



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 33 OF 2019

FREDRICK ODOWA ABUNGU.....APPELLANT

VERSUS

COLLINS ONDIGO.....1ST RESPONDENT

GEORGE OUMA SISI.....2ND RESPONDENT

(Appeal from the judgment and decree of Hon G. Adhiambo, SRM delivered on 10/7/2019 by Hon. C.N Sindani, SRM in Ukwala SRM Civil Suit No. 63 of 2017)

JUDGMENT

Introduction

1. The appellant herein, **Fredrick Odowa Abungu** was the plaintiff in Ukwala SRM Civil Suit No. 63 of 2017. Vide a plaint filed in court on 2/11/2017, the plaintiff-now appellant sued the 1st Respondent herein Collins Ondigo seeking for general damages and special damages following injuries sustained by the plaintiff in a road traffic accident which occurred on 23/9/2017 along Kisumu Busia Road, the plaintiff was a fare paying passenger in the defendants/1st Respondent's motor vehicle registration Number KCM 341S Toyota Shark, which rammmed into motor vehicle registration number KBU 722Z going in the same direction as a result of which the plaintiff and others sustained severe personal injuries.
2. The plaintiff/ appellant blamed the 1st respondent's driver, agent and or servant for the material accident and set out particulars of negligence as per paragraph 5 of the plaint.
3. In his defence filed in court on 26/1/2018, the 1st defendant denied that his driver was negligent as alleged and attributed the occurrence of the accident to the driver /owner of motor vehicle registration Number KBU 722Z. He also pleaded inevitable accident.
4. The 1st respondent then took out a third party Notice against the 2nd respondent herein George Ouma which Notice was served on 3/5/2018 via substituted service- registered post with leave of court and an affidavit of service duly filed in court on 30/5/2018 sworn by **Calvince Okach Odero**, process server.
5. It is worth noting that the parties did agree vide Civil Suit No 63 of 2017 that liability as determined in the said suit do apply to the following suits Nos. **CC 59 of 2017, Lenice Akinyi Oniala vs Collins Ondigo; 60/2017 Ronny Oniala(Minor) vs Collins Ondigo; 62/2017 Mourice Owuor vs Collins Ondigo; 64/2017 Stephen Oniala (minor) vs Collins Ondigo and 61 of 2017 Moses Sitotweti vs Collins Ondigo**. The plaintiffs in the above suits are also appellants in **HCCA 30,31,32 and 34, of 2019** and in the same vein, it was agreed that judgment in this appeal to apply to the above appeal files as the main issues for determination touch on liability between the two respondents herein.
6. In her impugned judgment, Hon G. Adhiambo posed the question- who is liable for the aforesaid traffic accident? In answering that question, she analysed the evidence adduced by the plaintiff and her witness against the evidence of the witness for the 1st respondent and reached a conclusion that both the respondents were equally to blame and apportioned liability between the two at 50:50 and proceeded to quantify the damages awardable to the plaintiff(s) in all the cases.
7. It is that part of the judgment of Hon G. Adhiambo which the appellant herein was aggrieved by and as a result filed this appeal vide memorandum of appeal dated 2.8.2019 seeking, *inter alia*, that the appeal herein be allowed with costs and the judgement on liability by the trial court be set aside and substituted with one on liability against the 1st respondent only at 100%. The memorandum of appeal sets out the following grounds of appeal:

a) *The learned Principal Magistrate erred in law and in fact in apportioning liability at 50:50 against the Respondents against the weight of evidence adduced before her.*

b) *The learned Principal Magistrate erred in law and fact in finding the 2nd respondent liable in the absence of any evidence adduced by the 1st respondent against him.*

c) *The learned Principal Magistrate erred in law and fact in failing to find the 1st respondent liable at 100%.*

d) *The learned Principal Magistrate erred in law and fact in predicating her judgement on liability upon theories and hypothesis that were not supported by any evidence.*

e) *The learned Principal Magistrate erred in law and fact in purporting to compute and apportion the sums payable to the appellant by the 2nd respondent when the 3rd party notice by the 1st respondent merely sought indemnity and or contribution against the 2nd respondent.*

8. As earlier stated, on 7th October, 2020, the parties' counsel agreed by consent to have this appeal as the lead file in the series of appeals including **SIAYA HCCA Nos. 30,31,32 and 34 all of 2019** as the issues raised by the appellants and to be determined are exactly the same.

9. It is worth noting that the 2nd respondent has not participated in these proceedings despite being served.

10. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

11. on behalf of the appellant, it was submitted that on the basis of the evidence adduced by the witnesses in the trial court, there was no basis to find the 2nd respondent liable at all and that the trial court based its findings on liability on no evidence and that therefore the apportionment of liability at 50:50 between the two respondents herein was absolutely erroneous. This court was urged to interfere with the trial court's finding. Reliance was placed on **Mwanasokoni v Kenya Bus Services Ltd [1985]e KLR.**

12. It was further submitted on behalf of the appellant that the 1st respondent pleaded contributory negligence but called no evidence to prove such negligence hence, the trial court was precluded from investigating relative blameworthiness. Counsel for the appellant submitted that therefore, trial court fell into error in apportioning liability as it did. He relied on the case of **Nairobi Civil Appeal No. 292 OF 1997: - Samwel Ngure Gathi v Josephine Wanjiru Mbugua.**

13. It was the appellant's counsel's further submission that a defendant who seeks contribution and or indemnity and who is found liable to a plaintiff must settle the claim as adjudged and thereafter seek contribution or indemnity from the 3rd party as apportioned by the court and that therefore the 1st Respondent was under a duty to pay the Appellant the entire award and thereafter seek to recover 50% thereof from the Third Party. The appellant based his assertion on **Nairobi Civil Appeal No. 24 of 1980: - Jessie Mwangi Gachago v Attorney General** in which the court stated that a defendant and a Third party stand in a plaintiff and defendant relationship between themselves; **Nairobi HCCC NO. 7 OF 2015: James Kimani Maina v Athi Water Services Board and Another** where the court stated that there is no cause of action between the plaintiff and a Third Party and; **Civil Appeal No. 177 of 2002: Sammy Ngigi Mwaura v John Mbugua Kagai and Another**, where the Court of Appeal upheld the decision by the High Court to the effect that a Third Party's liability is through the defendant and to the defendant in indemnity.

The 1st Respondent's Submissions

14. It was submitted on behalf of the 1st Respondent that the appellant's testimony that he saw the 2nd respondent's motor vehicle indicating that it wanted to turn to the **right** from his position behind the driver of the 1st respondent's vehicle contradicted the evidence by PW1, the police officer who never mentioned the presence of the unknown motor vehicle being driven between the 1st respondent's and the 2nd respondent's vehicle and that as such, the learned trial magistrate did not err in law and in fact in finding both the respondents equally to blame for causing the material accident.

15. Further submission on behalf of the 1st respondent was that he agreed with the learned magistrate's finding on computation and apportionment of the sums payable to the appellant by the respondents as both the appellant and the 1st respondent took directions to the effect that the issue of liability as between the plaintiff and the defendant and the 3rd party be determined simultaneously, which directions gave the learned trial magistrate the discretion to exercise its judicial powers to compute and apportion the sums payable to the appellant by the respondents.

Analysis & Determination

16. This being a first appellate court, I am under a duty to examine matters of both law and facts and subject the whole of the evidence to afresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that this court did not have an opportunity to hear the witnesses first hand and test the veracity of their evidence and demeanor. This principle is espoused in Section 78 of the Civil Procedure Act, Cap 21, Laws of Kenya, which provides for powers of this court on appeal as a first appellate court as to **'..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'** These principles were buttressed by the Court of Appeal in the case of **Peter M. Kariuki vs. Attorney-General [2014] eKLR** where court stated that;

“We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and reevaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui v Republic, (1984) KLR 729 and Susan Munyi v Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported).”

17. In addition, as the first appellate court, I will only interfere with the lower court’s judgment if the same is founded on wrong principles of fact and or law as guided by the court of Appeal decision in **Nkuba – Vs – Nyamiro [1983] KLR 403** that:

“A court on appeal will not normally interfere with the finding of fact by a 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 reaching his conclusion.” Per Law JA Kneller & Hanno Ag JJA.

18. In the above cited decision, the court also held that the above position of non-interference with the trial court’s finding of fact notwithstanding, the appellate court is however not bound by the trial court’s finding of fact if it appears that either it failed to take into account particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

19. In **Ndiritu Vs – Ropkoi & Another EALR 334 O’Kubasu, Githinji & Waki JJA**, the Court of Appeal held that the appellate court should be slow to differ with the trial court and should only do so with caution and only in cases where the findings of fact are based on no evidence, or a misapprehension of evidence, or where it is shown that the trial court acted on wrong principles of law in arriving at the findings he did. See also **Mwangi & Another – Vs – Wambugu [1983] 2 KCA 100** where the above principle was restated.

20. Having considered the evidence before the trial magistrate as adduced by the appellant, and taking into account the grounds of appeal and submissions by counsel for the appellant and first Respondent in writing, the issues to be determined in this appeal are:

1. whether the trial magistrates erred in apportioning liability equally as between the 1st and 2nd respondents and;

2. whether the 1st respondent was under duty to settle the entire decretal sum and thereafter seek to be indemnified by the 2nd respondent.

21. On the question of apportionment of liability, from the trial court record, PW1 No. 85472 PC Peter Mwaura testified that both motor vehicles KBU 722Z and KCM 341S were heading towards Busia along the Kisumu Busia highway when the accident occurred. He testified that both cars collided on the right lane as the saloon car which was ahead branched to the right without indicating, causing it to collide with KCM 341S which was attempting to overtake the salon car. In cross-examination, PW1 confirmed that he was not the investigating officer and that the matter was still being investigated. It was his evidence that the accident was caused by the driver of KCM 341S and in re-examination he stated that the driver of KCM 341S was issued with a notice of intended prosecution.

22. The appellant on his part testified as PW2 stating that he was a fare paying passenger in the matatu registered as KCM 341S and that he sat behind the driver. The appellant told the trial court that in an attempt to overtake another matatu that was between it and the salon car KBU 722Z, the matatu KCM 341S rammed into the salon car which he testified had indicated that it was turning to the right. The appellant testified that the matatu KCM 341S was being driven at 140km/hr. The appellant reiterated his statement in cross-examination and in re-examination.

23. In his defense the 1st respondent called DW1 No. 88222 PC Peter Rono who produced an Occurrence Book Report booked on 23/9/2017 in relation to a road traffic accident involving motor vehicles KCM 341S and KBU 722Z. It was his testimony that the matatu registration no KCM 341S was heading to Busia and upon reaching the location of the accident, it hit the salon car registration no KBU 722Z which was turning to its left. It was his testimony that the salon car was to blame for the accident however he was unable to state why. On cross-examination PC Rono stated that the information was recorded by PC Rubia whereas the investigating officer was PC Wanjala. He admitted not knowing the owner of KBU 722Z but that he knew the driver.

Determination

24. Under Sections 107 and 108 of the Evidence Act, the person who alleges is under a duty to prove all allegations as contained in his claim against the respondent on a balance of probability. As was held in the case of **Kirugi & Another – Vs – Kabiya & 3 Others [1987] KLR 347**, the Court of Appeal held thus:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

25. The burden of proof in civil cases is on the balance of probability and lies on he who alleges. This was defined in the case of **Kanyungu Njogu v Daniel Kimani Maingi [2000] eKLR** that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

26. From the evidence adduced there is no doubt that an accident occurred between salon car registration No. KBU 722Z and a matatu registration No KCM 341S. Further it is undeniable that it was the matatu that rammed into the salon car, which latter vehicle, according to PW2, was ahead and had indicated that it was turning to the right.

27. The appellant asserts that the matatu in which he was a passenger was over speeding and being driven at 140km/hr and rammed the salon

car as it was competing with another matatu ahead of it and so when the salon car was turning to the right, the driver of KCM 341S rammed into it.

28. The appellant further stated that from his position behind the driver of the matatu he was able to see the driver of the saloon car indicate that he was turning to the right.

29. PW1 who testified on behalf of the appellant and relied on information which was reported in the occurrence Book at the police station did not mention any car between the matatu and saloon but stated that as the saloon car was turning to the right, it did not indicate that it was turning.

30. DW1 testified that the saloon car was to blame for the accident but did not give any reasons. It is worth noting that neither PW1 or DW1 were the investigating officers. This leaves the court with the evidence of PW2 who was the eye witness to the accident. There was also no evidence of concluded investigations to fully determine who was entirely to blame for the material accident.

31. In **Treadsetters Tyres Ltd v John Wekesa Wepukhulu [2010] eKLR** Ibrahim J. allowed an Appeal and cited **Charlesworth & Percy On Negligence, 9th edition at P. 387** on the question of proof, and burden thereof where it is stated:

“In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably infer and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”

32. Under Section 109 of the Evidence Act, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

33. It is now established that determination of liability in road accident cases is not a scientific affair as **Lord Reid** put more graphically in **Stapley – Vs – Gypsum Mines Ltd (2) (1953) AC 663 at pg 681** that:

“To determine what caused an accident from the point of new legal liability is a most difficult task. If there is any valid logical or scientific theory of ... It is quite irrelevant in this connection in a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...”

“The question must be determined by applying common sense to the facts of each particular case. 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 fault 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. I doubt whether any test can be applied generally.”

34. As stated above, there were specific acts of negligence pleaded by both parties in their pleadings and the onus of proving the said allegations lay on both, on a balance of probabilities. However, as this was the appellant’s case, and as the respondent had no counterclaim against him, it was upon the appellant to demonstrate to the court how negligent the 1st respondent was in the manner that his driver or agent drove or managed the accident motor vehicle, leading to the accident.

35. In my humble view, if the 1st respondent’s driver checked the road to ensure that it was safe before attempting to overtake either the salon car or another vehicle following the salon car, he could not have rammed into the salon car. On the other hand, if the salon car had indicated that it was turning to the right, it is surprising that it was hit by the matatu meaning, there is a high probability that both vehicles contributed to the occurrence of the accident. I say so because overtaking per se is not an offence. Neither is turning off the road. It depends on the circumstances of each case.

36. Having reviewed all the evidence on record, it is my humble view that both the saloon car driver and the matatu driver were to blame for the accident. If the matatu driver was not to blame, then at least he or another eye witness should have been called to testify in rebuttal of the appellant’s evidence. Conversely the appellant testified that the driver of the salon car indicated before turning to the right, something he could ascertain from his position behind the driver of the matatu. However, the appellant’s testimony was contradicted by the appellant’s own witnesses PW1 who testified that the driver of the saloon car failed to indicate that he was turning.

37. In my view, and based on the evidence adduced, the balance of probability on liability for the accident does not tilt solely against the 1st respondent. Had the driver of the saloon car indicated that he was turning to the right it is more likely that the driver of the matatu would have not attempted to overtake it. Accordingly, it is my opinion that the appellant failed to prove acts or omissions of negligence by the 1st respondent wholly and therefore I am unable to find the 1st respondent to be 100% liable for the accident.

38. Turning to the 2nd issue as to whether the 1st respondent should fully settle the decretal amount then get indemnified by the 2nd respondent as alleged by the appellant, the appellant asserts that the doctrine of subrogation applies between the 1st and 2nd respondents. I however do note that when the matter came up for hearing on the 13/6/2018, the appellant’s advocate Mr. Omondi moved the court to have the issue of liability as between his client, the 1st respondent and 2nd respondent be determined simultaneously. The court proceeded to order that ***“the issue of liability as between the plaintiff and the defendant and as between the defendant and the third party be determined simultaneously.”***

39. The principle of subrogation applies where there is a contract of insurance. If the “insured risk” takes effect and the insurer settles the insured’s claim, then the insurer is entitled to diminish the loss suffered by its insured by seeking compensation from the party who caused the loss. The assumption is that the loss would have accrued due to the acts of a third party. By the principle of subrogation, the insurer is put in the position of the insured and is entitled to claim compensation from the 3rd party tortfeasor. The extent of the compensation is not more than what has been paid to the insured.

40. This doctrine of subrogation was interrogated in the case of Mercantile Life & General Assurance Company Limited & another v Dilip M Shah & 3 others [2015] eKLR, citing K.I. Laibuta; *Principles of Commercial Law at pg 254* where the author stated as follows:

“Having compensated the insured, the insurer is entitled to take advantage of and enforce any legal and equitable rights and remedies that the insured has or might have enforced against such third party whether in contract or in tort. To enforce such rights, the insurer brings the action in the name of the insured who must lend his name in return of an undertaking that he will not be personally liable for the costs in the action. The insurer is said to “step into the shoes” (stands in the place of the insured) and is subrogated to his rights. Subrogation is the substitution of one person for another so that the person substituted succeeds to and assumes the rights of the other.”

41. Mureithi J made similar observations in Paragraph 14 of his Ruling dated 23rd September 2015 in HC Misc Civil Application No 2 of 2015 Akamba Road Services v Abdikadir Adan Galgalo citing Halsbury’s Laws of England 4th Edition (2003 reissue) at Paragraph 490 where the principles of subrogation was set out as follows:

“Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss. ...”

42. In Leslie John Wilkins v Buseki Enterprises Limited [2015] eKLR, Kasango J made reference to the observations of the learned author Mac Gillivay & Parkinson “Insurance Law” at page 471

43. In Joseph Obiero –vs- Stephen Kosgei Kwanbai & 4 Others (2019) eKLR the Court appreciated the doctrine of subrogation as discussed in ‘Insurance Law’ by Mac Gillivay & Parkinson at pg 471 as follows:

“The doctrine confers two distinct rights on insurer after payment of a loss. The first is to receive the benefit of all its rights and remedies of the assured against third parties which, if satisfied, extinguish or diminish the ultimate loss sustained. The insurer is thus entitled to exercise, in the name of the assured whatever rights the assured sasses to seek compensation for the loss from third parties. This right is corollary of two fundamental principles of the common law. If a person suffers a loss for which he can recover against a third party, and is also insured against such a loss, his insurer cannot avoid liability on the ground the assured has the right to claim against the third party. Conversely, the third party if sued by the assured, cannot avoid liability on the ground that the assured has been or will be fully indemnified for his loss.”

44. In “General Principles of Law” 6th edition (E.R. Hardy Ivamy”, the author states as follows at page 493:

“In the case of all policies of insurance which are contracts of indemnity the insurers, on payment of the loss, by virtue of the doctrine of “subrogation’ are entitled dot be placed in the position of the assured, and succeed to all his rights and remedies against third parties in respect of the subject-matter of insurance.

Thus, subrogation applies to marine insurance policies and to many non-marine policies, e.g. a fire, motor, jewelry, contingency insurance providing cover against non-receipt of money within a given time, fidelity, burglary, solvency, insurance of securities, and an export credits guarantee policy. But it does not apply to life insurance nor to personal accident insurance, for these are not contracts of indemnity.”

45. In “Bird’s Modern Insurance Law” (7th edition) – JOHN BIRDS, the author states as follows in chapter 15 under “subrogation”:

“This chapter is concerned with the fundamental correlative of the principle of indemnity, namely, the insurer’s right of subrogation. Although often in the insurance context referred to as a right, it is really more in the nature of a restitutionary remedy. The “fundamental rule of insurance law” is “that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified”. A number of points arise simply from that oft-cited dictum and the doctrine of subrogation has many ramifications that must be examined. It is convenient first, though, to consider some general points-: subrogation applies to all insurance contracts which are contracts of indemnity, that is, particularly to contracts of fire, motor, property and liability insurance. It does not apply to life insurance nor prima facie to accident insurance.”

46. From the above authorities, it is clear that Subrogation presupposes the existence of an insurance contract. In the instant case, there is no contractual relationship between the 1st and 2nd respondent, of indemnification in case of loss. In Dubai Electronics v Total Kenya & 2 Others High Court (Milimani Commercial and Admiralty Division) Civil Case No. 870 of 1998 after considering past decisions on the issue it was stated:

“Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability.

However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them. That is my understanding of joint and several liability. In the case of Kenya Airways Limited vs. Mwaniki Gichohi (supra) Ringera, J (as he then was) stated as follows:

“The concept of joint and several liability comprehends one judgement and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant(s).”

47. It therefore follows that the doctrine of subrogation is not applicable in the circumstances of the case herein as the 1st respondent and the 2nd respondent have no relation to one another and there is no substitution of one for the other in the instant suit but rather a sharing of liability.

48. In *in Jessie Mwangi Gachago v Attorney General [1981] eKLR* citing *Gloucestershire Banking Co v Phillips (12 QBD 533)*, Lord Colaridge CJ said:

“The third party is in the position of any other defendant, and if any other defendant appears and will make no defence, when properly called upon to make it ... Judgment may be signed against him.”

49. The trial court shared the liability between the defendant and the third party which this court has found to be in order. I find no error in the trial court sharing the quantum of damages as it did so that the 1st respondent pays 50% while the 2nd respondent pays 50%, and whether or not the appellant elects to recover all from the 1st respondent and leaves the 1st respondent to recover from the 2nd respondent is a question of settlement of the decree in execution process. An appeal cannot lie on the manner a party elects to execute decree and in the event that the orders of the court were unclear, the right court to seek clarification from is the trial court not to appeal. I find no reason to interfere with the division of quantum by the trial magistrate.

50. Consequently, it is my finding and holding that the instant appeal lacks merit and is hereby dismissed. This judgment applies to **HCCA Nos. 30, 31, 32 and 34** all of 2019 with necessary modifications.

51. Costs are in the discretion of the court. In this appeal, I order that each party shall bear their own costs of the appeal.

52. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 16TH DAY OF MARCH, 2021

R.E. ABURILI

JUDGE