Karia v East African Sea Food Ltd (Civil Appeal 7 of 2020)
[2024] KEHC 5993 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5993 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL APPEAL 7 OF 2020

JN NJAGI, J

MAY 23, 2024

BETWEEN

RICHARD WACHIRA KARIA ..... APPELLANT

AND

EAST AFRICAN SEA FOOD LTD ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. Njeri Thuku, Principal Magistrate, in Nanyuki CM`s Court Civil Case No. 123 of 2017 delivered on 07/05/2020)

JUDGMENT

1. By a plaint dated 24th October 2017, the Appellant sued the Respondent seeking for compensation in general damages and special damages following injuries he sustained in a road traffic accident involving the motor vehicle that he was driving registration No. KAZ 588M Toyota matatu and a motor vehicle registration No. KCB 524S Mitsubishi Lorry that at the time of the accident was being driven by the respondent`s driver. The appellant pleaded that the Defendant's driver carelessly and recklessly overtook other motor vehicles when it was not safe to do so thereby crashing into the appellant`s motor vehicle and pushing it to collide with motor vehicle registration no. KBT 895R, Toyota Landcruiser. The appellant blamed the respondent`s driver to have been liable for the accident and claimed damages.

2. The Respondent denied the claim and contended in their defence that the accident was as a result of the appellant's negligence. In the alternative they pleaded that the accident was solely caused by or substantially contributed to by the negligence of the Appellant.

3. After a full hearing in which the Appellant was the only witness in his case and the respondent`s driver was the only witness for the defence, the trial magistrate dismissed the Appellant's claim on account that he had failed to prove on a balance of probability that the Respondent`s driver was to blame for the accident.

4. Being aggrieved by the trial court`s judgement, the Appellant appealed to this court vide a Memorandum of Appeal dated 3rd June 2020 raising the following grounds of appeal;

    (1) The trial magistrate erred relying entirely on the findings in the police abstract and wholly disregarding the evidence adduced at the trial.

    (2) The trial magistrate misdirected herself on probative value of the findings of the investigating officer who did not prefer traffic charges against the Appellant.

    (3) The magistrate failed to appreciate that the investigation officer relied on the statement of the Respondent driver in reaching his conclusion since the Appellant was in critical condition.

    (4) The trial magistrate failed to appreciate that the Appellant had proved his case and failed to apportion liability.

5. The parties canvassed the appeal by way of written submissions.

Appellant`s Submissions

6. The appellant faulted the trial magistrate for relying on the findings of the investigation officer as captured in the police abstract that the appellant was the one to blame for occasioning the accident. It was submitted that there was no conclusive proof that the appellant is the one to blame as no charges were brought up against him. It was further submitted that it is normal practice in traffic accidents for drivers involved in traffic accidents to be issued with Notice of Intended Prosecution.

7. The appellant submitted that the purpose of a police abstract in a road traffic accident is only to confirm that an accident did indeed happen and was reported to the issuing police station. It was submitted that the trial magistrate failed to analyze and evaluate the police abstract together with the oral evidence adduced to make her own finding on liability.

8. The appellant further submitted that even a court conviction of a traffic offence of careless driving does not make such a driver wholly liable in civil proceedings since a court exercising civil jurisdiction has the discretion to apportion blame depending on the weight of the evidence tendered. In support of this proposition the appellant relied on the case of Peter Mulanda Wanje v Capture Transport Limited & 2 0thers (2022) eKLR in which Lady Justice Njoki Mwangi upheld the trial court`s apportionment of liability in the ratio of 70:30 despite a traffic conviction for careless driving.

9. It was submitted that the appellant provided sufficient evidence to establish his case on a balance of probabilities as he did establish that it is the driver of the respondent who was overtaking carelessly thereby occasioning the accident. It was submitted that the version of the respondent`s driver that it is the appellant who caused the accident in driving on the wrong side of the road left more questions than answers. That the respondent failed to call the turnboy who was in the respondent`s vehicle at the time of the accident. More so that the respondent failed to produce the motor vehicle inspection report which would have confirmed the parts of the motor vehicle damaged. It was submitted that the evidence adduced by the appellant was sufficient to enable the court to enter judgment on liability against the respondent or to apportion the same between the parties in such a ratio of at least 70% to 30% in favour of the appellant. The appellant asked the court to set aside the trial court`s judgment and enter judgment for the appellant on liability at such a rate as it may deem appropriate.

10. On quantum of damages, the appellant faulted the trial court for failing to assess the amount of damages it would have awarded the appellant had his case been successful. It was submitted that the appellant suffered an amputation of his right arm and multiple other fractures. Counsel for the appellant urged this court to award damages as proposed in their submissions at the lower court.

Respondent`s Submissions

11. The Respondent submitted that the police abstract indicated that the appellant was to blame for occasioning the accident and that he was to face charges of careless driving. It was submitted that no evidence was produced to rebut the contents of the police abstract.

12. The respondent submitted that the appellant`s case was marred with contradictions. That he stated in his witness statement that he crashed into motor vehicle registration No.KBT 895R but during cross-examination he stated that he did not remember a land cruiser nor hitting another vehicle.

13. The respondent submitted that the burden of proof was on the appellant to proof his case. That the appellant did not adduce evidence that proved that the respondent was liable for the accident. The respondent relied on the case Mercy Wanjiru Nyaga v Josphat Kiura & another (2020) eKLR where it was stated as follows:

> " ...there is yet no liability without fault in the legal systemin Kenya, and a plaintiff must prove negligence against the defendant where the claim is based on negligence. The plaintiff in my opinion must place sufficient material before the court which is sufficient enough to discharge the burden placed on such a party.."
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> The court in that case cited Ibrahim J. (as he then was) in Treadsetters Tyres Ltd v John Wekesa Wepikhulu (2010) eKLR where the learned judge held that:
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> "The party seeking to recover compensation for damages must make out the party against whom he complains was in the wrong. The burden of proof is clearly upon him and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales and does not satisfy the court that it was occasioned by the negligence or default of the other party, he cannot succeed."

14. The respondent submitted that the conclusion by the trial court that the appellant had not proved his case was correct. Therefore, that the dismissal of the suit for want of evidence was sound. The respondent urged this court to dismiss the appeal in its entirety with costs.

Analysis and Determination

15. This being a first appeal, it is trite law that the court ought to examine and re-evaluate the evidence on record, assess it and make its own conclusion. This duty was well articulated by the Court of Appeal in Selle & Another –vs- Associated Motor Boat Co. Ltd & others (1968) EA 123 where the Court stated thus:

> " 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. 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 and inconsistent with the evidence in the case generally."

16. I have considered the grounds of appeal, the record of the trial court and its judgment and the rival submissions tendered by the respective advocates for the parties. The trial magistrate did not make any finding on quantum after dismissing the Appellant's claim. The issues for determination in this appeal are, in my view, on liability and assessment of damages.

Liability

17. The Appellant's position on liability is that the Respondent was to blame for the accident and the trial magistrate erred by relying on the police abstract merely because the investigating officer had given an intention of preferring charges of careless driving against the Appellant.

18. The Respondent`s position on the other hand is that the Appellant was to blame for the accident and in fact, the police abstract which the Appellant produced as evidence before the trial court blamed the Appellant for causing the accident.

19. The Appellant`s evidence was that he was on the material day at around 10.30 pm driving his motor vehicle on his way to Nyeri from Nanyuki. He was alone in the vehicle. That on reaching National Petrol station at Naromoru, he met with a lorry driving from the opposite direction heading to Nanyuki. That the lorry was being driven at high speed and was overtaking. That in his attempt to avoid a collision, he swerved to his left side but the body of the lorry hit his vehicle consequent to which he lost consciousness. He came to on the second day and found himself in hospital. He stated that he sustained injuries on the ribs, chest, head and his right arm was amputated. He produced his documentary evidence as exhibits, P.Exh. 1-10.

20. On cross examination, the appellant stated that the Respondent's lorry was the only vehicle that was overtaking and he could not remember hitting motor vehicle registration No.KBT 895R, Land cruiser. He denied that he was speeding. He stated that he could not apply emergency breaks as the lorry was very near and all he could do was to swerve.

21. The driver of the lorry, Moses Wainaina, DW1, on the other hand testified that he was on the material day travelling from Nairobi on his way to Nanyuki. That on reaching Naromoru, he saw a matatu driving from the opposite direction. That it was being driven on the middle of the road. He tried to warn the driver but he did not heed to his warning. He swerved to his left to avoid a head on collision. However, the matatu hit the back axle of the lorry. There was a Landcruiser behind him which also got involved in the accident. Policemen went to the scene of the accident. They found that the point of impact was on his left side of the road as one drives towards Naromoru.

22. The witness stated in cross-examination that there was no vehicle ahead of him at the time of accident. He denied that he was overtaking the Landcruiser at the time of the accident.

23. While dismissing the Appellant's case, the trial magistrate relied on the findings of the police as contained in the police abstract that the Appellant was to blame for the accident and that he was to be charged with the offence of careless driving.

24. It is clear from the evidence adduced before the trial court that both drivers blamed each other for causing the accident. It was therefore their duty to prove that either party was at fault. The court of

Appeal in Rahab Micere Murage (Suing as a Representative of the Estate of Esther Wakiini Murage) v Attorney General & 2 others [2012] eKLR held that;

> Since each of the three respondents had knowledge as to how the accident happened, they were duty bound under the law to call evidence to show either, which one of them was responsible for the accident or which one of them was innocent in the matter. All of them having failed to adduce evidence in that regard, the rebuttable presumption of fact is that all of them were in one way or another negligent, and through such negligence caused the accident in which the deceased died.

25. The same Court had earlier on in the case of Hussein Omar Farah v Lento Agencies [2006] eKLR held that where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. Said the Court;

> The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame.

26. It is therefore trite that where parties blame each other for occasioning an accident, both parties are duty bound to produce evidence to show that either party was at fault. It is trite that both should be held equally liable for causing the accident if they fail to establish the fault of the other side.

27. The Respondent`s driver testified that he was in company of his turn boy during the fateful night. The turn boy was not called to testify in support of the driver`s story that it is the matatu driver who was to blame. While the respondent made reliance on the findings in the police abstract that the appellant was the one to blame for causing the accident, he did not call the investigating officer to explain why he concluded that the matatu driver was the one to blame for causing the accident. More so, the respondent`s driver stated in cross-examination that he did not record a statement in the matter. How then did the police conclude that the appellant was the one to blame without even the driver of the lorry recording a statement?

28. The respondent`s driver claimed that the police found that the point of impact was on his side of the road. However, there were no sketch plans produced showing the possible point of impact and the final resting places of the three vehicles and whether or not there were any signs of evasive actions by either of the drivers. Worse still, the appellant was never charged with any traffic offence even after the police blamed him for causing the accident. In my view, the trial magistrate was wrong in making reliance only on the evidence contained in the police abstract to hold the appellant liable for the accident.

29. The Appellant on the other hand gave conflicting evidence from what was pleaded in his plaint. In his plaint, he pleaded that the Respondent`s lorry was overtaking other motor vehicles and as a result the lorry crashed into his motor vehicle and pushed it thereby causing it to collide with motor vehicle registration No. KBT 895R, Toyota Landcruiser. He reiterated the same story in his witness statement in which he added that the lorry emerged into his lane in an attempt to overtake the vehicles that were ahead. That the distance between them was not sufficient and the driver of the lorry tried to squeeze between 2 of the vehicles he was overtaking but the tail of the lorry was still on his lane and a collision occurred despite him applying breaks. That this made him to lose control and he crashed into motor vehicle registration No. KBT 895 R.

30. During trial, the appellant however stated in cross-examination that he could not tell whether or not he hit another motor vehicle when he lost control. He further testified that he could not apply emergency breaks as the lorry was very near when he saw it and all he could do is to swerve. If then the appellant

does not remember hitting the land cruiser after colliding with the lorry, why did he plead in his plaint that he crashed into the land cruiser after being hit by the lorry? Which version of his evidence was to be believed by the trial court? The appellant may in the premises not have been telling the truth on how the accident happened.

31. Upon interrogating the entire evidence that was adduced before the trial court, it is my considered view that the evidence was not sufficient to establish exclusive liability on either party. Each party blamed the other for causing the accident by driving on the wrong lane. None of them called an independent witness especially the police to show the possible point of impact. At the end of the day, there was no concrete evidence on which side of the road the accident had taken place. As such no party established fault of the opposite party. Being guided by the case of Hussein Omar Farah (supra), liability for the accident ought to have been shared equally on both the drivers. I therefore hold each driver equally to blame and apportion liability in the ratio of 50:50 for both parties.

Quantum

32. The law requires a court that dismisses an action for damages to assess the amount of damages it would have awarded the claimant had the suit succeeded. The trial magistrate in this case did not assess the damages after dismissing the appellant`s suit. It follows that the trial court erred in law in that respect.

33. The appellant is seeking general damages for pain and suffering and loss of amenities, costs of future medical treatment, loss of earning and earning capacity, special damages and costs of the suit. Though this court has the discretion to assess the damages during appeal, the determination that is most appealing to me is to refer the matter back to the trial magistrate to determine the issue.

34. In view of the foregoing, the order of the trial court dismissing the appellant`s case is set aside and liability is apportioned equally between the parties. I refer this file back to the trial magistrate or any other magistrate of competent jurisdiction to determine the award on quantum while taking into account this court`s finding on liability at the ratio of 50:50.

35. Since the appeal has succeeded, the appellant to have the costs of the appeal. It is so ordered.

WRITTEN AND SIGNED BY:

J. N. NJAGI

JUDGE

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

By:

A K NDUNGU

JUDGE

In the presence of:

.....for Applicant

.....for Respondent

Court Assistant - .....

30 days Right of Appeal.