Rurwan v Kinyua (Civil Appeal E448 of 2024)
[2025] KEHC 4412 (KLR) (Civ) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4412 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E448 OF 2024

LP KASSAN, J

APRIL 8, 2025

BETWEEN

JACKSON LOTIK RURWAN ..... APPELLANT

AND

WILSON KARIUKI KINYUA ..... RESPONDENT

(Being an appeal against the judgement of the Hon. L.B. Koech (SPM) delivered on 22nd March, 2024 in Nairobi Milimani CMCC No. E4276 of 2022)

JUDGMENT

1. This appeal emanates from the judgment delivered on 22/03/2024 by the lower Court in Nairobi Milimani CMCC No. E4276 of 2022 (hereafter the lower Court suit). The lower Court suit was instituted via a plaint by Jackson Lotik Rurwan, the plaintiff in the lower court (hereafter the Appellant) as against Wilson Kariuki Kinyua, the defendant in the lower court (hereinafter the Respondent). The Appellant's claim was for damages founded on negligence as a result of a road traffic accident that occurred on 01/03/2022.

2. It was averred that at all material times to the suit, the Respondent was the registered, beneficial, insured owner and or owner in possession of motor vehicle registration number KCG 020F (hereinafter suit motor vehicle) which was being driven by him, his authorized driver, servant and or agent. That on the date in question the Appellant was lawfully walking along Dr. Griffins Road when the Respondent's driver managed, controlled and or drove the suit motor vehicle so carelessly and or negligently at a very high speed that he lost control causing the suit motor vehicle to veer off the road and collide onto the Appellant thereby causing him injuries, loss and damages. The doctrine of Res Ipsa Loquitor was equally relied on.

3. The Respondent filed a statement of defence that was later amended denying the key averments in the plaint and liability. He went on to aver that in the alternative and without prejudice to the averments in the defence, that the any such occurrence of the accident as the Appellant may prove was caused and or substantially contributed to by the Appellant's own negligence. The doctrine of Volenti Non-Fit Injuria was pleaded.

4. The suit proceeded to full hearing, during which both parties called evidence in support of the averments in their respective pleadings. In its judgment, the trial Court failed to see how the Respondent was negligent or could be blamed for the accident and thus proceeded to dismiss the Appellant suit with costs.

5. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in his memorandum of appeal as itemized hereunder: -

    1. That the learned trial magistrate erred in law and fact in dismissing the suit even when liability has been proved as against the Respondent.

    2. That the learned trial magistrate misdirected herself in totality disregarding the plausible evidence by the Appellant in support of his case on the issue of negligence against the Respondent.

    3. That the learned trial magistrate erred in law and fact by considering only the evidence of the Respondent and his witness and disregarding the Appellant's evidence and his witness.

    4. That the learned trial magistrate erred in fact and in law in failing to consider the Appellant's submissions on liability by completely disregarding submissions and authorities of the Appellant and as a result rendered an unjustified decision on liability.

    5. That the trial Court erred in law and fact in finding that the Appellant's case had not been proved on a balance of probabilities.

    6. That the learned magistrate grossly erred in her evaluation of the evidence before her.

    7. That the learned trial magistrate grossly erred in failing to find that the Respondent wholly or substantially contributed to the occurrence of the accident herein.

    8. That the trial Court manifested clear bias against the Appellant which was unfair and unjust.

    9. That the learned magistrate's final orders have occasioned a miscarriage of justice. (sic)

6. Both parties filed submissions.

7. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate Court in Selle –Vs- Associated Motor Boat Co. [1968] EA 123. Further, it is trite that an appellate Court will not ordinarily interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278. Thus, a revisit of the memorandum of appeal it is apparent that the appeal turns on the twin issue of liability and awardable damages.

8. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties' respective cases before the trial Court. See;- Court of Appeal decision in Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91. This Court has earlier in its judgment outlined the gist of the respective parties' pleadings, as such it serves no purpose restating

the same at this juncture. Further, having equally identified what the dispute before the trial Court twirled on, the key query for determination is whether the trial Court's findings on the issues falling for determination before it were well founded.

9. To contextualize the latter, it would be apposite to quote in extenso the relevant facets of the impugned judgment. The trial Court after restating the evidence tendered before it addressed itself on liability as follows-;

> " 5. I have carefully considered the evidence tendered by the parties. I have read the submissions filed and the authorities cited and it is not in dispute that an accident occurred on the 1st of March 2022...involving the Plaintiff and Defendant who at the time was the registered owner of motor vehicle KCG 020F.
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> 9. In this case, the Plaintiff claims that he was hit off the road by Defendant. His witness, a police officer testified that as at the time the police abstract was being issued, the case was pending investigations. The Defendant on the other hand produced an investigation report which clearly indicates how the accident occurred and which corroborated the Defendant's evidence.
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> 10. The accident occurred along Dr. Griffin Road which has three lanes. It is a dual carriage. The accident occurred on the inner lane as per the photographs produced by the Defendant. There is a foot bridge which is almost 10 meters from where the accident occurred.
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> 11. From the evidence given, I do not see how the Defendant was negligent or how he can be blamed for the accident. When Plaintiff knowingly faulted the traffic rules. This being the case, I do not find merit in the Plaintiff's suit and is hereby dismissed with costs.
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> 12 ....." (sic)

10. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. Equally, it is well trodden that the same is on a balance of probabilities meaning that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. See Court of Appeal decision in Mumbi M'Nabea v David M. Wachira [2016] eKLR. Hence, the duty of proving the averments contained in the plaint lay squarely on the Appellant vice versa with respect to the averments contained in the Respondent's statement of defence. See Court of Appeal decision in Karugi & Another v Kabiya & 3 Others (1987) KLR 347.

11. Further, this Court has continually observed that the mere occurrence of an accident, without more, cannot be proof of negligence. As the Court of Appeal stated in Eastern Produce (K) Ltd v Christopher Atiado Osiro [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant [Emphasis mine]. The Court

in that case cited the famous decision of Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing by stated 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."

12. In Gideon Ndungu Nguribu & Another v Michael Njagi Karimi [2017] eKLR the Court of Appeal stated that determination of liability in a road traffic case is not a scientific affair and proceeded to quote Lord Reid in Stapley vs Gypsum Mines Ltd (2) [1953] A.C. 663 at Pg. 681 as captured in Paragraph 8 of the impugned decision of the trial Court, therefore this Court will not restate verbatim the rendition of Lord Reid as captured therein.

13. With the above wisdom in reserve, before the trial Court, PC Jesee Mwololo - No. 88537, testified as PW1. It was his evidence that he was attached to Pangani Police Station and that before the trial Court he had a police abstract dated 15/03/2023, which he adduced into evidence, relating to an accident that occurred on 01/03/2022 along Dr. Griffin Road between the Appellant and the suit motor vehicle. On cross examination he stated that the Police Abstract did not blame any party; that he did not have sketch plan of the scene of the accident; that he did not have the Occurrence Book (O.B) before Court; that he was familiar with road in question; that he did not know the exact point where the accident occurred; and that there was a foot bridge along the said road.

14. The Appellant testified as PW2. He began by adopting his witness statement and adducing into evidence his list of documents as PExh.1-6. The gist of his witness statement captured that on the date in question he was lawfully walking along the road in question when the driver of the suit motor vehicle negligently drove the same at high speed occasioning it to lose control thus colliding with him. He emphasized at trial that the suit motor vehicle hit him while he was off the road. During cross-examination, he reiterated that he was off the road and that he was not hit while in the middle of the road. He further confirmed that the road had three lanes and had barriers on the road divider. On re-examination, he maintained that he was hit off the road.

15. The Respondent testified as DW1. He too began by adopting his witness statement and adduced into evidence the documents appearing in the defendant list of documents as DExh.1 -6. It was his evidence that on that date in question he was driving on the inner lane along the said road towards the Karioko Intersection. He confirmed that the road had a barrier on the road divider and there being a foot bridge about 10 meters from where the Appellant was knocked. That he did not expect the Appellant to cross the road at that particular section given the forestated meanwhile despite applying emergency brakes or hooting it was too late. During cross-examination, he stated that the accident occurred at around 10pm and reiterated there being a foot bridge. That the Appellant was crossing from left to right and after the accident a report was done by investigators whom captured pictures of the scene of the accident. He asserted being attentive while driving and that he was not speeding. On re-examination, he iterated that he was driving on the inner most lane.

16. Evidently, from the totality of the aforecaptioned, it can be concluded by PW1's evidence, he did not witness the accident. Further, the Police Abstract which was adduced as PExh.6, he was neither the investigating officer nor did he adduce the sketch plan and Occurrence Book (O.B) before Court. Thus, he appears to have merely read into evidence the contents of PExh.6 confirming the occurrence of the accident. He did inveterate that the he was familiar with the road and that the same had a footbridge. It can thus be obstinately stated that his evidence aside from confirming occurrence of the accident and general lay out of the road was not instructive on liability.

17. Both PW2's and DW1's evidence was at variance. With former insisting that he was hit off the road and the latter asserting that the former was hit on the road a few meters from a foot bridge. PW1's evidence did not aid the PW2's case on negligence meanwhile he confirmed the existence of a foot bridge along the said road. Aside from PW2 (the Appellant) and PW1, the Appellant did not call any other eye witness to shore up the particulars of negligence pleaded at paragraph 4 of his plaint, in order to infer culpability upon the Respondent. That said, DW1 aside from his oral evidence, relied on an investigation report adduced as DExh.6, which though was prepared after the fact was an attempt to shore up the particular of contributory negligence pleaded as against the Appellant at paragraph 6 of the amended statement of defence. The gist of DExh.6 contradicted the Appellant's version of events, particularly relating to being hit off the road as in its analysis and deduction was that the Appellant was hit while crossing the road.

18. The Appellant vide the grounds of appeal has made heavy weather of the fact that the trial Court only considered the Respondent's evidence with exception to his evidence. The contestation cannot hold in light of the earlier excerpt capturing the trial Court's analysis on the issue of liability. This Court concurs with the learned Magistrates observation that the accident occurred along the road in question which was a dual carriage highway possessed of a foot bridge. And it appears that Appellant rather than utilize the said footbridge opted to cross the road. However, it must be recollected that corollary to the above reasoning, at all material times onus was on the Appellant to prove his case on a balance of probabilities as against the Respondent in respect of the particulars of negligence pleaded in his plaint.

19. At the risk of repetition, the Respondent had pleaded contributory negligence at paragraph 6 of his amended defence citing inter alia the Appellant's failure to use the footbridge to cross the road and walking and or running across a busy super-highway. PW1's corroborated DW1's evidence that there was a footbridge along the road. Further, DExh.6. was adduced to shore up the Respondent's assertions of contributory negligence. Palpably, as rightly observed by the trial Court, the Appellant evidence did not meet the muster as to how the Respondent could be blamed for the accident and given the Appellant's deliberate negligence by failing to use a designated foot bridge on the said road. By willfully crossing the road in disregard of the latter, the Appellant voluntarily invited risk upon himself of which the Respondent would not have reasonably foreseen in the circumstance, given that the accident occurred at around 10pm whereas the road was a dual carriage highway.

20. The Appellant questioned the reliance by the trial magistrate on the investigation report in his submission. First, it is clear that this report was produced as an exhibit. The report points out to three key issues as to wit- presence of a foot bridge near the scene of the accident and that the road was a dual carriage with three lanes separated by a barrier. This was corroborated by DW1 and the Plaintiff witness. From the Report, the Respondents Motor Vehicle was bordering the barrier such that to reach its side, a pedestrian had to cross two lanes from left to right. This therefore means that there was no chance of the Respondent (driver) to see a pedestrian who luckily eschews being knocked by vehicles cruising along the first and Second lane (on his left side). Were it that the Respondent was on the first lane, the Court could have taken notice of the fact that the driver could have spotted pedestrians breaching traffic rules by crossing three lanes highway since before crossing, the pedestrian is off the road but in this case the pedestrian was already on the road and perhaps on the run to escape being knocked by vehicles (if any) on the first and second lane. The Report specifies the exact location and if it was doubted, nothing prevented the Appellant from insisting on site visit or preparing another report.

21. As regards the application of the doctrine of res ipsa loquitur, the Court of Appeal in Keziah & another (Personal Representatives of the late Isaac Macharia Mutunga) v Lochab Transport Limited [2022] KECA 477 (KLR), discussed in brief, its application. It observed in part that; -

> " The question that remains unanswered is who was then on the wrong, or caused and or contributed to the accident? The mere fact that an accident involving the two vehicles occurred does not per se translate into the respondent's driver being culpable. It was the duty of the appellants to call evidence to prove the particulars of negligence or any one of them that they attributed to the respondent's driver. We do not think just like the High Court that they discharged this burden.

22. The Court proceeded to conclude that: -

> " ..... The police abstract on record showed that the accident was under investigation. The accident involved two motor vehicles and from the evidence adduced, there is nothing to show that the respondent was culpable. There cannot be an assumption of liability as the appellant failed to prove facts which give rise to what may be called the res ipsa loquitur situation or moment. In our view, the doctrine was inapplicable in the circumstances of the case and the High Court was right in so holding."

23. Similarly, in this case, beyond proof of the occurrence of the accident, the Appellant failed to prove facts which could give rise to or justify the invocation of the doctrine and or its application in order to attribute negligence as against the driver of the suit motor vehicle. The Court of Appeal decision in David Onchangu Orioki (Suing as personal representative of Anthony Nyabondo Onchangu (Deceased) v Ismael Nyasimi & Charles Michieka Nyoungo [2019] eKLR while discussing the applicability of the foregoing principles stated that;

> " Ordinarily, in a road traffic accident, a claimant must lead evidence to prove not only the occurrence of the accident but how it happened."

24. The same court equally stated that;-

> " .....in a cause of action founded on negligence, there are two elements in the assessment of liability, namely causation and blameworthiness. See (Baker v Willoughby [1970] AC 467).
> ".....

25. The trial Court while making a finding on liability correctly acknowledged that there is no evidence to suggest that the driver of the suit motor vehicle was to blame for the accident. In conclusion, this Court agrees that the Appellant failed to establish on a balance of probabilities that the Respondent was blameworthy and liable for the accident and this Court cannot fault the trial Court for arriving at the decision it did on liability. Under Section 107 of the *Evidence Act*, the burden of proof lay with the Appellant and if his evidence did not support the facts pleaded, he failed as the party with the burden of proof. See the case of Wareham t/a A.F. Wareham (supra). It would therefore be inconsequential to consider the question of awardable damages in light to the forestated finding on liability. Consequently, the appeal herein lacks merit and is dismissed with costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF APRIL 2025.

HON. L. KASSAN

JUDGE

In the presence of;

Kiptanui holding brief Wachira for the Appellant

Maronda holding brief Mbigi for the Respondent

Carol – Court Assistant