Kibos Sugar Factory and Allied Industries Limited v Ngesa (Civil Appeal E092 of 2023) [2024] KEHC 10688 (KLR) (16 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10688 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E092 OF 2023

RE ABURILI, J

SEPTEMBER 16, 2024

BETWEEN

KIBOS SUGAR FACTORY AND ALLIED INDUSTRIES LIMITED APPELLANT

AND

AUSTIN ODUOR NGESA ..... RESPONDENT

(An appeal arising out of the Judgment & Decree of the Honourable B. Omolo in the Chief Magistrate's Court at Kisumu delivered on the 23rd May 2023 in Kisumu CMCC No. 122 of 2019)

JUDGMENT

Introduction

1. The respondent was the plaintiff in the lower Court. Vide a plaint dated 2nd March 2019, he claimed against the appellant for general and special damages as well as costs of the suit for injuries sustained following a road traffic accident that occurred on or about the 18th June 2018.

2. It was the respondent's case that he was lawfully riding motorcycle registration number KMDY 841W along Kondele – Nyamasaria bypass when the appellant's driver negligently and carelessly drove motor vehicle registration number KBK 605S that it hit the respondent's motorcycle. The respondent averred that the accident was soley caused by the negligence of the appellant's driver.

3. In response, the appellant filed a statement of defence dated 13th July 2018 denying the respondent's averments and putting him to strict proof. The appellant further contended that the accident was contributed to by the respondent's own negligence.

4. The trial magistrate in her judgement found the appellant 100% liable for causing the accident and awarded the respondent Kshs. 200,000 as general damages.

5. Aggrieved by the trial court's judgment, the appellant filed its appeal vide memorandum of appeal dated 12th June 2023 raising the following grounds of appeal:

    1. That the learned magistrate misapprehended th evidence on record and therefor erred and misdirected herself in fact and in law in finding that the respondent had proved his case against the appellant to the required standard.

    2. That the learned trial magistrate erred in law and fact in finding the appellant 100% liable whereas the evidence tendered by the respondent fell short of the required standard of proof.

    3. That the learned magistrate erred in law by failing to consider the submissions made by the appellant as to the issue of liability and thus arrived at an erroneous determination.

    4. That the learned magistrate erred in law and in fact in failing to consider and appreciate the appellant's counsel's cross-examination of the respondent's witnesses, specifically the investigating officer and therefore arrived at an erroneous determination on liability.

    5. That the learned trial magistrate erred in law and in fact in failing to analyse the evidence and testimonies on record and as presented by the witnesses, more so the admissions by the investigations officer and sketch plan submitted into evidence.

    6. That the learned magistrate erred in law and in fact in failing to give reasons why she aligned herself with the respondent's case as opposed to the appellant's case.

    7. That the learned magistrate erred in law in failing to give cogent reasons for her decision on liability as contemplated under Order 21 Rules 4 and 5 of the *Civil Procedure Rules 2010*.

    8. That the learned magistrate erred in law and fact in failing to consider and take into account th authorities placed before hr touching on the pertinent and substantial points of law and fact so as to arrive at a just and fair decision.

    6. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

7. The appellant submitted that from the Trial Court's determination, it was evident that the Trial Magistrate failed to give any reasons for her determination on liability. That she did not analyze the testimonies of the witnesses who appeared before her and that she did not analyze the evidence placed before her thereby flouting the provisions of Order 21, Rules 4 and 5 of the *Civil Procedure Rules, 2010*.

8. The appellant further called into question the testimony of the Police Investigating Officer on the grounds that the evidence tendered, specifically the Sketch Plan, did not also support the Police Officer's allegation that the accident occurred when the Appellant's authorized driver made a U-Turn.

9. It was submitted that the evidence clearly showed that the accident occurred when the Respondent encroached onto the Appellant's driver's lawful lane, leading to a collision thus the party at fault was the Respondent and not the Appellant's driver as alleged and therefore taking into consideration the circumstances of the case and applying common sense to the facts, it was clear that the Respondent did not prove his case on a balance of probabilities and thus his suit was ripe for dismissal for want of proof.

10. The appellant submitted that the circumstances of this case warranted the interference of the Trial Court's decision and thus urged the court to allow the Appeal herein and order for a new trial of the suit under the provisions of Order 42 Rule 26 of the *Civil Procedure Rules*.

The Respondent's Submissions

11. The respondent submitted that the appellant took issue with the fact that PW2 admitted that the skid marks began at the line of DW1 whereas it should be noted that the said witness explained that the skid marks began at the line of DW1 and ended on the left side of the road, rightful line of respondent and the exact point of impact and that this must have been at the point when he decided to make a sharp U-turn and ended up colliding with the respondent on his rightful lane.

12. It was thus submitted that taking into account the evidential material on record, the respondent discharged the burden of proof on a balance of probabilities as the evidence which the trial court admitted and accepted created a credible impression consistent with the findings that appellant was to blame for the accident.

13. The respondent relied on the case of *Aoro v Odinga* (Civil Appeal E023 of 2022) [2022] KEHC 14896 (KLR) where the court held interalia that:

> "In this case, I find that there was absolutely no factual evidence that the Respondent was to blame in any way, for the accident, considering the contradictory testimony of DW3 as to how the accident occurred, which contradictions are material and raise doubts as to its veracity and truth".

14. The respondent submitted that as to the submissions and authorities filed by the appellant, the same were not evidence and cannot be substitute of pleadings or evidence adduced before a trial court as was held in the case of *East Africa Portland Cement, CFC Stanbic Limited & another v Peter Ividah Muliro* [2019] eKLR. It was further submitted that that the court properly informed her of the issues for determination and determined those issues as she did and that it should be noted that the trial court stated that she considered the rival submissions of the parties in writing this judgment.

15. Regarding the respondent's failure to have a driving license it was submitted that this does not negate the circumstances under which an accident occurred as was held in the case of *Joshua Okello Ochieng v Francis Ouko Odira* [2021] eKLR where Ochieng F.A observed that:

> "Liability in a civil claim is an issue to be determined on evidence which shows the person whose actions or omissions caused the accident. Therefore, whereas it amounts to a traffic offence to ride a motor cycle without a valid driver's license, it is possible that the person who had no valid licence could have been driving so carefully that he cannot possibly be at fault for the accident. The converse is also possible; that a driver who holds a valid driver's licence could be so negligent that the accident is wholly attributable to his said negligence."

16. The respondent also relied on the case of *Aoro v Odinga supra* where the court observed that:

> "I must however warn that the fact that the motor cycle rider had no driving licence had nothing to do with the cause of the accident. Once the plaintiff discharges the burden of proof as required under section 107 of the *Evidence Act*, that the driver was to blame for the accident for driving the vehicle in a negligent manner as pleaded in the plaint, and as per the evidence adduced in court on oath, the failure to have a driving or riding licence cannot be the reason for the accident unless there is proof that the rider drove in such a manner that the failure to have the driving licence was the contributory factor to the material accident."

17. It was submitted that contrary to the to the appellant's submissions that the trial court failed to consider and analyse the appellant's pleadings, evidence, Written Submissions, the issues raised therein and the

law, and failed to give reasons for the decision, the trial court properly proceeded to decide the case on the basis of the evidence adduced and on record. Reliance was placed on the case of *County Government of Narok v British Pharmaceuticals Limited* (Civil Appeal 20 of 2020) [2022] KEHC 10127 KLR) where the court observed that:

> " Although a court is obliged to give reasons for its decision, it is not required to address every submission that was advanced during the course of the hearing as long as the court has determined and given reasons on the principal and relevant issues upon which the decision turns; this is the muster. The trivial or minor matters are only to be properly subordinated. See Telstra Corporation Ltd v Arden {1994} 20 AAR 285. Burchett J And Dodds v Comcare Australia (1993) 31ALD 690}, 691.

Analysis and Determination

18. This being a first appeal, this court is under a duty placed on it under section 78 of the *Civil Procedure Act* to re-evaluate and assess the evidence and make its own conclusions. It must, however, bear in 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. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

19. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a 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 reaching his conclusion."

20. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions as well as the evidence adduced, the only issue for determination is that of liability, specifically Whether or not the trial court should have apportioned liability between the appellant and the respondent herein, having regard to the circumstances of this case.

21. In *Khambi and Another v Mahithi and Another* [1968] EA 70, 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."

22. That was the position in Isabella *Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mahendra M Malde v George M Angira* Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

23. The law is that he who alleges must proof. See sectons 107 and 109 of the *Evidence Act*. The question in this case, therefore, is, whether the respondent herein discharged the burden of proof that the appellant was liable in negligence for the occurrence of the accident wherein he was injured.

24. The respondent testified as PW1 adopting his statement dated 2.3.2019 as his evidence in chief. The respondent testified that on the material date he was riding his motor cycle coming from Kondele to Kachok when at the Kondele Nyamasaria bypass, he saw an oncoming car from the Kachok direction being driven at high speed and which car took a U-turn into his lane and collided with him leading to his injuries.

25. In cross-examination, the respondent reiterated his testimony and stated that he was on the left side of the road, his side, when the accident occurred.

26. PW2, No. 50139 PC Geoffrey Ndiema the investigating officer testified that following the accident which was reported by the driver of the accident motor vehicle, he went to the scene with the said driver. It was at Nyamasaria Fly over. That the motor vehicle, from the investigations, was from Kachok service lane when the driver of the appellant's vehicle made a sharp U-turn to go back to Nyamasaria direction and encroached on the respondent's lane of the road thus causing the rider to ram into the motor vehicle. PW2 produced the sketch map of the accident as Exhibits No. 7a the measurements on the road as 7b. He blamed the motor vehicle driver for the accident. He reiterated his testimony in cross-examination and re-examination.

27. In defence, the appellant called one George Osida Owuor as DW1 who adopted his statement filed on the 23.2.2021 as part of his evidence in chief. It was his testimony that it was the respondent who negligently and recklessly ventured onto the path of the motor vehicle at an undesignated area without due care or concern of his own personal safety and that of other road users. Further, that he was forced to apply emergency breaks to avoid hitting the respondent but unfortunately, he was too close to the motor vehicle. That he had never been involved in a prior accident and that he was not charged with any traffic offence. The witness further stated that the respondent should be blamed for the accident for crossing the road carelessly and recklessly at the undesignated area without due care of his own safety.

28. In his sworn testimony in court, the appellant's driver testified that he was coming from Nyamasaria side heading to Kibos Sugar Company and as he was heading to Kondele Area to the main road, the motor cyclist was from Kondele side trying to overtake another motor vehicle. That he was on top of the fly over. He took the injured to Jootrh and thereafter reported the accident to Kondele Police Station.

29. However, in cross-examination DW1 changed his testimony and stated that the accident happened when he was still at the fly over and that the respondent was trying to overtake DW1 when they collided on the road on the side of DW1.

30. I have considered the evidence tendered before the trial court and I note that contrary to the appellants' submissions before this court, the respondent was firm and consistent in his witness statement and testimony before the trial court that he was on his lane and side of the road when the appellant's driver took a u turn and hit him from that very side. The respondent's testimony was corroborated by that of PW2, the investigating officer who went to the scene immediately after the accident and even drew a sketch map and legend showing how the accident occurred.

31. Juxtaposed against this was the appellant's witness whose testimony contradicted itself on how the accident occurred. Further, and contrary to the appellant's submissions, I note that PW2 admitted that the skid marks began at the line of DW1 but went on to state that the skid marks began at the line of DW1 and ended on the left side of the road, the rightful line of respondent and the exact point of

impact. In essence, the appellant's driver collided with the respondent while the respondent was on his own lane.

32. The fact that the appellant's driver was not charged with any traffic offence does not exonerate him from blame in negligence as the standard of proof in criminal cases is much higher than in civil cases.

33. Considering all the aforementioned, I find no error in principle in the finding by the trial court that the appellant's driver was 100% liable for the material accident. I hasten to add that being on the road in itself is not negligence and one cannot be held to have contributed to the accident simply because he was found to be using the road as there is no crime in using the road and in a cautious manner.

34. I find no reason to interfere with the finding on liability by the trial court against the appellant's driver.

35. As regards the respondent's failure to have a driving license, I am in agreement with the respondent's submission that failure to have a driving licence in itself cannot be said to have contributed to an accident like the one herein as the respondent was knocked when he was on his lane. He did not get into the way of the appellant's motor vehicle to warrant a finding that he contributed to the occurrence of the accident. No amount of negligence attributable to him was proved. This holding is in line with the finding in the case of Joshua Okello Ochieng (supra).

36. The upshot of the above is that I find that this appeal lacks merit and proceed to dismiss it with costs to the respondent, assessed at Kshs 40,000, payable within 30 days of today and in default, execution to issue.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16TH DAY OF SEPTEMBER, 2024

R.E. ABURILI

JUDGE