Mutemi v Ngugi & another (Civil Appeal E446 of 2022)
[2024] KEHC 3966 (KLR) (Civ) (18 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3966 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E446 OF 2022

CW MEOLI, J

APRIL 18, 2024

BETWEEN

KYALO MUTEMI ..... APPELLANT

AND

MARGARET WANGUI NGUGI ..... 1ST RESPONDENT

MARGARET WANGUI GACHANJA ..... 2ND RESPONDENT

(Being an appeal from the judgment of E.M. Kagoni, PM, delivered on 2nd June 2022 in Nairobi Milimani CMCC No. E5555 of 2020)

JUDGMENT

1. This appeal emanates from the judgment delivered on 2nd June, 2022 in Nairobi Milimani CMCC No. E5555 of 2020. The suit by Kyalo Mutemi, the plaintiff in the lower court (hereafter the Appellant) was commenced by way of the plaint dated 7th August, 2020 named Margaret Wangui Ngugi and Margaret Wangui Gachanja, as the 1st and 2nd defendant, respectively in the lower court (hereafter the 1st and 2nd Respondents, respectively).

2. The claim was for general and special damages arising out of a road traffic accident, which occurred on or about the 8th of December 2019. It was alleged that the 1st Respondent was at all material times the registered owner of the motor vehicle registration No. KCV 344P (hereafter the subject motor vehicle) while the 2nd Respondent was its beneficial/actual owner. It was further alleged that the subject motor vehicle was so negligently, carelessly driven or controlled and managed on the material date that, it knocked down the Appellant who at the time was lawfully walking off the road, along Mukiri Road, occasioning him severe bodily injuries.

3. Upon service of summons, the 1st and 2nd Respondents entered appearance and filed their joint statement of defence dated 13th July, 2021, denying the key averments in the plaint and liability. Alternatively, the Respondents pleaded contributory negligence against the Appellant as particularized in the statement of defence.

4. The suit proceeded to full hearing. The Appellant testified and called two (2) additional witness, while the 1st Respondent testified for the defence. In the end, the trial court dismissed the Appellant's suit with costs.

5. Aggrieved by the dismissal, the Appellant preferred this appeal through the memorandum of appeal dated 24th June, 2022 which is premised on the following grounds:

> " 1. The learned trial Magistrate erred in law and in fact in finding that the Plaintiff had not proved his case on liability against the Defendants.
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> 2. The learned trial Magistrate erred in law and in fact by failing to appreciate that the police abstract filed by the Plaintiff and produced in court did not blame the Plaintiff for the accident.
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> 3. The learned trial Magistrate erred in law and in fact by relying only on insufficient evidence thus dismissing the Plaintiff's suit.
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> 4. The learned trial Magistrate erred in law and in fact by failing to appreciate the doctrine of res ipsa loquitor was applicable.
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> 5. The learned trial Magistrate erred in law and in fact by awarding general damages which were manifestly too low as to be erroneous.
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> 6. The learned trial Magistrate erred in law and in fact by misdirecting himself by failing to consider all the Submissions made before him by counsel for the Plaintiff thereby reaching an erroneous finding on liability.
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> 7. In all the circumstances of the case, finding of the learned trial Magistrate on liability was characterized with misapplication of the law, misapprehension of facts of the case, consideration of irrelevant matters and wrong exercise of discretion thus erroneously proceeding to dismiss the suit in Milimani-CMCC No. E 5555 of 2020." (*sic*)

6. The appeal was canvassed by way of written submissions. Counsel condensed the Appellant's grounds of appeal into two issues, namely, the trial court's respective findings on liability and general damages. Addressing the first issue, counsel contended that contrary to the finding of the trial court, liability had been proved against the Respondents; since it had been demonstrated that the accident was the result of negligent driving resulting in the vehicle veering off the road and knocking down the Appellant. Counsel further attacked the testimony of the 1st Respondent as contradictory and unreliable because it was devoid of proof of claims she made to the effect that the Appellant while drunk, had suddenly emerged on the road, thereby causing the accident. Counsel further faulted the trial court for disregarding the testimony by the Appellant on the manner in which the accident occurred. He thus urged the court to disturb the trial court's finding on liability and to instead find both Respondents entirely liable.

7. Concerning quantum of damages, counsel submitted that the proposed sum of Kshs. 380,000/- urged before the trial court constituted reasonable general damages. Relying on the cases of *Kitale Hauliers*

Limited v Emmanuel Soita Simiyu [2013] eKLR and *Joseph Kimani Gathaga v Dickson Njoroge* [2019] eKLR where the respective courts awarded the sums of Kshs. 200,000/- and Kshs. 240,000/- for comparable injuries. That consequently, the award which the trial court would have made was inordinately low and not commensurate with the injuries sustained by the Appellant. In conclusion therefore, it was contended that the trial court's judgment ought to be disturbed.

8. The Respondents defended the trial court's findings. On liability, counsel cited the decision in *Peter M. Kariuki v Attorney General* [2014] eKLR regarding the duty of the first appellate court. Counsel contended that the Appellant did not tender evidence at the trial to show that the accident was the result of negligence on the part of the Respondents, his evidence being conclusive on who was to blame.

9. Concerning quantum, counsel argued that a sum of Kshs. 90,000/- would be adequate compensation to the Appellant, should the court be inclined to disturb the finding by the trial court. Counsel here citing the decisions in *Nyambati Nyaswabu Erick v Toyota Kenya Limited & 2 others* [2019] eKLR and *Godwin Ireri v Franklin Gitonga* [2018] eKLR where the respective courts made the awards proposed here, in respect of comparable injuries. Consequently, it was asserted that the appeal lacks merit, and it ought to be dismissed with costs.

10. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is notably a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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> An appeal to this court from a trial by the High 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.
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> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

11. 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 v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278.

12. Upon review of the memorandum of appeal and submissions by the respective parties before this court, it is the court's view the appeal turns on two issues, namely, whether the dismissal order made by the trial court was well founded, and if not, whether the assessed general damages was fair. Pertinent to the determination of issues are the pleadings, which form the basis of the parties' respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. In *Wareham*

t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated the following in this regard:

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

13. The Appellant by way of his plaint averred at paragraphs 4, 5 and 6 thus:

"

"4. At all material times to this suit, the 1st Defendant was the registered owner of the motor vehicle registration number KCV 344P while the 2nd Defendant was either the actual but unregistered owner of the same motor vehicle or otherwise had a beneficial or insurable interest therein.

5. On or about the 8th day of December 2019, the Plaintiff was lawfully and carefully walking off the road along Mukiriroad when motor vehicle registration number KCV 344P so recklessly and carelessly driven that the same was allowed to veer off the road and knocked down the Plaintiff occasioning him severe bodily injuries and has since suffered loss and damage.

Particulars of negligence of the driver of motor vehicle registration Number KCV 344P

a. Driving the said motor vehicle in excessive high speed in the circumstances

b. Driving the said motor vehicle without due care and attention

c. Driving the said motor vehicle so dangerously and/or negligently and without regard to pedestrians and particularly the Plaintiff

d. Driving the said motor vehicle recklessly and in total violation of the Traffic Rules

e. Failing to slow down, stop, brake, swerve and/or take any reasonable steps to avoid the said accident

f. Driving a defective motor vehicle

g. Causing the accident

6. As a result of the aforesaid accident, the Plaintiff sustained severe bodily injuries.

Particulars of injuries

i. Deep cut on the scalp

ii. Bruises on the right shoulder

iii. Recurrent headaches

iv. Lacerated scar on the scalp

v. Bruised scars on the right shoulder." (*sic*)

14. The Respondents filed their statement of defence denying the key averments in the plaint and liability. Alternatively, the Respondents pleaded contributory negligence against the Appellant by stating at paragraphs 3 and 4 that:

"

" 3. The Defendants deny the occurrence of the accident in the manner alleged at paragraph 4 of the Plaint and that the said accident was caused by the alleged or any negligence as alleged or at all and put the Plaintiff to strict proof thereof.

4. without prejudice to the foregoing, the Defendants aver that any accident that the Plaintiff may prove was wholly or substantially contributed to by the negligence of the Plaintiff.

Particulars of negligence of the plaintiff

i. Failing to keep any or any proper lookout or to have any or any sufficient regard for his own safety when crossing and/or walking on the said Mukiri Road.

ii. Stepping into the said road near the path of the Second Defendant without giving her any reasonable opportunity of avoiding the said collision.

iii. Failing to pay any or any sufficient heed to the presence of the motor vehicle registration number KCV 344P on the said road.

iv. Crossing or attempting to cross the said road when it was unsafe and dangerous to do so.

v. Failing to see the said motor vehicle registration number KCV 344P in sufficient time to avoid the said accident." (*sic*)

15. The Appellant's case was supported by the evidence of three (3) witnesses including the Appellant himself. Dr. Cyprianus Okoth who was PW1 stated that he examined the Appellant on 10.02.2020 and prepared a report to that effect. During cross-examination, he confirmed that the injuries sustained by the Appellant were soft tissue in nature.

16. The Appellant testifying as PW2 relied on his signed witness statement dated 7.08.2020 as part of his evidence-in-chief and further produced his bundle of documents of like date as P. Exhibits 2-10. He blamed the driver of the subject motor vehicle for the accident resulting in his injuries. During his brief cross-examination, the Appellant testified that the road on which the accident took place was a feeder road with light traffic on the material date.

17. PC Julius Lanathi (PW3) produced the police abstract issued on 12.12.2019 as P. Exhibit 1. The officer stated that according to the police abstract, the subject motor vehicle was driven by the 2nd Respondent on the material date. He further stated that as at the time of his testimony, the material accident was marked as 'Pending Under Investigation.' In cross-examination, he testified that the accident occurred along a narrow feeder road which was utilized by both motorists and pedestrians. That however, he was not the investigating officer thereof.

18. On behalf of the Respondents, the 1st Respondent testified as DW1, adopting her witness statement dated 8.02.2022 as her evidence-in-chief. During cross-examination, she asserted that she was driving at a speed of 20km/ph and that she noticed that the Appellant whom she had seen prior to the accident, appeared drunk and was staggering on the road.

19. The trial court upon restating the said evidence in its judgment stated the following concerning liability before proceeding to dismiss the Appellant's case:

> "It is trite law that he who alleges must prove. The Plaintiff alleges blameworthy conduct on the driver of KCV 344P. however, it would be impossible for PW2 herein, to determine whether the vehicle was driven recklessly and carelessly, as it was his evidence vide his adopted statement, that motor vehicle registration KCV 344P, knocked her from behind. Again, since both PW1 and PW3 were never present when the accident occurred, they cannot testify as to how the vehicle was being driven, same as PW2.
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> ...
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> The court was thus faced with two pieces of uncontroverted testimony. On the one hand is the testimony that the driver of KCV 344P is to blame (though the evidence shows that the Plaintiff never witnessed the accident). On the other hand, is DW1's testimony that, the Plaintiff appeared suddenly from the right-hand side, without warning (in this case, DW1 actually was driving the vehicle and is thus an eye witness to the accident). Since uncontroverted evidence or testimony must have merits, I find the testimony of DW1 more probable than that of PW2. Accordingly, taking note that he who alleges must prove, taking note the balance of probability, the court finds that it is more probable, based on the testimonies of the witnesses herein, that the Plaintiff appeared suddenly from the right-hand side, without warning than it is for the driver to have recklessly, carelessly and over speeding, leading to her failing to control the vehicle and thus occasioning the Plaintiff's injuries.... " (*sic*).

20. The applicable law as to the burden of proof is found in Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> > "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."

The above provision provides for the legal burden of proof.

However, Section 109 of the same *Act* provides for the evidentiary burden of proof and states as follows:

> " 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."

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

> " Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same *Act* recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

21. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR held that:

> " *Denning J, in Miller v 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
> >
> > This, burden 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... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

22. Thus, the duty of proving the averments contained in the plaint lay squarely with the Appellant. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of

rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

23. It is not in dispute that an accident occurred on the material date, involving the subject motor vehicle and the Appellant and resulting in bodily injuries to the Appellant. Suffice it to say that the mere occurrence of an accident is not 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(s). 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, while reiterating the foregoing, 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."

24. A review of the evidence before the trial court reveals the conflicting evidence by the Appellant and the 1st Respondent regarding the manner of the occurrence of the accident. While the Appellant on the one hand claimed that the driver of the subject motor vehicle drove carelessly and at a high speed, eventually losing control and hitting him, the 1st Respondent's evidence was that the Appellant who appeared drunk at the time, suddenly came onto the road, making it impossible for her to avoid the collision in good time or at all. Be that as it may, it is apparent from the two witnesses that the subject motor vehicle was likely headed in the same direction as the Appellant, and therefore came up from behind the Appellant.

25. In view of the foregoing, the court concurs with the reasoning by the learned trial magistrate that it would not have been conceivable for the Appellant to state with certainty the speed at which the subject motor vehicle was being driven prior to the accident or what exactly led to the accident. His averment both in his pleadings and his oral evidence being that the said vehicle came from behind him.

26. No eyewitnesses to the accident were summoned by the parties to corroborate the order of events narrated either by the Appellant or the 1st Respondent. The closest witness, the police officer neither witnessed nor investigated the accident. Moreover, he said that according to the police abstract tendered as P. Exhibit 1, the matter was pending under investigation. The investigating officer of the accident was not summoned to shed light on the events leading up to the accident.

27. The burden of proof at all material times lay with the Appellant to prove the particulars of negligence alleged against the Respondents. Upon its own review of the evidence, the court is not satisfied that the Appellant discharged this burden to the required standard.

28. Concerning the application of the doctrine of *res ipsa loquitur* as pleaded by the Appellant, the Court of Appeal in *Keziah & another (Personal Representatives of the late Isaac Macharia Mutunga) v Lochab Transport Limited* [2022] KECA 477 (KLR) stated thus:

> "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 Appellant 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.

29. The Court proceeded to conclude that:

> " As already stated, there was no eyewitness to the accident as would have shed light as to how it occurred. 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."

See also *Nandwa v Kenya Kazi Limited* [1988] eKLR.

30. In the present case, the court is of the view that 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.

31. In view of all the foregoing, the court agrees with the trial court that the Appellant's evidence did not rise to the standard of balance of probabilities. The record shows that in arriving at its findings on liability, the trial court took into consideration the evidence and submissions before it and therefore cannot be faulted. There is hence no justification for interfering with the decision.

32. In view of the above finding, this court need not consider the question of quantum, raised in the appeal. Consequently, the appeal is without merit and is hereby dismissed with costs to the 1st and 2nd Respondents.

DELIVERED AND SIGNED AT NAIROBI ON THIS 18 TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:-

For the Appellant: N/A

For the Respondents: Mr. Kirui

C/A: Erick