Mwangi & another v Oginga (Civil Appeal 88 of 2023)
[2025] KEHC 7976 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 7976 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 88 OF 2023

AB MWAMUYE, J

FEBRUARY 13, 2025

BETWEEN

GEORGE WAMBUGU MWANGI ..... 1ST APPELLANT

JOEL GACHUI NGARI ..... 2ND APPELLANT

AND

JAMES OGUTU OGINGA ..... RESPONDENT

JUDGMENT

A. Introduction and Background

1. This appeal arises from the decision of the Principal Magistrate at Maseno in Civil Case No. E004 of 2022. The Appellants were aggrieved by part of the decision that apportioned 100% liability on the Appellants to the exclusion of the Respondent who it is alleged contributed to the negligence that caused and/or aggravated the accident.

2. The Respondent approached the trial court by way of a plaint wherein he was seeking general damages as compensation for the injuries he suffered following an accident that occurred on or about 24th April, 2021. The Respondent and the 1st Appellant, driving a motor cycle registration KMET605Z Boxer and a motor vehicle registration KCV493Z FUSO respectively, met each other in a perilous accident that claimed two of the Respondent's pillion passengers as well as inflicting some bodily injuries on the Respondent.

3. The Respondent lodged a suit in the trial court to pursue compensation for the injuries. There doesn't seem to be a dispute on the extent of the injuries and the appropriate quantum in damages. The quarrel seems to be on the apportionment of liability. As stated above, the trial court found the 1st and 2nd Appellants a hundred percent liable.

4. In the 1st and 2nd Appellant's memorandum of appeal instituting the present appellate proceedings, the Appellants want this court to make a finding that the learned trial magistrate misdirected herself by failing to appreciate the evidence in totality thereby failing to apportion liability accordingly between the Appellants and the Respondents as she ought to have done as a consequence whereof, she found 100% against the Appellants on liability.

5. It is the Appellants' prayer that I set aside the judgment of the trial court to make my own findings on liability based on evidence and sound legal principles.

6. Both parties filed their submissions.

B. Issues, Analysis And Determination

7. I have gone through all the material placed before me and I am of the view that the gravamen of the Appellant's case is whether the trial court properly directed itself to apportion 100% liability on the Appellants.

8. I shall proceed to discuss that issue. Before I do, I wish to delineate the work of this court as the first appellate forum.

9. Selle vs. Associated Motor Boat Company is probably the most seminal authority on the review scope of the High Court as the first appellate forum for matters emanating from the sub-ordinate courts.

10. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> " . this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

11. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

12. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " 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 exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

13. This court will therefore reevaluate the evidence on record, if necessary, to be able to arrive at an independent decision on liability.

14. I take note that in his testimony given under oath the Respondent expressed that he was riding the aforesaid motor cycle while carrying two pillion passengers when he was involved in the aforesaid road accident. The trial court in its judgment took note of the same deposition.

15. The Appellants may not have invited any witness to testify in their support, but they didn't have to. As the trial court noted in its judgment, the Respondent's recollection of the accident was the only version of the accident available.

16. By his own admission, the Respondent testified that he was carrying two pillion passengers.

17. Section 60(1) of the *Traffic Act* CAP 403 states as follows:

> " It shall not be lawful for more than one person in addition to the driver to be carried on any two-wheeled motorcycle, nor shall it be lawful for any such person to be so carried otherwise than by sitting astride the motorcycle and on a proper seat securely fixed to the motorcycle behind the driver's seat."

18. Section 68 sub-section 3 of the *Traffic Act* Laws of Kenya provides that:

> " A failure on the part of any person to observe any provisions of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in the proceedings be relied upon by any party to the proceedings as tending to establish to negative any liability which is in question in those proceedings."

19. There must be a good reason why the law discourages more than one pillion passenger on a motorcycle. It is not a dogmatic prescription.

20. In *Simba v Langat (Civil Appeal 84 of 2021)* [2024] KEHC 2110 (KLR) the High Court at Nakuru observed that:

> " The basic principle underlying the defense of contributory negligence is that people should take reasonable care for their own safety as well as for that of others."

21. In Rentco East Africa Limited V Dominic Mutua Ngonzi |2021|e KLR The Court observed;

> " That the plaintiff rode the motor cycle against the law and that the law does not allow for two pillion passengers and the respondent was apportioned liability. By riding on the said motor cycle against the law, the Respondent exposed himself to danger"

22. Guided by the above cited cases, I am of the view that the Respondent by his own actions, contributed to the accident. He may have been riding on his lane as pleaded, but the excess passenger load likely adversely affected the motorcycle's maneuverability. Such a vehicle cannot swiftly get out of the way of oncoming obstacles.

23. The reason behind limiting the number of pillion passengers to one is neither whimsical nor dogmatic; it is a safety measure. Nonetheless, the law also recognizes that traffic infractions do not automatically determine liability, although they can be relevant in determining contributory negligence.

24. The Respondent alleges that the 1st Appellant drove recklessly and at high speed in a shopping area, overtook improperly, lost control, and hit the motorcycle from behind, causing fatalities and injuries. According to the trial court's findings, it was indeed the Appellants' vehicle that struck the Respondent's motorcycle.

25. Despite the Appellants not calling any witnesses, their main argument is that the Respondent contributed to the occurrence or the severity of the accident. They rely on the fact that he was carrying two pillion passengers contrary to law. In so doing, the Respondent arguably placed himself in a

vulnerable position, potentially affecting the maneuverability of his motorcycle and his ability to avoid a collision.

26. In the same vein, there is a clear principle that where there is no conclusive proof of who caused or contributed more to the accident, the law often apportions blame between parties. This principle was established in the case of Barclay – Steward Limited & Another Vs. Waiyaki [1982-88] 1 KAR 1118, where the Court said:-

> " The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it."
>
> The Court said further:-
>
> "The collision is a fact. It is, however, not reasonably possible to decide on the evidence of Waiyaki & Gitau who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame."
>
> In Baker V Market Harborough Industrial Co-operative Society LTD [1953] 1 WLR 1472 at 1476, Denning L.J. (as he then was) observed inter alia as follows:
>
> "Every day, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them..... "
>
> See also Welch V Standard Bank LTD [1970] EA 115 at 117 and Simon V Carlo [1970] EA 285. It cannot be doubted that both drivers are to blame. In the ultimate analysis of the evidence in the instant case, the circumstances are such that there is no concrete evidence of distinguishing between the two drivers. The drivers should therefore be held equally to blame....."

27. Similarly in Hussein Omar Farah v Lento Agencies [2006] eKLR the court held that:

> " The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."

28. In this case, the evidence does not conclusively establish exclusive fault on either side. Although the Appellants' vehicle appears to have been speeding and overtaking recklessly, the Respondent's non-compliance with the lawful passenger limit may also have affected his control of the motorcycle at a critical moment. The trial court's decision to place 100% liability on the Appellants fails to account for these complicating factors, including the statutory stipulation against carrying more than one pillion passenger.

29. Nevertheless, the law also holds that in the absence of clear proof pinpointing who primarily caused or contributed to the accident, liability ought to be shared. This is because neither side provided conclusive evidence that the other was solely responsible. As a corollary, pillion passengers, who merely boarded the motorcycle, are to be viewed as innocent parties unless specific evidence shows they contributed to the cause of the accident.

30. On the balance of probabilities and guided by the principle of fairness, I find that the trial court erred in failing to apportion liability at all. The safer conclusion, consistent with the facts and the rule that doubtful or unproven causation should lead to shared liability, is to hold both parties equally responsible.

31. The Respondent's act of carrying two pillion passengers might have diminished the motorcycle's maneuverability, contributing to the inability to avoid the accident in a timely fashion.

32. The 1st Appellant, by overtaking recklessly at high speed in a shopping center, was equally at fault.

33. In the absence of clear and cogent evidence fixing a higher ratio of blame on one party, the fairest conclusion is to share liability equally between the Appellants and the Respondent.

34. In the upshot, I find that the Respondent contributed to the accident and I enter judgment as follows:

    i. The judgment of the trial court apportioning 100% liability to the Appellants is hereby set aside.

    ii. In place thereof, liability is apportioned on a 50:50 basis between the Appellants and the Respondent.

    iii. Each party to bear its own costs.

    It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13TH FEBRUARY, 2025

.....

BAHATI MWAMUYE

JUDGE