Omamo v Otieno (Civil Appeal E176 of 2023)
[2024] KEHC 5204 (KLR) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5204 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E176 OF 2023

RE ABURILI, J

MAY 17, 2024

BETWEEN

GEORGE ODHIAMBO OMAMO ..... APPELLANT

AND

KAVALA NABOTH OTIENO ..... RESPONDENT

(An appeal arising out of the Judgment of the Honourable L.N. Kiniale in the Senior Principal Magistrate's Court at Nyando delivered on the 28th September 2023 in Nyando PMCC No. 21 of 2020)

JUDGMENT

Introduction

1. The appellant George Odhiambo Omamo instituted suit against the respondent Kabala Naboth Otieno vide a plaint dated 2nd November 2020 seeking special damages of Kshs. 485,980 as well as costs of the suit with interest.

2. It was the appellant's case that on the 4th November 2017, along the Kisumu Ahero road, while driving his motor vehicle registration no. KAC 900S at Korowe market, the respondent drove his motor vehicle registration no. KBX 395J so carelessly, recklessly and negligently causing it to ram into the appellant's motor vehicle causing him to suffer loss and material damage. The appellant particularized his loss and material damage at Kshs. 485,980 to include total costs of repair, painting and labour as well as towing charges.

3. On his part, the respondent entered appearance and filed a statement of defence dated 30th November 2020 denying the appellant's averments and putting him to strict proof. It was his case that the appellant contributed to the accident.

4. In his judgement, the trial magistrate found that both vehicles were overtaking and collided in the middle of the road and as such he apportioned liability equally between the parties herein

5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 25th October 2023 raising the following grounds of appeal:

    a. The learned trial magistrate erred in law and in fact in failing to consider the evidence adduced before her and the circumstances of the case and therefore apportioning 50% liability to the appellant.

    b. That the learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions on liability by completely disregarding the submissions of the appellant and as a result arrived in unjustified decision on liability.

6. The parties filed written submissions to canvass the appeal.

The Appellant's Submissions

7. On behalf of the appellant, it was submitted that the respondent acknowledged in his testimony that he was overtaking when the accident happened and as such the trial court's apportionment of liability failed to give due consideration to the appellant's testimony that he was on his right lane when the accident occurred. It was further submitted that the respondent's testimony that he had been driving for many years prior meant that he owed due care to other road users.

The Respondent's Submissions

8. It was submitted that the instant appeal was an afterthought and an act of bad faith as it was initiated after the appellant had received the decretal sum from the respondent and the parties had recorded a consent dated 18.12.2023 on costs and interests. It was submitted that the appellant was an opportunist and that there was nothing that the court could find in his favour. Reliance was placed on the case of *Ruth Shikanda (Suing as Legal Representative on behalf of the Estate of Agnes Ayori Ashiembi (DCD) v Sibed Transport Company Ltd* [2020] eKLR.

9. It was submitted that the respondent's testimony was not rebutted by the appellant and that it was on this account that the trial court found liability at 50:50.

10. The respondent further submitted that there was no sufficient grounds to interfere with the trial court's award on liability and that by allowing this appeal this court would prejudice the respondent as he had already honoured the judgement of the subordinate court by settling the entire decretal sum. Further, that no sketch plan or court proceedings in the traffic case had been produced in evidence.

Analysis and Determination

11. This being a first appeal, it is now settled that this court is entitled to reassess and re-evaluate the evidence adduced before the lower court bearing in mind that the Learned trial magistrate had the advantage of hearing and seeing witnesses testify before her, that advantage is not availed this Court (See *Peters vs Sunday Post Limited* [1958] EA 424.

12. In the case of *Bundi Murube v Joseph Omkuba Nyamuro* [1982-88]1KAR 108, the Court stated that:

> " However, a Court on appeal will not normally interfere with a finding of fact by the trial Court unless, it is based on no evidence or on a misapprehension of the evidence or the judge

is shown demonstrably, to have acted on wrong principles in making the findings he did." And also, in *Rahima Tayabb & Another v Ann Mary Kinamu* [1982-88] 1KAR 90 Law JA also stated; -

"An appellant Court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanor of witnesses who has given evidence before him."

13. It is undeniable that these principles are fundamental to this appeal. While it is a fact that two vehicles were involved in the accident, the responsibility to prove that the negligence of the Respondent caused the accident rested solely on the Appellant. This was the central issue that was prominent during the trial before the Learned Magistrate.

14. In order to determine liability for the accident, the trial magistrate had to carefully consider the evidence as presented in the Judgement. The Appellant, as per section 107 (i) of the *evidence Act*, had the responsibility to adduce evidence to prove negligence on the part of the Respondent. Based on the proven facts, the trial court would then be able to make a judgement in favour of the Appellant. The Court in *Ciabaitani M'Mairanyi & Others v Blue Shield Insurance Co. Ltd* CA No.101 of 2000(2005) 1EA 280 held that; -

> " Whereas under section 107 of the *Evidence Act*, which deals with the 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."

15. Under sections 107 and 108 of the *Evidence Act*, the responsibility of proving a fact lies with the party who claims the existence of any relevant fact in question. This burden of proof may shift from the asserting party to the Defendant. Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER at 374 held as follows:

> " If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to determinate conclusion the way or the other, then the man must be given the benefit of doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. The 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 probably than not', the burden is discharged, but, if the probabilities are equal, it is not."

16. In this case, the burden fell upon the appellant to demonstrate the occurrence of the accident was solely the responsibility of the respondent. Additionally, it is noteworthy that section 109 of the Act allows the court to presume the existence of specific facts.

17. In the case of *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR the Supreme Court expounded the evidential burden of proof as follows:

> "(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, this, evidential burden keeps shifting and

its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."

18. It is evident from this explanation that the burden of proof required from litigating parties varies significantly, with each form imposing different responsibilities on the parties involved. In this particular instance, the issue before the trial court and before this court is whether the appellant proved that the respondent was wholly to blame for the material accident.

19. The witnesses to the accident were PW3, Tobias Apisi Apiyo, the appellant's driver and DW1 the respondent herein. PW3 testified that he was driving along the Kisumu – Ahero road when around Korowe market, the respondent's vehicle was carelessly driven causing the said accident and extensive damage on the appellant's vehicle. In cross-examination, PW3 testified that the respondent's vehicle left its lane and collided with the car he was driving which was on its rightful lane. PW3 further testified that he was at the bumps and even flashed his lights to warn the respondent but all was in vain.

20. The respondent testified as DW1 that he was trying to overtake a matatu that had pulled over on the road and on checking whether it was safe, he proceeded to start overtaking but was met with the appellant's oncoming vehicle that was being driven at a high speed but despite slamming on the brakes, he ended up colliding with the appellant. He reiterated his testimony in cross-examination.

21. From the above evidence as highlighted, it is clear that the respondent was overtaking the matatu when he met head on with the appellant. There is no evidence that the appellant too was overtaking any motor vehicle when he encountered the respondent on his-appellant's lane.

22. There is therefore no competing versions of how the accident took place. This was a clear case of the respondent having overtaken the matatu without ensuring that it was safe to do so and that is why he met the appellant head on.

23. Liability can only be apportioned equally where the evidence is available to demonstrate that the other party too, in one way or the other, contributed to the occurrence of the material accident. Being on the road as a road user and driving on your lane is what is expected of you. If a careless driver or road user finds you on your lane without any warning of approach or while overtaking another motor vehicle, without first ensuring that it is safe to overtake, as was in the instant case, I find that in such a case, the appellant was not proved to have contributed to the accident at all. Being on the road per se is not being negligent as every person has a right to use the public road. In this case, had the respondent been careful as he stated in his testimony, there is no way the accident could have occurred. In addition, collision in the middle of the road was in itself evidence of negligence on the part of the appellant who was on his lane. I find that the respondent underestimated the distance between him and the oncoming vehicle hence the accident.

24. Taking all the aforementioned in consideration, although the respondent submitted that the appellant had been paid all the damages claimed hence he is not entitled to the orders sought, I find that the settlement of the decretal sum in full as special damages and costs and interest did not settle the question of liability on which the appellant wanted a pronouncement on.

25. I therefore my finding that the respondent was wholly and 100% to blame for the material accident for overtaking another motor vehicle without first ensuring that it was safe for him to do so. I therefore find this appeal on liability to be meritorious. I allow it and set aside the finding of the trial court apportioning liability between the appellant and respondent equally and substitute it with a finding that the respondent was wholly to blame for the accident.

26. As the claim by the appellant in special damages has already been settled by the respondent, I make no orders as to costs.

27. The lower court file together with copy of judgment to be returned.

28. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF MAY, 2024

R. E. ABURILI

JUDGE