he could not swerve to the other lane as there were other motor vehicles from the opposite direction. It was his evidence that he applied emergency brakes but could not avoid the accident as there was sand on the road and thus he swerved off the road and hit the loaders.

27. The appellant, Lawrence Mukundi pleaded guilty to the offence of obstruction but equally blamed the driver of motor vehicle KBS 709 Z for swerving thus causing the accident herein. It was his case that, had the driver of KBS 709Z not been at a high speed, then he would have managed to stop and in which case, the accident herein could not have occurred.

28. In the case of *Grant v David Pareedon et* at Supreme Court of the Caribbean in Civil Case No 91 of 1987 the court held as follows:

> "Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth."

29. Applying the above principle to the facts of this case, I find that there was sufficient evidence that the 1st respondent failed in his expectation as a reasonable driver, he ought not to have been wholly absolved from liability in the causation of the accident and injury/death of the deceased.

30. While the court must always record the incidence of burden of proof to be that it was the duty of the 2nd respondent in the respective case to prove their cases on a balance of probability, I find that, they discharged that burden. Looking at the record and evidence that was adduced before the trial court, I hold the view that both the appellant and the 1st respondent were to blame for the accident.[See *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLE 526]. Further, it is trite that a driver, owes the road users a duty of care, in the case of *Masembe v Sugar Corporation and Another* [2002] 2 EA 434, it was held that:

> "When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it... A reasonable person driving a motor vehicle on a highway with due care and attention,does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object."

31. The appellant submitted that the 1st respondent was to blame for causing the accident herein and that liability be apportioned in the ratio of 70:30 in favour of the appellant while the 2nd respondent submitted that the judgment by the trial court be varied so that the 1st respondent be held 40% liable while the appellant 60% liable for the reason that, had he not been driving at a high speed, he would have had sufficient time to slow down and his vehicle would have avoided the accident that occurred off the road; that indeed the appellant equally parked his vehicle in a dangerous way thus contributing to the occurrence of the said accident.

32. Lord Reid in *Stephany v Gypsum Mines Ltd* (2) (1953) AC 663 P.681 stated as follows, concerning determination of what caused an accident:

> ' .....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....'

33. In view of the foregoing, therefore, I humbly find and hold as follows:

    i. That liability is hereby apportioned between the appellant and the 1st respondent in the ratio of 70%:30% respectively.

    ii. That the costs of the appeals are awarded to the 2nd respondents in all the appeals, to be paid by the appellant and 1st respondent on pro-rata basis.

    iii. That the finding herein applies to Civil Appeal Nos. E018 of 2022, E019 of 2022, E020 of 2022 and E023 of 2022.

34. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF DECEMBER, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent