REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 5 OF 2020

YAKUB HUSSEIN GANYO.....APPELLANT

VERSUS

AUTO INDUSTRIES LIMITED.....1ST RESPONDENT

JONATHAN CHARO KALAMA.....2ND RESPONDENT

(Being an appeal from the Judgment by the Learned Senior Resident

Magistrate Hon. D. Wasike in Civil Suit No. 401 of 2018 in the

Chief Magistrates Court at Malindi delivered on the 17th December 2019)

Coram: Hon. Justice R. Nyakundi

Wambua Kilonzo Advocates for the appellant

C. B Gor & Gor Advocates for the respondent

JUDGEMENT

This is an appeal in which the appellant **Yakub Hussein Ganyo** filed an appeal against the Judgment of the trial Court presided over by **Hon. Wasike (SRM)** in **CMCC No. 401 of 2018** delivered on 17.12.2019, he seeks variation on the findings made on liability. The borne of contention by the appellant allegedly is on apportionment of 50% ratio as against the appellant whereas she did not have the probative evidence to arrive at such a conclusion. The question of quantum is not the subject matter of this appeal as none of the grounds of appeal raise this issue.

Background

The appellant sued the respondents in a Plaint dated 5.12.2018 to seek both general and special damages for personal injuries suffered in an accident which occurred on 30.6.2018 along Tsavo Road at Chakama area. The appellant alleged that while travelling as a lawful pillion passenger on motorcycle registration No. KMDE 362M the 2nd respondent and his authorized driver so, negligently drove, managed and controlled motorcycle KMDE – 362M. That collision resulted in an accident and thereafter the appellant sustained cut on the head, blunt injury to the right wrist and blunt injury to the pelvis. It was the appellant case that the accident was caused by the respondents acts of negligence and breach of the duty of care owed to the appellant.

The respondents on their part filed a statement of defence denying any negligence or wrongdoing occasioning the accident. The case for the appellant at the trial Court was primarily based on the testimony of his own testimony together with documentary exhibits on treatment notes, and identification of a police abstract; and the medical-legal report by **Dr. Ndegwa**. Further as deduced from his witness statement, the appellant blames the respondent's driver, agent or servant for negligently driving the offending motorcycle at high speed, veering off his lane and subsequently colliding with their motorcycle.

At the close of the appellant's case, its clear that the respondents elected not to call any evidence in rebuttal. Confronted with this single narrative as to how the accident involving the appellant occurred, the Learned trial Magistrate in her Judgment of 17.12.2019 had this to say:

"I concur with submissions by the defendant that it was for the plaintiff to show that the defendant was liable whereas I am

satisfied that an accident occurred, there is doubt as to whether the 2nd defendant solely caused the accident. It is not worthy, that PC Omar who visited the scene did not find it important to produce the sketch of the accident scene as this would have greatly assisted the Court in reducing a determination in regard to the contradictory evidence between Mr. Lokate who was an eye witness and PC Omar who visited the scene the Court still wonders, was there or was there not a bend on the road? This is of great importance as it would determine whether Mr. Lokale actually saw the motorcycle coming on the wrong side of the road or they just happened upon it, if indeed the road was straight and there was no bend as PC Omar stated in his evidence why did the rider of motorcycle KMDE 362M not swerve to avert an accident when he realized that motorcycle KMJE 461H was coming on its lane, yet there was no traffic at all, if indeed it was going at a very slow pace as Mr. Lokale stated with the above, I find that both the rider of motorcycle KMJE 461H and KMDE 362M were equally to blame for the accident."

Pursuant to the Learned trial Magistrate holding as is set out above, appellant counsel submitted as follows: there is no finding or evidence to aver contributory negligence on the part of the appellant.

As regards this contention Learned counsel cited and relied upon the principles in the dictum of **David Kiprotich Bor v Kassim Maranga & Celtel Kenya Ltd Civil Appeal No. 94 of 2011, Richard Kiplagat Chebon v Kennedy Swanya Mwayaka Civil Appeal No. 60 of 2016.** As regards the Learned counsel for the appellant second contention, the findings of the Learned trial Magistrate decision was erroneous for making reference to a third party who was not a party to the proceedings. Learned counsel referred and cited the decision in **Stellah Muthoni v Japheth Mutegi {2016} eKLR** for the legal proposition that a Court cannot make orders against someone who is not a party before it. From that Learned counsel argued therefore in absence of any evidence regarding the elements of negligence the findings on contributory negligence was error committed by the trial Court. There is also in the present case an issue as to claim by the respondent Learned counsel that the appeal was filed in breach of Section 79 (G) of the Civil Procedure Act. On this ground, appellant counsel argued that the appeal was filed within time as premised on count down on expiry of time under Section 79 (G) of proceeding thirty days period and the computation as to time provided under Order 50 Rule 4 of the Civil Procedure Rules. In these circumstances appellant counsel contended that the appeal was filed within time. The appellant counsel also raised a rejoinder with regard to the issue on attachment of decree in terms of Order 42, (13) (4) (F) of the Civil Procedure Rules.

The Learned counsel relies strongly on a passage in the Judgment of **Nyota Tissue Products v Charles Wanga Wanga & 4 Others {2020} eKLR.** it was against these submissions that the Learned counsel argued that the appeal has merit and should be allowed as prayed.

At the hearing and rejoinder by the respondent counsel contention there is no merit in the appeal as prosecuted by the appellant. Learned counsel first line of attack was in respect of an appeal filed out of time without leave of the Court. On this Learned counsel submitted that the appellant failed to take advantage of the principles in **Nicholas Salat v IEBC & 7 Others {2014} eKLR** in particular to seek leave of the Court for consideration of his appeal being admitted out of time.

With respect to the main appeal, Learned counsel argued and submitted that there was not sufficient evidence in this case to wholly blame the respondent for the accident. To buttress his argument Learned counsel referred to the decisions of the Courts **in Blyth v The Company of Properties of the Birmingham Waterworks cited in Kenya Power & Lighting Co. Ltd v Mathew Kabage Wanyiri {2016} eKLR, Maria M'mairanyi & Others v Blue Shield Insurance Co. Ltd CA No. 101 of 2000 {2005} 1 EA 280, Patrick Omutere v Accurate Steel Mills Ltd {2019} eKLR, Evans Mogire Omwansa v Benard Otieno Omolo & Another {2016} eKLR, Freda Stores Limited v National Oil Corporation of Kenya Ltd {2017} eKLR.**

Learned counsel argued and maintained that in the case under consideration there is no question that the evidence provided sufficient grounds for the findings arrived at by the Learned trial Magistrate on liability. That the evidence accepted and acted upon by the trial Magistrate in apportioning liability to a large extent: was on a balance of probabilities. Learned counsel invited the Court to appreciate the principles in **Timsales Ltd v Harun Thuo Ndungu {2010} eklr and Nguku v R {1985} KLR 412.** According to Learned Counsel, there was thus on the face of it abundant evidence to support the decision on apportionment of liability.

Determination

In assessing the standard of review by both counsels as regards the collision and the Learned trial Magistrate apportioning blame between the appellant and the respondent, I am to be guided by the well settled principles on the jurisdiction of the Court in **Selle & Another v Associated Motor Boat Co. Ltd {1968} EA 123 and Peters v Sunday Post Limited {1958} EA 424.** The real principle in the above cases seems to be thus:

"It is a strong thing for an appellate Court to differ from the findings on a question of fact, of the Judge who had the advantage of seeing and hearing the witnesses, but the jurisdiction to review the evidence should be existed with caution. It is not enough that the appellate Court might have come to a different conclusion."

The Law

As stated in **Kamaru & Another v Mwanembe & Another {1995 – 98 1 EA 84}:**

***"The burden of proving contributory negligence on the part of the plaintiff rests squarely on the defendant. That is when it is open to the trial Court to apportion liability and on that account reduce the award of damages."* (See also G. V. Odunga Digest on Civil Case Law and Procedure, 2nd Edition Law Africa Publishing Co. 2010) Pg 2942 at para (D).**

Hence in **Treadsetters Tyres Ltd v John Wekesa Wephukulu {2010} eklr, Ibrahim J citing a passage in one of the lead text books by Charlesworth & Percy on negligence 9th Edition at page 387** had this to say:

> ***"In an action for negligence, as in every 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 inferior and (2). Whether assuming it may be reasonably inferred, negligence is infact inferred, proof of liability is on a balance of probabilities as applied in civil claims and generally discerned from the evidence of the claimant as against the defendant. This is what the Law stipulates in Section 107, 108 and 109 of the Evidence Act."***

In the instant appeal on proof of liability at this juncture it connotes the principle in **Lolligenccy Iron & Coal Company M'mullan {1934} A. C. 25 as cited by G. V. Odunga in his Digest on Civil Cases Law and Procedure 2nd Edition 2010 Law Africa Publishing House Pg 249 at para 6421 paragraph (D),** where he stated:

> ***"In strict legal analysis, negligence means more than needless or reckless conduct, whether in commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."***

Guided by the instructive principles in the above references and citations it is clear from the record that the Learned trial Magistrate findings were based on the liability of **(PW1) Yakub Hussein Ganyo**, the police officer **PC Omar** who visited the scene of the accident and one witness by the name **Lokale** on the degree of blameworthiness and who should bear greater or less proportion of apportionment on liability for the collision of the two motorcycles.

The appellants theory and contention on appeal is that the analysis of the trial Court seems to have been in dilemma as to who between them was not keeping a proper look out. That by apportioning liability in so far as the appellant is concerned the analogous facts did not support that conclusion. According to the appellant it was the respondent who failed to exercise sufficient care to veer off his lane without taking steps to minimize the risk of occurrence of the accident.

As to this apportionment of liability of the Learned trial Magistrate, my view is that it is purely a matter of discretion, unless appellant demonstrates that such a direction taken in the matter was clearly wrong or was a decision taken without any iota of evidence. In a comparative jurisprudence **"Cheong Guin Fan & Another v Murugian s/o Rangasamy {2004} 1SLR 628 at 87** the Court stated interalia:

> ***"The apportionment of liability is more an exercise of discretion than in clinical science."***

In the same jurisdiction, the Court of Appeal in **Asnah bte Ab Rahman v Lijianlin {2016} 2 SLR 944** it was held:

> ***"That it has been said that a finding of apportionment is a finding upon a question not of principle or a positive findings of fact or law but of proportion, of balance and relative emphasis and of weighing different considerations, two considerations emphasized by the Court of Appeal were the relative causative potency of the parties conduct and the relative moral blameworthiness of their conduct."*** **(See also Lakhamshi v Attorney General {1971} EA 118, 120, Baker v Marker Harbour Industrial Co-operative Society Ltd {1953} WLR 1472).**

Taking the queue from the illuminating principles and evidential material on record the ultimate burden of proof on a balance of probabilities was never discharged to place the acts of negligence wholly at the door of the respondent. The evidence which the Learned trial Magistrate admitted and accepted established that there were different scenarios which created a credible impression consistent with the findings that both drivers were equally to blame for the collision. The sum total of all these fully disapproves the appellant contention that the Learned trial Magistrate misdirected herself in Law and fact on apportionment of liability. As previously held in the case of **Selle Motor Boat (supra) & Peters v Sunday**, it is not easy for an appeals Court to disturb an apportionment of negligence made by a trial Court which heard the witnesses, saw the witnesses and made valuable evaluation of their demeanor and or credibility to arrive at such a finding.

The test is whether the appellant has discharged that burden of proof to dissuade me to exercise such appellate jurisdiction to vary and substitute the decision. In this case, I am unable to accept the view taken by the appellant on the basis of the evidence and discretion exercised by the Learned trial Magistrate. Therefore, this ground lacks merit to entitle the appellant an interference of Judgment by the Court.

As I observed, before in this analysis the respondent also proceeded to challenge the appeal on the basis of the incompetence of the appeal in terms of Section 79 (G) of the Act. In relation to this question, although it did come in as a cross-appeal, I expressly disallow it as a matter of Law supported by Order 50 Rule 4 of the Civil Procedure Rules which states as follows:

> ***"Except where otherwise directed by a Judge for reasons to be recorded in writing the period between the twenty – first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time whether under these Rules or any order of the Court for the amending, delivering or filing of any pleading or the doing if any other act provided that this rule shall not apply to any application in respect of temporary injunction."***

That is to say that from the time the impugned Judgment was delivered on 17.12.2019, the computation of time placed the filing of the appeal on 11.1.2020 within the timeline of 30 days under Section 79 (G) of the Civil Procedure Act. This proposition by the respondent fails and I also reject it.

The final aspect of the matter is on failure to attach the decree stated to be the final order of the Court as defined under Section 2 of the Civil Procedure Act to mean:

> ***"the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of***

the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final, it includes the striking out of a Plaint and the determination of any question within Section 34 or Section 91 but does not include any adjudication from which an appeal lies as an appeal from an order or any order of dismissal for default provided that for the purposes of appeal, decree includes Judgment and a Judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such Judgment may not have been drawn up or may not be capable of being drawn up."

In my view this is the yardstick by which the appellate Court should decide whether it is fair and proportionate to strike out an appeal for want of a decree not annexed as part of the record. Essentially, the Court has inherent jurisdiction in this regard exercising a balancing act in that perspective, whether the parties have been prejudiced by virtue of a decree not annexed to the appeal. In my view notwithstanding, the mandatory nature of the wordings under Order 42 of the Civil Procedure Rules the fundamental principle is to ensure that justice is being done between the parties in exercise of its discretion. **(See Section 1A and 3A of the Civil Procedure Act).** In general I respectively agree with the dictum in **Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo {2016} eKLR** on the conditions hereinafter referred to in accordance to filing an appeal and the annexed formal decree. The requirements mentioned in this rule are that the appeal's Court has in its record the precise statement of the order or decree of the impugned Judgment. In that a situation there will be need for the Court to ensure compliance during the case-management directions on admission and pretrial conference to ascertain adherence to the prescribed provision. This appeal to be incompetent and premature, I rely on the express provisions of Section 2 of the Act not to strike out the appeal. It follows from the above arguments raised the Court finds the appeal is devoid of merit. I on my part hereby dismiss the appellant's appeal with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Kiponda holding brief for Wambua Kilonzo advocates for the appellant