Gichana v Multiple ICD & another (Civil Appeal E028 of 2021)
[2024] KEHC 16973 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 16973 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E028 OF 2021

F WANGARI, J

MAY 23, 2024

BETWEEN

BONIFACE NYANGAU GICHANA ..... APPELLANT

AND

MULTIPLE ICD ..... 1ST RESPONDENT

DANIEL NZAMBA MUASA ..... 2ND RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. G. Kiage, Senior Resident Magistrate dated 3/2/2021 arising from Mombasa CMCC No. 2062 of 2019. The Appeal is only on liability.

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

3. The Plaint dated 31st October 2021 claimed damages for an accident that occurred on 28th September 2019 involving Motor Vehicle Registration Number KCD 922B owned by the 1st Respondent and driven by the 2nd Respondent.

4. It was pleaded that the Respondent was driving his Tuktuk Registration No. KTWB 917V along Nyerere Road when the 2nd Respondent drove motor vehicle registration number KCD 922B negligently causing it to loss control and ram into the Tuktuk hence the accident.

5. The Plaintiff set forth particulars of negligence for the accident motor vehicle inter alia as follows:

    a. Driving at excessive speed

    b. Failing to apply brakes

    c. Failing to stop

d. Failing to observe traffic rules

e. Joining the main road without due care.

6. The Appellants entered appearance and filed Defence denying the particulars of negligence and injuries pleaded in the Plaint.

7. The Trial Court heard the parties and proceeded to render judgement on 3rd February 2021. In the Judgement, the Court found liability at 60:40 against the Defendants. I will not venture into the findings on quantum because they do not constitute this Appeal.

8. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.

The Appellants' case on liability

9. The Appellant as Plaintiff called 3 witnesses, a Medical doctor, police officer and the Appellant himself. The evidence of the Appellant and the Police Officer will be relevant to this Appeal.

10. PW1, was PC Joshua Muchesya. He testified that he attended the scene of the accident after the accident had occurred. It was his case that the 2nd Respondent did not stop before joining the junction and he caused the accident as a result. That there was a traffic case pending against 2nd Respondent for dangerous driving. He produced the police abstract and stated that he was the investigating officer.

11. On cross examination, it was his case that the point of impact was on the right lane as you face Likoni Ferry. He did not have a sketch plan od the scene of the accident.

12. On his part, the Appellant also testified and relied on his witness statement dated 28th September 2019. On cross examination, it was his case that he did nit see the 2nd Respondent joining the road and it was on a straight stretch.

13. The 2nd Respondent also testified for the Respondents on the issue of liability. He relied on his witness statement dated 2nd March 2020.

14. It was his case that he was the driver of the accident motor vehicle registration number KCD 922B at the time of the accident. That while approaching the junction to join the road leading to Likoni, he stopped to give way and the Appellant also emerged and stopped on the lane right hand to the 2nd Respondent's driven motor vehicle.

15. On cross examination, it was his case that charges were pending in traffic case against him. He added that the impact on his case was on rare right side.

Submissions

16. The Appellants filed written submissions. It was submitted that the evidence produced overwhelmingly proved that the Respondents were 100% liable for the accident. They relied on authorities which I have perused.

17. The Respondents on the other hand submitted that the trial court's finding on liability should not be interfered with except in exceptional circumstances. They relied on Obwoge v Muema & 2 Others (2022) eKLR.

18. They submitted that the Appellant had not attained the legal burden to proof the Respondents 100% liable for the Accident. They cited Section 107 of the *Evidence Act* and authorities which I have considered.

Analysis

19. 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.

20. 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

21. The Appellant urges this court to find that the trial court erred in finding 60% liability against the Respondents because the Respondents were to wholly blame for the accident. They propose that the Judgement of the trial court on liability be set aside and substituted with 100% in favour of the Appellant.

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

23. The role of this court 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."

24. I have perused the record of appeal filed in Court and the written submissions and authorities cited in support and opposition to the Appeal.

25. In re-evaluating the evidence, I note like did the trial court that there was speculation as to who could have been fully liable for the accident. The Investigating Officer unfortunately did not file a sketch plan for the scene of crime of the accident.

26. Therefore, what emerges in my view is that the Appellant had to lead evidence that would rule out contributory negligence. In other words, the Respondents acceded to being 40% negligence but the Appellant's appeal is that the Appellant was not negligent at all.

27. These are matters of evidence and the Appellant had the legal burden of proof. On this subject, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> 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.

28. 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.".

29. It follows that the initial burden of proof lied on the Appellant, but the same may shift to the Respondents, depending on the circumstances of the case.

30. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " 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 that 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."

31. The Appellant appears to have hinged on the pendency of a traffic case to impute full liability on the Respondents. Even where there is conviction in a traffic case, it has been held that the conviction cannot be used to conclude in evidence that the offender is liable in a traffic case.

32. In relation to that section, it was held by the Court of Appeal in Chemwolo and Another vs. Kubende [1986] KLR 492; [1986-1989] EA 74 in which Platt, JA opined that:

> "It was not for the Judge to read the proceedings in the Traffic case as if the evidence recorded there was the final position in the case since not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness. It was therefore premature to come to the conclusion that not even prima facie case of contributory negligence could be established. It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of the proceedings in the traffic case...It was correct for the learned Judge to refer to the conviction because section 47A of the *Evidence Act* (Chapter 80) declares that where a final judgement of competent court in criminal proceedings has declared any person to be guilty of criminal offence, after expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. But that does not matter because it may also be that the other party was also guilty of carelessness and despite the other party's conviction, the issue of contributory negligence may still be alive if the facts warrant it and this may affect the quantum of damages."

33. According to Apaloo, JA (as he then was) in the same case:

> "It was not competent for the Judge to merely peruse the record of the criminal trial and conclude that a prima facie case on contributory negligence cannot be established. If the averments of contributory negligence are proved at the trial, the Court may well feel that the plaintiff was in part to blame for the accident and the Court would then come under a duty to assess his own degree of blameworthiness and depending on the Court's assessment of responsibility for the accident, such apportionment may affect, perhaps in a substantial manner, the quantum of damages to which the plaintiff is entitled. Or it may affect it in a negligible way. Whatever it is, there is a triable issue on the plea of contributory negligence."

34. Therefore, as found by the trial court, it was indeed difficult to find the Respondents wholly liable for the accident in the absence of the sketch plan and a witness who could have been at the scene of the accident immediately prior or during the occurrence thereof. On a balance of probability, I am unable to fault the trial court. The finding on liability was in tandem and reflected the evidence and testimonies presented by the parties before the court. I uphold the finding on liability.

35. The Appellant did not appeal against the award of damages I will not disturb the award under this head.

Determination

36. In the upshot, this court orders as hereunder;

    a. The Appeal is dismissed.

    b. The Respondents shall have the costs of the Appeal

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF MAY, 2024.

.....

F. WANGARI

JUDGE

In the presence of;

Nyabena Advocate for the Appellant

N/A by the Respondent

Barile, Court Assistant