



REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

HIGH COURT CIVIL APPEAL NO. 53 OF 2017

EUNICE WAYUA MUNYAO.....PLAINTIFF

-VERSUS-

MUTILU BEATRICE.....1ST DEFENDANT

SIMON MUTUKU.....2ND DEFENDANT

BENSON MUTUNGA NDUVA.....3RD DEFENDANT

WYCLIFFE NJOROGE KIHUMBA.....4TH DEFENDANT

JUDGMENT

1. The Respondent instituted suit against the Appellant and Respondents No. 2, 3 and 4 claiming special and general damages costs and interest in **TAWA RMCC NO. 27/2010**.

2. The Respondent averred that on **06/01/2010**, she was travelling In motor vehicle **KBJ 882J** as fare paying passenger when same was involved in a head on collision with motor vehicle **KAT 840U** at Soweto whereby she sustained injuries.

3. After the case was heard the court found that on liability, Defendant No. 1 was **20%** and Defendants 2 and 3 were **80%** to blame.

4. On General Damages, **Kshs. 100,000/=** was awarded and Special Damages **Kshs. 1,200/=** plus Costs and Interest.

5. The Appellant/1st Defendant being dissatisfied with the above decision, lodged instant appeal and set out 8 grounds namely:-

a) The judgement of the Learned Trial Magistrate does not meet the mandatory requirements of Order 21 Rules 4 & 5 of the Civil Procedure Rules 2010 and is therefore a nullity.

b) The Learned Trial Magistrate erred in law and in fact in failing to allow the 1st Defendant/Appellant herein to adduce her evidence on denial of negligence on her part.

c) The Learned Trial Magistrate erred in law and in fact in not finding that the Plaintiff/1st Respondent had failed to attribute and did not prove any of the pleaded particulars of negligence to the 1st Defendant/Appellant.

d) The Learned Trial Magistrate erred in law and in apportioning liability of 20% against the Appellant/1st Defendant without any basis in law or in fact.

e) The Learned Trial Magistrate erred in law and in fact in finding that the 1st Defendant/Appellant was liable when the evidence on record was that the 2nd, 3rd and 4th Defendants'/Respondents' driver solely caused the accident by overtaking an unidentified motor vehicle at a blind corner.

f) The Learned Trial Magistrate erred in law and in fact in basing his findings on irrelevant issues not supported by evidence adduced or the applicable law, as clearly captured in his judgement.

g) The Learned Trial Magistrate's decision is against the weight of evidence.

h) The Learned Trial Magistrate erred in law and in fact in denying the Appellant her fundamental constitutional right to a fair hearing by unreasonably, unfairly and injudiciously denying the Appellant/1st Defendant an adjournment to call witnesses.

APPELLANT'S SUBMISSIONS

6. The Appellants Appeal herein is mainly on liability and as such the 8 (eight) grounds of Appeal shall be coalesced under two heads:

a) Whether the trial court erred in apportioning liability of 20% against the Appellant/1st Defendant without any basis.

b) Whether the trial magistrate erred in denying the Appellant her fundamental constitutional right to a fair hearing by denying the Appellant a 1st adjournment to call witnesses.

A. LIABILITY

7. FACTS AND EVIDENCE:- During trial three witnesses were called to testify for the (Plaintiff/1st Respondent) namely; **Dr. Kimuyu Judith** who was the plaintiff's doctor who testified as **PW1**, the Plaintiff as **PW2 Eunice Wayua Munyao** and **PW3 Rebecca Kitano alias Rebecca Musyoka**. The 2nd and 3rd Respondent called one witness namely **Benson Mutunga Nduva** who testified as **DW1**. The Appellants did not call any witnesses.

8. **PW2 Eunice Wayua Munyao** (the Plaintiff/1st Respondent) testified that she was travelling in the Appellant/1st Defendants motor vehicle **KBJ 882J** where she was involved in a road traffic accident at a place called Soweto where there is a sharp corner.

9. In her cross-examination she stated there were two motor vehicles from the opposite direction which were over speeding namely **KAT 840U** and another unidentified vehicle.

10. She stated as follows:-

“There was a sharp corner, there was a speeding motor vehicle from Machakos the other vehicle was KAT 840U. I blame both motor vehicles as they were over speeding. They are common in the road. They should have slowed down.” (See page 26 of the record of Appeal).

11. On cross-examination by the Appellants advocate she stated that she did not know which motor vehicle was on the wrong and that their motor vehicle was hit and that the Appellant's motor vehicle was on the right side. There was a corner and that it was the other motor vehicle that came into their lane.

She stated that the other vehicle should be held responsible.

12. Her testimony was as follows:-

“I do not know on what side of the road the accident occurred. I do not know which vehicle hit ours. I felt the impact of the accident. We were on the right side. There was a corner. The other motor vehicle came to our lane. It should be held responsible.” (See page 27 of the record of Appeal).

13. The 1st Respondent called **PW3 Rebecca Kitano alias Rebecca Musyoka** who was an eye witness and also travelling in the Appellant/1st Defendants matatu stated that they were lawfully on the left lane of the road. She further testified that **KAT 840U** wanted to overtake another motor vehicle and it entered the left lane, despite there being a bend.

14. She stated as follows:-

“I had sat in front, I saw well, I saw clearly, we were on the left hand side. There were 2 motor vehicles approaching. The approaching vehicles were speeding. One motor vehicle trying to overtake the other. It came to our lane. I blame KAT 840U as it was trying to overtake yet there was a corner.” (See page 28 of the Record of Appeal).

15. It is appellant’s submission that, the above testimony by PW3 exonerated the Appellant from any blame whatsoever.

16. The Plaintiff being required to prove her allegations of negligence and the particulars set out in the plaint against the Appellant/1st Defendant did not prove any of the pleaded particulars as it shall be demonstrate below and it is for this reason that appellant urge the court to dismiss the 1st Respondents claim against the Appellant.

17. The 2nd and 3rd Respondent called their witness, **DW1 Benson Mutunga**. He was the driver of the motor vehicle **KAT 840U**. He stated that the road he was travelling had sharp corners. It was his testimony that suddenly he saw a motor vehicle in front and immediately applied breaks.

18. On cross-examination by the 1st Respondents advocate he stated that if he were driving slowly then the accident could have been avoided.

19. He stated as follows:-

“There was no dust, it was during a rainy season. It was only a blinding corner. If I were driving slowly the accident would have been voided.” (See page 29 of the Record of Appeal).

20. On cross-examination by the Appellants advocate, he stated that he was charged as a result of the accident and that the traffic case was still pending investigation.

21. He stated as follows:-

“My vehicle landed on a ditch on the left side. I was charged and the case is ongoing.” (See page 30 of the Record of Appeal.)

22. If the driver of motor vehicle **KBJ 882J** (Appellants vehicle) was indeed negligent then the police ought to have charged him too for careless driving. However this was not done since he was not to blame.

23. JUDGEMENT OF TRIAL COURT ON LIABILITY:- In the judgement of the trial court, the learned magistrate failed to analyze the issue of liability at all. The trial magistrate failed to carefully and

critically interrogate and analyze the evidence PW2, PW3 and DW1 and this led him to a wrong conclusion of both fact and law.

24. The trial magistrate concluded as follows:-

“I henceforth find that the 2nd and 3rd defendants have to bear the lion’s share of the burden which I apportion at 80%. The 1st defendant on the other hand will bear 20% of the Burden.”
(See page 54 of the Record of Appeal).

25. SUBMISSIONS ON LIABILITY:-The conclusion by the trial court that the Respondent was a fare paying passenger and therefore liability on the part of the Appellants was 20% is erroneous in both the law and the fact. It is the Appellant’s submission that negligence of the driver was not established and/or determined simply because the claiming party was a passenger in the subject motor vehicle.

26. **PW3 Rebecca Kitano alias Rebecca Musyoka** who was an eye witness and also travelling in the Appellant’s matatu as well and testified that they were lawfully on the left lane of the road. It was her testimony in Examination in chief that she was seated in the front row with the driver and that she saw two motor vehicles approaching from the opposite direction, and that the 2nd and 3rd defendant’s matatu (KAT 840) was on the lane of the Appellant’s lane, i.e. the left lane.

27. She further testified that KAT 840U wanted to overtake another motor vehicle and it entered the left lane, despite there being a bend. She blamed motor vehicle KAT 840U for trying to overtake and there was a corner, this is a very important fact which ought to have been taken into consideration by the trial magistrate.

28. In **OLUOCH ERIC GOGO –VS- UNIVERSAL CORPORATION LIMITED [2015] eKLR**, the court re-stated the duty of an appellate court as follows:-

“As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of SELLE & ANOTHER –VS ASSOCIATED MOTOR BOAT CO. LTD & ANOTHER 91968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.....”

29. In view of all the foregoing, it is the Appellants humble submissions that the trial court erred in fact and in law and this Honourable Court ought to re-evaluate the evidence afresh and arrive at the proper conclusion with regard to the causation of the accident and how liability was apportioned by the trial court.

30. In the plaint the 1st Respondent pleaded particulars of negligence in respect of the Appellant her driver, Agent and or servant as follows:-

- a. Driving the said motor vehicle KBJ 882J at a speed which was fast and dangerous in the circumstances.
- b. Failing to take any proper and effective control of the said motor vehicle.
- c. Driving without due care and sufficient attention.
- d. Failing to have any proper regards to the safety of passengers on board KBJ 882J.
- e. Failing to stop, slow down, and apply brakes, swerve or any other way so as to manage or control the said motor vehicle effectively.

31. From the evidence on record, nothing pointed a finger on the Appellant and that the particulars of negligence enumerated by the 1st Respondent were not proved during trial. Therefore it is worth noting that:-

- a. It was not the Appellants vehicle that was overtaking at a bend.
- b. It was not the Appellant who was driving at a high speed.
- c. The Appellants vehicle was lawfully on the left lane of the road.
- d. All fingers pointed at the driver of **KAT 840U** who was racing against another unknown vehicle and overtaking at a bend.

32. In view of the foregoing, it is clear that the evidence of PW3 exonerated the Appellant of any blame as alleged by the 1st Respondent in her plaint.

33. It is the Appellant's submission that in an action for negligence the burden of proof falls against the plaintiff alleging to establish each element of tort, hence it is for the Plaintiff to adduce evidence of facts on which he bases his claim. Indeed, the award the 1st Respondent witness exonerated the Appellant from any blame.

34. In **TREADSETTERS TYRES LTD –VS- JOHN WEKESA WEPUKHULU [2010] eKLR** where Ibrahim J. allowed an Appeal quoted Charles worth & 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 inferior and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”

35. The court in the same case was guided by the case of **DARE -VS- PULHAM (1982) 148, C.L.R. 658 AT 664** which described the functions of pleadings:-

“Pleadings and particulars have a number of functions; they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet, they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court.....”

36. The driver of the KBJ 882J was never charged with a traffic offence of over speeding despite there being a complete police file with testimonies of passengers and eye witnesses.

37. **Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya** clearly captures these aspects and they provide as follows:-

107. Burden of proof (1) whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden The of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact *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.*

38. The issue has been dealt with and settled by the Court of Appeal and was applied in one of the fairly recent authorities of **EAST PRODUCE (K) LIMITED -VS- CHRISTOPHER ASTIADO OSIRO IN CIVIL APPEAL NO. 43 OF 2001** where it was held that:-

“It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku –Vs- Kenya Cargo Hauling Services Ltd 1991 where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”

39. As such, it is the Appellants submission that causation of the accident by the Appellant was not established by the 1st Respondent at all and equally the negligence of the driver of the subject motor vehicle was never established and/or demonstrated by the 1st Respondent. As such, the conclusion that the driver was 20% liable simply because the 1st Respondent was a passenger was wrong and erroneous. It is the Appellant’s submission that negligence of the driver was not established and/or determined simply because the claiming party was a passenger in the subject motor vehicle.

40. In view of all the foregoing, it is the Appellants humble submissions that the trial court erred in fact and in law and this Honourable Court ought to re-evaluate the evidence afresh and arrive at the proper conclusion with regard to the causation of the accident and negligence.

B. RIGHT TO A FAIR HEARING

41. The Appellant was denied a first adjournment to call their witness, it is notable that this was a first adjournment that the defence counsel was seeking however the trial court declined to grant the same.

42. The prayer for adjournment was within the ambit and preserve of the Learned Magistrate and he ought to have exercised his discretion judiciously.

43. The Appellants advocate had communicated their intention to adjourn the matter to the Respondents advocate, however when the matter was called the Respondents counsel stated that this was not the position and prayed that the 1st defence case be ordered to close its case. The court agreed and closed the defence case.

44. The reasons given by the Trial Magistrate were not reliable Law. He only stated it was a test suit and that parties were ought to have been prepared.

45. It is our submissions that the said application of adjournment was not in bad faith and the same should have been allowed as it was only the first adjournment.

46. **Article 50 of the Constitution** of Kenya provides that every person is entitled to a Fair hearing, which is a critical ingredient to Natural justice. The principles of Natural Justice implies fairness, reasonableness, equity and equality.

47. The maxim *audi alteram partem* accentuates the rule of fair hearing. It lays down that no one should be condemned unheard.

48. It is the first principle of the civilized jurisprudence that a party to a suit must be given an opportunity to be heard before any decision is taken against him.

49. It is our submission that when the trial court denied the defence a first adjournment the rule of fair

hearing was violated.

50. In **SAVANNAH DEVELOPMENT COMPANY LTD VS MERCHANTILE COMPANY LTD, CASE NO. 120 OF 1992**, the court stated that:-

“there may be reasons for seeking adjournment of a case set down for hearing on a particular day and that where there are valid reasons to justify granting of an adjournment the Court always has unfettered discretion to grant the adjournment. The Court further stated that elements to be taken into consideration in an application for adjournment include the adequacy of the reasons given for the application for adjournment; how far, if at all, the other party is likely to be prejudiced by the adjournment; and whether the other party can be suitably compensated by award of costs.”

51. It is our submission that this being a first adjournment and the fact that there was new information on the subject accident, the trial magistrate ought to have allowed the adjournment and the 1st respondent should have been awarded cost for the day.

52. In **PETER M. KARIUKI VS ATTORNEY GENERAL [2014] eKLR**, the court stated that an adjournment should be exercised in **a judicial and reasonable manner and upon proper material. Such discretion, the court continued, should be exercised after considering the party’s conduct in the case, the opportunity he had of getting ready and the truth and sufficiency of the reasons alleged by him for not being ready.**

53. The court is obliged to be more circumspect in rejecting an application for adjournment and to specifically consider whether denial of such a right guaranteed by the Constitution would result in miscarriage of justice.

54. In denying the Appellant’s application for adjournment, the court did not address its mind to the critical question whether denial of the adjournment would occasion a miscarriage of justice. Indeed your Lordship, the Appellant was denied a chance to call their witness and as a result they were not able to buttress their averments that they were not to blame in any way for the accident. This led to a wrong factual conclusion that the Appellant was 20% liable.

55. In **JOB OBANDA –VS- STAGE COACH INTERNATIONAL SERVICES LTD & ANOTHER, (2002) eKLR**, this Court was emphatic that where, among others, a judge fails to apply his mind to the question whether a miscarriage of justice might be occasioned to a party who is refused an adjournment, that would constitute sufficient basis upon which an appellate court would be entitled to interfere with the exercise of the discretion.

56. In view of the foregoing, it is clear that the Appellant was not to blame and that they were denied a chance to call their witnesses thus their Constitutional Right to a fair hearing was violated. This also led them to the trial magistrate to come to a wrong conclusion of fact since the Appellant were not given a chance to exonerate herself from blame.

57. Accordingly, the Appellants urge that the trial court’s finding that the Appellant was 20% liable be set aside and make a finding that the Appellant was not to blame.

RESPONDENT’S SUBMISSIONS

58. Evidence on liability as captured by Trial Magistrate was to the effect that:-From the evidence on record the Plaintiff was travelling as a fare paying passenger in motor vehicle reg. no. KBJ 882J and the same was involved in a head on collision with a motor vehicle reg. no. KAT 840U at a place called Soweto.

59. No evidence was attributed towards her negligence and there is no doubt that she did not contribute towards the accident. What this court is to consider is who is responsible and to what extent for the

accident.

60. Prosecution witnesses testified that motor vehicle reg. KAT 840U drove onto their path as it tried to overtake an unidentified motor vehicle. The 2nd and 3rd Defendants state that the road in question was narrow and that their motor vehicle was travelling uphill and could henceforth not have been travelling at a high speed.

61. The 2nd/3rd Defendant blames the accidents on the high speed of the 1st Defendant's motor vehicle. The 1st Defendant did not tender any evidence. It is of significance to note that DW1 was charged with a trafficked offence of careless driving (case is yet to be determined).

62. It is also of significance to note that the accident occurred at a blind corner and drivers of both motor vehicles should have been more cautious. Apparently, they did not as was testified by the prosecution's witnesses.

63. The driver of motor vehicle Reg. No. KAT 840U besides speeding threw caution to the wind and proceeded to overtake an identified motor vehicle at a blind corner.

64. Henceforth the court found that the 2nd/3rd Defendants have to bear the lion's share of the burden which was apportioned at 80%. The 1st Defendant on the other hand would bear the balance of 20% of the burden. After going through proceedings and the submissions by the parties, I find the issues emerging as;

ISSUES

65. As the Award is not challenged, the court adopts the issues that:-

a) Whether apportionments of liability of 20% against Appellant/1st Defendant had any basis.

b) Whether the Appellant fundamental right to a fair hearing was violated by denying the Appellant an adjournment to call witnesses?

66. On the issue of the apportionment of liability between DW2 & 3 on one side and DW1 on the other at a rate of 80% and 20% respectively, the trial court relied on PW2, 3 and DW1 testimony. They testified that motor vehicle reg. KAT 840U drove onto their path as it tried to overtake an unidentified motor vehicle.

67. The 2nd and 3rd Defendants state that the road in question was narrow and that their motor vehicle KBJ 882 J was travelling uphill and could henceforth not have been travelling at a high speed. PW2 and 3 blame the driver m/v KAT 840 U that is DW1. Infact DW1 in his testimony admits the wrong doing and thus the blame for the accident.

68. DW1 Benson Mutunga. He was the driver of the motor vehicle KAT 840U. He stated that the road he was travelling had sharp corners. It was his testimony that suddenly he saw a motor vehicle in front and immediately applied breaks.

69. On cross-examination by the 1st Respondents advocate he stated that if he were driving slowly then the accident could have been avoided.

70. He stated as follows:-

“There was no dust, it was during a rainy season. It was only a blinding corner. If I were driving slowly the accident would have been voided.” (See page 29 of the Record of Appeal.)

71. On cross-examination by the Appellants advocate, he stated that he was charged as a result of the

accident and that the traffic case was still pending investigation.

72. He stated as follows:-

“My vehicle landed on a ditch on the left side. I was charged and the case is ongoing.”

73. If the driver of motor vehicle KBJ 882J (Appellants vehicle) was indeed negligent then the police ought to have charged him too for careless driving. However this was not done since he was not to blame.

74. Sections **107, 108** and **109** of the **Evidence Act Cap 80 Laws of Kenya** clearly captures these aspects and they provide as follows:-

75. **107.** Burden of proof (1) whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

76. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

77. Sect 108 Incidence of The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

78. 109. Proof of particular fact 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.

79. The issue has been dealt with and settled by the Court of Appeal and was applied in one of the fairly recent authorities of **EAST PRODUCE (K) LIMITED -VS- CHRISTOPHER ASTIADO OSIRO IN CIVIL APPEAL NO. 43 OF 2001** where it was held that:-

80. “It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of **KIEMA MUTUKU –VS- KENYA CARGO HAULING SERVICES LTD 1991** where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”

81. As such, it is the Appellants submission that causation of the accident by the Appellant was not established by the 1st Respondent at all and equally the negligence of the driver of the subject motor vehicle was never established and/or demonstrated by the 1st Respondent. As such, the conclusion that the driver was 20% liable simply because the 1st Respondent was a passenger was wrong and erroneous.

82. The court thus finds that there was no justification in attributing 20% blame on the appellant .No evidence was laid before the court to warrant that measure of blame against the appellant.

83. On the issue of denial of adjournment, the appellant laments that the trial court denied him an adjournment yet it was the first application on his side for an adjournment to enable him bring witnesses.

84. In the case of In **SAVANNAH DEVELOPMENT COMPANY LTD -VS- MERCHANTILE COMPANY LTD, CASE NO. 120 OF 1992**, the court stated that:-

“There may be reasons for seeking adjournment of a case set down for hearing on a particular day and that where there are valid reasons to justify granting of an adjournment the Court always has unfettered discretion to grant the adjournment. The Court further stated that elements to be taken into consideration in an application for adjournment include the adequacy of the reasons given for the application for adjournment; how far, if at all, the other party is likely to be prejudiced by the adjournment; and whether the other party can be

suitably compensated by award of costs.”

85. One of the fundamental elements to be taken into account for application for adjournment is **adequacy of the reasons given for the application for adjournment. The fact that** it was a first application for adjournment is not the prime ground for grant of the same. It was incumbent upon the appellant to demonstrate the adequacy of reasons for the adjournment.

86. The said obligation was not discharged by the appellant.in any event the appellant having succeeded on the first issue above, the instant issue becomes superfluous. The appellant knew of the date of the hearing of the matter but failed to bring the witnesses nor account for the same failure to the standard set by the aforesaid authority.

87. The court therefore makes the following orders;

i. The Appeal is allowed, the Judgement on liability set at 80% to 20% between 2nd & 3rd Defendants and 1st Defendant respectively, is hereby set aside.

ii. The 2nd and 3rd Defendants are held 100% liable.

iii. The Plaintiff’s suit is dismissed against the 1st Defendant with costs.

iv. The defendant 2nd and 3rd Defendants to pay 1st Defendant/Appellant costs for the Appeal.

SIGNED, DATED AND DELIVERED THIS 30TH DAY OF NOVEMBER, 2017.

C. KARIUKI

JUDGE

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