Onsongo v Matemi & another (Civil Appeal E176 of 2021)
[2025] KEHC 3333 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3333 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E176 OF 2021

DKN MAGARE, J

MARCH 6, 2025

BETWEEN

ALPHONCE OMAE ONSONGO ..... APPELLANT

AND

TERESHA KEMUMA MATEMI ..... 1ST RESPONDENT

KEGURU ENTERPRISE LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of the subordinate court delivered by Hon. C.A. Ocharo (CM) on 11.9.2024 in Kisii CMCC No. E158 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 Appellant filed suit vide a plaint dated 10.3.2022. He claimed damages for an accident that occurred on 18.1.2022 involving motorcycle registration No. KMFG 665G Honda, which the Appellant was riding along Kisii Township road at Nyambera area. The same was involved in an accident with Respondent's motor vehicle Registration Number KDD 384N, an Isuzu lorry owned by the Appellant. The said lorry is said to have lost control and hit the Appellant.

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

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

6. The trial court heard the parties and rendered 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 they do not constitute this appeal. Aggrieved by the finding of the trial court, the Appellant lodged a Memorandum of Appeal hence this appeal. The grounds set out are:

i. The learned magistrate erred on law and, in fact, in the manner she apportioned liability, which was against the weight of evidence.

ii. The learned magistrate exhibited open bias in favour of the Respondent by apportioning liability against the Appellant in the ratio of 60:40% without any basis.

iii. The learned magistrate misdirected herself into using the wrong principles in determining liability and thus arrived at a wrong conclusion.

7. The court will dismiss the question of open bias as it has no foundation in the evidence on record. I shall only deal with the first and last grounds of appeal.

Evidence

8. The evidence of the Appellant and the Police Officer will be relevant to this appeal and defence evidence, if any.

9. PW1 was Alphonce Omae Onsongo, the Appellant. He testified that he was a motorcycle rider. The minor herein was his son. He was carrying the minor on the motorcycle. He produced his documents as exhibits. On cross-examination, he argued 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. His evidence was that the motor vehicle was overtaking a fleet of vehicles, moved to his lane, and hit him.

10. PW2 PC Moses Kasera gave evidence and stated that the accident was reported on 18.1.2022. He stated that the vehicle overtook a chain of vehicles and hit the oncoming motorcycle, which was in its lane. The witness was stood down. He was recalled on 7.11.2023, where he produced a police abstract and OB extract in evidence. He stated that the point of impact was the right side, the side where the motorcycle was lawfully entitled to be. This was the left side of the road in respect of the motorcycle but the right side in respect of the motor vehicle.

11. 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 and was not overtaking.

Submissions

12. The Appellants filed written submissions dated 11.12.2024. They submitted that the evidence produced overwhelmingly proved that the Respondents were 100% liable for the accident. They 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.

13. 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.

14. 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

15. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its 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. 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..."

16. The first appellate court is not bound necessarily to accept the findings of fact by the court below as held in the case of 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..."

17. This is not a criminal trial. It is a civil trial where the court has to find for one party or another on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

18. This was further enunciated in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

> The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are

equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

19. What amounts to prove is set out in Sections 107-109 of the *Evidence Act* as follows:

> " 107.
>
> (1) Whoever desires any court to give judgment 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. 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.
>
> 109. 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."

Liability

20. 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.

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

22. 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."

23. 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. It 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%.

24. 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 Appellant is a matter of defence and it is an error to instruct the jury that the burden of proof is on the Appellant to show that the injury occurred without such negligence".

25. 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 Respondents did not prove contributory negligence. Clear evidence of PW1 as corroborated with the evidence of PW2 the police officer, was that DW1 was overtaking a series of motor vehicles when the accident occurred. It was clear that the point of impact was on the left side of the road in the lane the Appellant was riding the motorcycle. In the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, and 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:
>
> ".....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 Appellant'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."

26. No want of care was proved on the part of the Appellant as to apportion liability to 60:40 as did the lower court. 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 Appellant is a matter of defence and it is an error to instruct the jury that the burden of proof is on the Appellant to show that the injury occurred without such negligence".

27. 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."

28. 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

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

    a. The Judgment of the lower court on liability is set aside and substituted with liability of 100% jointly and severally against the Respondents.

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

    c. There shall be 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