Kilungu (Suing as the Administrator and Legal Representative of the Estate of Mue Kilu alias Joshua Mue Kilungu - Deceased) v Makindu Motors Limited (Civil Appeal E031 of 2022) [2024] KEHC 7122 (KLR) (19 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7122 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CIVIL APPEAL E031 OF 2022

FROO OLEL, J

JUNE 19, 2024

BETWEEN

MUNYWOKI KILUNGU (SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF MUE KILU ALIAS JOSHUA MUE KILUNGU - DECEASED) .... APPELLANT

AND

MAKINDU MOTORS LIMITED .... RESPONDENT

(Being an Appeal from the Judgment/Order of Honourable M.K. Mwangi Esq -Chief Magistrate Sitting in Mwingi Principal Magistrates Civil suit No 41 of 2015 delivered on 25th May 2022)

JUDGMENT

A. Introduction

1. This appeal arises from the judgment of Honourable M.K Mwangi C.M dated 25th May 2022, delivered in Mwingi CMCC No. 41 of 2015 where he dismissed the Appellants suit as against the respondent, who was the 2nd defendant in the primary suit on the basis that the Appellant had failed to prove liability on part of the respondent in causing the said accident.

2. Being aggrieved by the said decision, the Appellant raised two (2) grounds of Appeal namely;

    a. The learned chief Magistrate erred in law and misdirected himself on the facts when he made a finding that the respondent was not to blame for the accident contrary to the evidence tendered in court by the Appellant.

    b. The learned chief Magistrate erred in law and in Misdirected himself on the facts when he failed to follow judicial precedents that where a defendant blames a Third party, it is the said defendant to join the said third party failure to which liability attaches to the defendant.

3. The Appellant therefore prayed that this Appeal be allowed, the judgment of the trial court be set aside and be substituted with an order allowing this Appeal, and judgment on liability be entered as against the respondent as it was done as against the other defendant in the primary suit.

B. The Pleadings

4. By an Amended plaint dated 28.04.2021, the Appellant pleaded that the respondent herein was the registered owner of Motor cycle registration Number KMTC 747S (hereinafter referred to as the 1st suit motor cycle), and also the registered owner of motor cycle Registration Number KMCZ 302H (hereinafter referred to as the 2nd Suit Motor cycle) while one Juma David was the beneficial owner thereof. On or about 16.09.2013 along Mwingi-Garissa road, the deceased was lawfully riding the 1st suit motor cycle, when the respondents authorized driver so negligently, carelessly and recklessly drove the 2nd suit motor cycle, allowed it to leave its lane and violently collided with the 1st suit motor cycle, consequence whereof the deceased, who was driving the 1st suit motor vehicle suffered fatal Injuries.

5. The Appellant particularized the Respondent's agent/driver/agents negligence and list of dependents to benefit from the deceased estate as provided for in law. He further pleaded that as a consequence of this accident, the deceased Estate had suffered loss and damage and consequently claimed General damages for loss of life under the *law Reform Act*/Fatal Accident Act, special damages, costs of the suit and interest on the decretal sum and on the said costs.

6. The Respondent, who was the 2nd defendant in the primary suit filed their Amended statement of defence wherein they denied liability for this accident either directly and/or vicariously and put the Appellant to strict proof thereof. The respondent further denied owning or having any interest the 1st and 2nd suit motor cycles as they had sold the 1st suit motor cycle to one Nduku Mulwa- ID/NO 102249 and cell phone No 0705703136, In April 2013, and earlier on 17.07.2010 had sold the 2nd suit motor cycle to one Patrick Mutia Wambua-ID/NO 22369301 who paid part purchase price leaving a balance of Kshs 20,000/= which was to cleared later. Upon purchase, they had handed over the log book duly signed, the motor cycle and all accessories to enable the said purchaser to register the same in his name.

7. The respondent did further plead that neither of the riders of both suit motor cycles, which were the subject of the said suit was/were its agents, servants or employees and therefore, they could not be held liable for their mistakes and/or negligence. They also stated that they were complete strangers as to the circumstances under which the accident had occurred, the particulars of negligence, injuries or dependency pleaded and put the Appellant to strict proof thereof. The respondent thus prayed for the suit to be dismissed.

C. Evidence at trial

8. The Appellant, relied on his witness statement and further testified that the deceased was his younger brother, who unfortunately had died due to injuries sustained in a road traffic accident, which occurred on the 16.09.2013 at about 9.00pm. He did not witness the accident but was called to the scene of the accident immediately after it had occurred, where he found that the accident involved the two motor cycles. The accident was cause by the 1st defendant in the primary suit as he was driving the 2nd suit motor cycle on the wrong side of the road. The 1st defendant before the primary suit had been charged with a traffic offence of causing death by dangerous driving, but skipped court before judgment could be delivered and warrants of arrest had been issued as against him.

9. In cross examination, he testified that the respondent herein was the registered owner of the 2nd suit motor cycle and that is why he had opted to sue them claiming damages. He had been called to testify in the traffic case, but it was not concluded due to the fact that the 1st defendant, who was the accused person in the said traffic case had absconded court.

10. DW1 Samuel Nzioka Mimile, adopted his witness statement and testified that he worked for the respondent as the operations manager and his duties entailed supervising, selling and servicing of motor cycles. In the said witness statement, he averred that they would manufacture/assemble motor cycles, have them registered in their name first to enable them sell them to their various customers in the normal cause of their business. They had sold the 2nd suit motor cycle to one Patrick Mutia Wambua-ID/NO 1022249, who had made part payment and had a balance of Kshs 20,000/= which was to be cleared later. As a result of this transaction they had handed over the Motor cycle, logbook and Number plate to him to enable him register his name or his nominee.

11. The witness further testified that both riders were not their agents, servants or employee and therefore they could not be held liable for their mistakes and/or negligence. He produced the transaction documents into evidence in support their case. In cross examination he confirmed that the 2nd suit motor cycle had been sold to one Patrick Mutia Wambua, and as per the police abstract the driver of the 2nd suit motor cycle was one Juma David, who after the accident was charged before court with the offence of causing death through dangerous driving. While the logbook of the 2nd suit motor cycle still showed that they owned it, that was not the case as they had sold the said motor cycle as at the time of the accident. Further he did not have anything to show that ownership of the two motor cycles had changed registration and/or their companies name removed therefrom.

12. In reexamination, the witness clarified that initially they would give log books and duly filled transfer forms upon completion of payment, but as from 02.09.2016, they had changed their policy and it was now their role to transfer the sold motor cycles on the designated NTSA portal. The trial court did consider the evidence adduced, the submissions made by the parties and absolved the respondent of liability for the said accident, but proceeded to find the 1st defendant before the trial court 100% liable and proceed to award damages as follows; sum of Ksh.100,000/= for loss of expectancy of life, Kshs.50,000/= for pain and suffering, Kshs.1,600,000/= for loss of dependency and special damages of Kshs.31,000/=. The Appellant was also awarded costs and interest of the suit.

13. Being wholly dissatisfied with the trial courts finding on liability, the Appellant filed this Appeal and it was disposed off by way of written submissions.

D. Submissions

(i). Appellant's Submissions

14. The appellant filed his submission dated 26th January 2024 and faulted the trial Magistrate for wrongly analyzing the respondent's evidence as tendered, and for failing to find that the respondent having failed to institute third party proceedings and/or enjoin the said Patrick Wambua as a third party, could not exonerate themselves from bearing the liability for the said accident. If a party (the respondent) was claiming contributory negligence, they in law had the obligation to enjoin the said third party into the said proceedings and their failure to do so was fatal to their case. Reliance was placed on the case of Stellah Muthoni Vrs Japhath Mutegi (2016) eKLR.

15. In the instant suit, the respondent had claimed that they had transferred the beneficial ownership for the suit motor cycle to a third party, but failed to enjoin the said third party to the suit. They therefore had to be held vicariously liable and should have carried the blame for the accident together with the 1st

defendant in the primary suit. The Appellants therefore prayed that this Appeal be allowed as prayed for, with costs.

The Respondent Submissions.

16. The respondent filed their submissions dated 04.03.2024, wherein they submitted that this Appeal was misconceived, lacked merit and the same ought to be dismissed with costs. The provisions of Order 1 Rule 15(1) of the civil procedure Rules, applied where a defendant was claiming as against a party not already a party to the suit, that he was entitled to contribution, indemnity or relief /remedy relating to or connected with the original subject matter. The said provisions of law were not applicable in this case, as they were not claiming any contribution or indemnity from the said Patrick Mutia Wambua. Their defence was that they had sold the suit motor cycles and were not vicariously liable for the accident as they had no proprietary interest thereon.

17. It was upon the Appellant to apply under Order 10(2) of the civil procedure rules to enjoin the said Patrick Mutia Wambua, who was disclosed as the owner of the 2nd suit motor cycle. In the alternative, the Appellant having had notice of issues raised in the statement of defence ought to have amended his plaint to drop the respondent as the 2nd defendant in the primary suit and enjoin the said Patrick Mutia Wambua to the suit. He failed to do so and had only himself to blame.

18. The respondent therefore urged the court to find that this Appeal was not merited and prayed that the same be dismissed.

E. Analysis and Determination

19. I have considered the entire record appeal, submissions by counsels for the parties and the authorities relied on. This being a first appeal, parties are entitled to and expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. This is the principle espoused in section 78 of the *Civil Procedure Act*.

20. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal stated that:

> " 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 allowances in this respect"

21. The Appellant challenged the trial court finding on liability, where the respondent was exonerated and judgment entered as against the 1st defendant in the primary suit.

22. As to the question of liability, it was held in Lakhamshi Vs Attorney General(1971) EA 118 i that:

> " A judge is under a duty when confronted with conflicting evidence to reach a decision on it and inmost traffic accidents, it is possible on a balance of probability to conclude that one or other party was guilty, or both parties were guilty, of negligence. In many cases, as for example, where vehicles collide near the middle of a wide straight road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both

drivers, because if one was negligent in driving over the Centre of the road, the other must be negligent in failing to take evasive action. It is usually possible, although extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but where it is not possible, it is proper to divide the blame equally between them.

23. The issue of apportionment of liability was also discussed in Khambi and another Vs Mahithi and another (1968) E.A 70 where it was held that;

> " It is well settled that where a trial judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge." Similar decisions have been reached in Mahendra M Malde Vs George M Angira Civil Appeal No 12 of 1981

24. The trial Magistrate dismissed the Appellants suit as against the respondent on the basis that the respondent had established rebuttable presumption of ownership of the 2nd suit motor cycle, despite being the registered owner thereof and therefore could not be held vicariously liable for the accident which occurred. In the case of Evans Nyakwana Vs Cleophas Rwana ongaro (2015) eKLR it was held that

> " As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of section 107(i) of the *Evidence Act*, Chapter 80 laws of Kenya. Furthermore, the evidential burden...... is cast upon any party, the burden of proving any particular fact which he desired the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person..... The appellant discharged that burden and as section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

25. The Question then is what amounts to proof on a balance of probabilities was also discussed by Kimaru J in William Kabogo Gitau Vs George Thuo & 2 others (2010) 1 klr 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 pleased in his case are more likely than 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 opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred.

26. This court having reexamined the evidence adduced cannot fault the finding of the trial Magistrate exonerating the respondent from bearing blame in this accident. The respondent indeed proved that they traded in assembling and selling motor cycles and indeed by the documentation/exhibits produced proved that in 2010, had sold the 2nd suit motor cycle to one PATRICK MUTUA WAMBUA and that as at the time of the accident, they and/or their employee, agent or servant was not in control of the same.

27. In Frida Kimotho Vs Ernest Maina {2002} Eklr , Justice Hayanga quoted with approval the case of Simmons L.J in Woods Vs Duncan 1946 AC 419, where it was held that ;

> " I accept Mr Fraser Murray's proposition that the respondents (defendants) can avoid liability if they can show either that there was no negligence on their part which contributed to the accident, or that the accident was due to circumstance's not within their control."

28. Further as held in Christine Kalama Vrs Jane Wanja Njeru & Ano (2021) eklr the high court had this to say

> " It is a basic element of a cause of action in negligence that the claimant can allege the he or she has suffered loss and damage falling within the scope of duty of care owed to her or him by the defendant. For that matter, it was the duty of the Appellant to show that she was owed a duty of care on the material day of the accident. It is a nexus between the harm and negligence on the part of the respondents. How is the scope of negligence and duty of care determined?
>
> 1. First that the respondents owed duty of care to the Appellant.
> 2. Second, that the respondents breached that duty of care in the manner of their driving.
> 3. That the breach caused the Appellant to suffer personal injuries attracting recoverable damages at law.
> 4. That the injuries suffered by the Appellant was as a result of the breach and negligence, which was reasonably foreseeable.

29. These principles were discussed in Caparo Industries PLC Vs Dickman (1990) 1 ALL 586 and Chun Pui Vrs Lee Chuen Tal (1988) RTR 298 where the determinants of negligence was highlighted as follows; "The requirements of the tort of negligence are, as Mr Batts submitted, fourfold, that is; the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damages and foreseeability of the particular type of damage caused."

30. The evidence of the Appellant as relates to negligence as pleaded and when also considered together with the evidence of PW1, was insufficient and did not prove that the 1st defendant in the primary suit was the driver, agent and/or employee of the respondent herein. Breached the duty of care to other road users was therefore not proved and by extension the respondent could not be held liable for the said accident. Finally, the evidential burden also shifted to the Appellant to disapprove the evidence lead by the respondent as relates to ownership of the 2nd suit motor cycle, and it was the Appellant, who was bound to fail if no such further evidence in rebuttal was adduced. He failed to shift this burden and therefore his claim had to fail.

31. Finally the respondent in their amended defence did not claim contribution or indemnity as against any third party. The provisions of Order 1 rule 15(1) of the civil procedure rules therefore did not come into play and it was therefore not necessary for the trial court to make a determination as to whose responsibility it was to file third party proceedings and/or the effect of not filing the same. The Appellants submissions and reliance on the said provisions are therefore misconceived, misguided and inapplicable to the circumstances herein.

F. Disposition

32. Having exhaustively analyzed all the issues raised in this appeal I find that this Appeal lacks merit and dismiss the same with costs to the respondent.

33. The costs of this Appeal are assessed at Kshs.150,000/= (All inclusive).

34. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF JUNE, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 19TH DAY OF JUNE, 2024.

In the presence of: -

No appearance for Appellant

Mr Kasyoka for Respondent

Sam Court Assistant.