DMO (Minor suing through next friend and father AOO) v Matemi & another (Civil Appeal E175 of 2024) [2025] KEHC 3309 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3309 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E175 OF 2024

DKN MAGARE, J

MARCH 6, 2025

BETWEEN

DMO (MINOR SUING THROUGH NEXT FRIEND AND FATHER AOO) ..... APPELLANT

AND

TERESHA KEMUMA MATEMI ..... 1ST RESPONDENT

KEGURU ENTERPRISES ..... 2ND RESPONDENT

(Appeal arises from the Judgment and decree of subordinate court delivered by Hon. C.A. Ocharo (CM) on 11.9.2024 in Kisii CMCC No. E157 of 2022)

JUDGMENT

1. This appeal arises from the Judgment and decree of subordinate court delivered by Hon. C.A. Ocharo (CM) on 11.9.2024 in Kisii CMCC No. E157 of 2022.

2. The appeal is only on liability. The Appellant pleaded that the lower court erred and misapprehended evidence in arriving at the finding on liability where the court apportioned 60:40 in favour of the Appellant.

3. The Plaint dated 10.3.2022 claimed damages for an accident that occurred on 18.1.2022 involving the Appellant as pillion passenger on motorcycle registration No. KMFG 665G HONDA along Kisii Township Road at Nyambera area and motor vehicle Registration No. KDD 384N Isuzu Lorry owned and driven by the Respondents.

4. The Plaintiff set forth particulars of negligence for the accident motor vehicle and pleaded special damages and general damages.

5. The Appellants entered appearance and filed defence denying the particulars of negligence and injuries pleaded in the plaint.

6. The trial court heard the parties and proceeded to render judgment on 11.9.2024. In the judgment, the Court found liability at 60:40 against the Respondents jointly and severally. I will not venture into the findings on quantum because it does not constitute this appeal. Aggrieved by the finding of the trial court, the Appellant lodged a Memorandum of Appeal hence this appeal.

Evidence

7. The evidence of the Appellant and the police officer will be relevant to this appeal.

8. PW1 was Alphonce Omae Onsongo. He testified that he was a motorcycle rider. The minor herein was his son. He produced his documents as exhibits. It was his case on cross examination that he was the one riding the motorcycle carrying the minor. It was not true that he was the one who left his lane onto the lane of the lorry. The police abstract and OB extract were produced in evidence and the Appellant closed case.

9. For the Respondents, DW1 was Jared Onkangi Makori. He was driving the accident lorry. He produced the police abstract and motor vehicle inspection report. He testified on cross examination that he was driving at 10 km/h. He was not overtaking.

Submissions

10. The Appellants filed written submissions dated 11.12.2024. It was submitted that the evidence produced overwhelmingly proved that the Respondents were 100% liable for the accident. It was further submitted that even in the absence of a sketch map, the available evidence proved that the Respondents were 100% liable. Reliance was placed inter alia on Wambui Katiti v Obed Mose Nyagaka (2021) eKLR.

11. The Appellant also relied on PAS v George Onyango Orodi (2020) eKLR to submit that as a pillion passenger, the Appellant ought not to have been found liable.

12. The Respondents on the other hand submitted that the court correctly found 60:40 in favour of the Appellant based on the evidence. Reliance was placed inter alia on Haji v Marair Freight Agencies Ltd (1984) KLR 139 to submit that there was evidence that both were to blame.

Analysis

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

14. In the case of Peters vs Sunday Post Limited [1958] EA 424 , the 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..."

15. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

Liability

16. The Appellant urged the court to find that the lower court erred in finding 60% liability against the Respondents because the Respondents were to wholly blame for the accident. They propose that the judgment of the lower court on liability be set aside and substituted with 100% in favour of the Appellant.

17. On the other hand, the Respondents' case is that the judgment of the lower court was correct on liability and should not be disturbed.

18. My role is thus to reevaluate the evidence and arrive at my independent finding on liability. In Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 the Court of Appeal held that:

> " A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

19. In reevaluating the evidence, the minor herein was a pillion passenger and there is nothing he could have done to prevent the accident. The Respondents did not blame the rider of the motorcycle in this case and his case is not before this court. As was held in *Maina v Nyamweya (Civil Appeal 30 of 2021)* [2022] KEHC 14357 (KLR) (11 February 2022) (Judgment):

> There is no dispute that the appellant`s motor vehicle hit the motor cycle the respondent was travelling on. As a pillion passenger the respondent did not contribute to the occurrence of the accident. Since the appellant did not take out third party notice as provided by the law, she is wholly liable in damages to the respondent. The apportionment of liability between the appellant and a motor cyclist who was not a party to the case was legally untenable. In the premises, I set aside the trial court`s finding on liability and enter liability against the appellant at 100%.

20. Where the Appellant proved his case to the required standard, it was the duty of the Respondents to prove contributory negligence which in my view they failed. In the case of Mac Drugall App V Central Railroad Co. Rbr 63 Cal 431 the court held that; -

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

21. Therefore, I find basis to disturb the finding of the learned magistrate on liability and hold that the Appellant proved 100% want of care on the part of the driver of KDD 384N. The fact remains that the minor had nothing to do with causing or avoiding the accident now that he was just carried on the motorcycle. I am also fortified by the reasoning of this court differently constituted in PAS v George Onyango Orodi [2020] eKLR as follows:

> The minor was a pillion passenger. A pillion passenger cannot be held liable for the causation of an accident. In any case the minor received a fracture of the right femur. Even if she had been wearing a helmet as submitted this could not have prevented the said injury. The learned trial magistrate erred in relying on hearsay evidence to dismiss the appellant's case. In my view the appellant had proved on a balance of probability that the respondent was entirely to blame for the accident.

22. No contributory negligence could be found against the minor who was a mere passenger, and the lower court erred in so finding. In the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR where Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, it was held as follows:

> " In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:
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> > " .....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

23. The Appellant proved his case 100% against the Respondents. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

24. The Appellant did not appeal against the award of damages. I will not disturb the award under this head. The net effect of the foregoing is that the appeal on liability succeeds.

Determination

25. In the upshot, I make the following orders:

    a. Judgment of the lower court is set aside and substituted with a finding of 100% against the Respondents.

b. The Appellant shall have costs of the appeal assessed at Kshs. 85,000/=.

c. 30 days stay of execution.

d. Right of appeal 14 days.

e. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 6TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Nyandoro for the Appellant

Ms. Barasa for the Respondent

Court Assistant – Michael