Onyango v Kioko (Civil Appeal 202 of 2020)
[2023] KEHC 17537 (KLR) (Civ) (11 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17537 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 202 OF 2020

CW MEOLI, J

MAY 11, 2023

BETWEEN

JOHN OMONDI ONYANGO ..... APPELLANT

AND

DANIEL MUEMA KIOKO ..... RESPONDENT

(Being an appeal from the judgment of L.B. Koech (Mrs) PM, delivered on 6th May 2020 in Nairobi Milimani CMCC No. 2461 of 2019)

JUDGMENT

1. This appeal emanates from the judgment delivered on May 6, 2020 in Nairobi Milimani CMCC No. 2461 of 2019. The suit was instituted via the plaint filed by Daniel Muema Kioko being the plaintiff in the lower court (hereafter the Respondent) against John Omondi Onyango, the defendant in the lower court (hereafter the Appellant). The suit was founded on negligence and was brought to recover inter alia general damages in respect of injuries sustained by the Respondent in a road traffic accident which occurred on or about the 1st day of November, 2017.

2. It was averred that the Appellant was at all material times the beneficial owner and driver of the motor vehicle registration no. 40UN238K (hereafter the motor vehicle) and that on the material date, the Appellant's motor vehicle was so negligently driven, controlled and or managed that it knocked down the Respondent who was lawfully crossing Uhuru Highway along a pedestrian crossing, occasioning him serious bodily injuries.

3. The Appellant filed the statement of defence dated 3rd June, 2019 wherein he denied the key averments in the plaint and alternatively, pleaded contributory negligence against the Respondent.

4. The suit proceeded to trial where both parties adduced evidence. The trial court apportioned liability between the parties in the ratio of 90%:10% in favour of the Respondent and awarded damages as follows:-

   a. General damages for pain and suffering Kshs 1,000,000/-

      Less 10% Kshs 100,000/-

      Net Kshs 900,000/-

   b. Future medical expenses Kshs 250,000/-

   c. Loss of earning capacity Kshs 600,000/-

   d. Special Damages Kshs 198,620/-

      Net Kshs 1,948,620/-

5. Aggrieved with the outcome, the Appellant preferred this appeal which is premised on the following grounds:

   1. "That the learned magistrate erred in law and in fact in finding the defendant liable for negligence.

   2. That the learned magistrate erred in law and in fact in not finding that the plaintiff failed to prove liability on the part of the defendant.

   3. That the learned magistrate erred in law and in fact in disregarding the evidence of the defendant.

   4. That the learned magistrate erred in law and in fact in failing to analyze the evidence adduced.

   5. That the learned magistrate erred in law and in fact in awarding excessive and exorbitant damages to the plaintiff."

6. The appeal was canvassed by way of written submissions. The Appellant condensed his grounds of appeal into two salient issues, namely, the trial court's respective findings on liability and general damages. Concerning liability, the Appellant cited inter alia, the case of *Palace Investments Limited v Geoffrey Kariuki Mwenda & another* [2015] eKLR to contend that liability was not established to the required standard. The Appellant argued that while it was undisputed that the accident occurred, liability was not established since the police abstract which was tendered in evidence indicated that investigations were still pending in the matter.

7. The Appellant further argued that the trial court did not consider his evidence pointing to negligence on the part of the Respondent and which negligence resulted in the material accident, by virtue of his action of crossing at an undesignated point. To buttress this point, the Appellant cited the case of *Peter Okello Omedi v Clement Ochieg* [2006] EKLR in which the court determined that a pedestrian equally owes a duty of care to other road users and where this duty of care is breached, liability ought to be apportioned. The Appellant contended that the Respondent did not call any independent witnesses to corroborate his testimony and hence he did not prove his case against the Appellant.

8. On quantum of damages, it was the contention by the Appellant that the award made by the trial court on general damages for pain, suffering and loss of amenities was manifestly excessive. In the Appellant's view, an award in the sum of Kshs 500,000/- would have sufficed given the nature and extent of the Respondent's injuries. Citing the decisions in *Daneva Heavy Trucks & another v Chrispine Otieno* [2022] eKLR where the court awarded the sum of Kshs 800,000/- in general damages for injuries

categorized as fracture of the pelvis and fractures of the left tibia and fibula, and *Blue Horizon Travel Co Ltd v Kenneth Njoroge* [2020] eKLR where a plaintiff who had sustained bruises on the scalp, neck, abdomen and lower back; cut wound on the left thumb and left palm; and sublaxation of the left shoulder joint, was awarded damages in the sum of Kshs 400,000/-.

9. The Appellant also submitted that the Respondent's receipts tendered at the trial in proof of specials amounted to the sum of Kshs 28,610/- and not the sum claimed in the plaint and awarded by the lower court. The Appellant cited the authority of *Swalleh C. Kariuki & another v Viloet Owiso Okuyu* [2021] eKLR for the principle that special damages must be specifically pleaded and proved. Regarding future medical expenses, it was the Appellant's submission that the trial court only considered the medical report prepared on behalf of the Respondent indicating that the Respondent required removal of the metal implants at a cost of Kshs 250,000/- while ignoring the Appellant's estimated costs of the procedure in the sum of Kshs 80,000/-, as contained in their medical report. The Appellant therefore urged that the award for future medical expenses be reduced to the sum of Kshs 100,000/-.

10. Moreover, the Appellant asserted that the Respondent did not tender evidence in proof of loss of earning capacity and was therefore not entitled to an award of damages in that regard. The court was therefore urged to set aside the judgment of the lower court.

11. The Respondent, in defending the trial court's findings, asserted concerning proof of liability that sufficient evidence had been tendered to support his averment that the Appellant was driving at a high speed and without due care and consideration, hence the accident. The Respondent further pointed out that he had relied on the res ipsa loquitur doctrine to support his pleadings and cited the case of *Margaret Waithera Maina v Michael K. Kimaru* [2017] eKLR wherein the Court of Appeal reasoned that in order for the doctrine to apply, one must prove that in the absence of an explanation by the defendant, the accident in question was the result of absence of care.

12. The Respondent submitted that in the present instance, the particulars of negligence were proved against the Appellant to the required standard and hence the trial court arrived at a proper finding on liability. Concerning quantum, the Respondent made reference to the case of *Catholic Diocese of Kisumu v Tete* [2004] eKLR to argue that an appellate court can only interfere with an award of damages assessed by a trial court if satisfied that the trial court applied the wrong principles; took into account some irrelevant factor or left out some relevant one; or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.

13. Hence the Respondent argued that given the nature of his injuries which constituted fractures and a deep cut, the sum awarded by the trial court as general damages was not so inordinately high as to call for interference. On special damages, it was the Respondent's submission that the appellate court has no reason to interfere with the award made in the sum of Ksh.198,620/- since the award was supported receipts tendered. Similarly, the Respondent defended the awards made on future medical expenses and loss of earning capacity as being well grounded and guided by the medical evidence tendered. For these reasons, the Respondent asserted that the appeal lacked merit and ought to be dismissed with costs.

14. The court has considered the record of appeal, the pleadings and original record as well as the submissions by the respective parties. This is my first appeal. The Court of Appeal for East Africa spelt out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account

of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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 inconsistent with the evidence in the case generally."

15. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278.

16. Upon review of the memorandum of appeal and the rival submissions, it is the court's view that the appeal turns on two issues, namely, whether the finding of the trial court on liability was well founded and if so, whether the quantum of damages was justified. Pertinent to the determination of issues are the pleadings, which form the basis of the parties' respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. In *Wareham t/a A.F. Wareham & 2 others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

17. As earlier mentioned, the Respondent pleaded in his plaint that the Appellant was at all material times the beneficial owner of the subject motor vehicle and the person in control of the said motor vehicle on the material date, whereas the Respondent was a pedestrian in the process of crossing Uhuru Highway when the accident occurred. The particulars of negligence as against the Appellant are set out under paragraph 6 of the plaint.

18. The Appellant filed a statement of defence denying the key averments in the plaint on liability. Alternatively, the Appellant pleaded contributory negligence against the Respondent by setting out the particulars thereof under paragraph 4 of the statement of defence.

19. In his oral evidence before the trial court, the Respondent who was PW1 having adopted his signed witness statement as his evidence-in-chief stated that on the material date, he was crossing Uhuru Highway near a roundabout at about 10.30 am when the accident occurred, following which he was rushed to Kenyatta National Hospital and admitted for about three (3) months. The gist of his written

statement was that the Appellant's vehicle had appeared suddenly, at a speed and had knocked him down while he was crossing the road.

20. During cross-examination, the Respondent stated that he was knocked down by the subject motor vehicle at a zebra crossing when motorists had stopped, and that the police had subsequently found the driver of the subject motor vehicle to blame for the accident. However, during re-examination, the Respondent stated that he did not know who was to blame for the accident.

21. On his part, the Appellant who was DW1 also adopted his executed witness statement as evidence and further produced his list and bundle of documents as exhibits, before proceeding to testify that the accident did not take place at a zebra crossing. The Appellant's account of the accident contained in the written statement blamed the Respondent for entering and crossing the road after traffic police signaled hitherto stopped vehicles including his own, which was on the outermost lane, to proceed.

22. In cross-examination, the Appellant testified that he was not driving at a high speed on the material date and that the Respondent was crossing from the direction of Harambee Avenue next to Uhuru Highway which area did not have a zebra crossing. This statement was echoed in re-examination.

23. Neither the Respondent nor the Appellant called a further eyewitness to the accident in question. That notwithstanding, the trial court in its judgment held that though the police abstract did not indicate who was to blame for the accident, both the Appellant and the Respondent by virtue of being road users, had a duty of care on the road, but that the Appellant owed a greater duty of care. On those grounds, the trial court apportioned liability between the parties in the ratio of 90%:10% in favour of the Respondent.

24. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> "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." The above provision provides for the legal burden of proof.
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> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
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> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
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> "Whereas under section 107 of the *Evidence Act*, (which deals with the legal 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."

25. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof, does not shift. In reiterating the standard of proof, the Court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
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> "That 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
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> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

26. The duty of proving the averments contained in the plaint lay squarely with the Respondent.

27. In the present instance, it is not in dispute that an accident occurred on the material day involving the subject motor vehicle being driven by the Appellant and the Respondent who was a pedestrian, and as a result of which the latter sustained bodily injuries. Suffice it to say that the mere occurrence of an accident is not proof of negligence. As the Court of Appeal stated in *Eastern Produce (K) Ltd v. Christopher Atiado Osiro* [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant. The court in that case cited the famous decision of *Kiema Mutuku v. Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing stated that:

> " There is, as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

28. Despite particularizing the alleged negligence of the Appellant in his plaint, the Respondent's account of the accident in his written statement was scanty; to the effect that while the Respondent crossed the road at a designated crossing, the Appellant's vehicle "appeared from nowhere" and at a high speed and knocked him down. Pressed under cross-examination, the Respondent all but admitted that prior to the accident the vehicles on the road he intended to cross had stopped thereby enabling the pedestrians to cross and that he entered the road last, the collision itself suggesting that by then, the vehicles had started moving.

29. This tends to lend credence to the Appellant's version of the accident, namely, that he started off after police signaled the vehicular traffic to move, and that the Respondent entered the road at that point and came face to face with the Appellant's vehicle which was on the outermost lane, making the collision inevitable. If this version is accurate, then it appears likely that the Appellant's vehicle had not picked up high speed at the time of the collision.

30. The police abstract tendered indicated that the matter was pending under investigations and the investigating police officer was not called to shed light on the events surrounding the accident. The Respondent's account of events lacked particularity regarding key facts surrounding the accident. It was not enough for the Respondent to assert, which fact was seriously disputed, that he was crossing

the road at a pedestrian crossing (a matter disputed) and that the Appellant's vehicle was speeding; other relevant surrounding circumstances ought to have been established.

31. The assertion by the Appellant of the presence of traffic police controlling traffic at the scene challenged or appeared to reduce the probative value of the Respondent's bare statements that the Appellant appeared suddenly at a speed and knocked him down. His scanty witness statement adopted at the trial was seriously put to doubt by the testimony of the Appellant and his own admissions during cross-examination. As held in A.F Wareham t/a Wareham (supra) where the evidence tendered does not support the facts pleaded, the party with the burden of proof should fail.

32. On the application of the doctrine of res ipsa loquitur, the Court of Appeal in *Keziah & another (Personal Representatives of the late Isaac Macharia Mutunga) v Lochab Transport Limited* [2022] KECA 477 (KLR) stated thus:

> " The question that remains unanswered is who was then on the wrong, or caused and or contributed to the accident? The mere fact that an accident involving the two vehicles occurred does not per se translate into the respondent's driver being culpable. It was the duty of the appellants to call evidence to prove the particulars of negligence or any one of them that they attributed to the respondent's driver. We do not think just like the High Court that they discharged this burden."

33. The Court proceeded to conclude that:

> " As already stated, there was no eyewitness to the accident as would have shed light as to how it occurred. The police abstract on record showed that the accident was under investigation. The accident involved two motor vehicles and from the evidence adduced, there is nothing to show that the respondent was culpable. There cannot be an assumption of liability as the appellant failed to prove facts which give rise to what may be called the res ipsa loquitur situation or moment. In our view, the doctrine was inapplicable in the circumstances of the case and the High Court was right in so holding."
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> See also *Nandwa v Kenya Kazi Limited* [1988] eKLR.

34. In the present instance, it is the court's considered view that the Respondent failed to prove facts which could give rise to or justify the invocation of the doctrine in his favor; indeed, the contrary appears to be the case. It is noteworthy that the trial court despite acknowledging that the circumstances surrounding the accident were unclear as to who should bear the blame for the accident had proceeded to apportion liability, having apparently shifted the burden of proof upon the Appellant. The trial court thereby fell into error. Had the court analyzed the evidence properly and in accordance with the applicable law on the burden of proof, it would have found that the Respondent had at best failed to discharge the burden of proof, and at worst, was most probably the author of his own misfortune.

35. The Respondent's evidence failed to rise to the standard of balance of probabilities pursuant to Section 107 of the *Evidence Act* and the appeal succeeds on the question of liability. The appeal is therefore allowed, and the court hereby sets aside the judgment of the lower court in its entirety, substituting therefor an order dismissing the Respondent's suit in the lower court. In these circumstances, no purpose will be served by the consideration of the further issue of quantum. In view of the circumstances in which this dispute arose, the court will order that each party bears its own costs in the lower court and on this appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 11TH DAY OF MAY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Ms. Chepkorir

For the Respondent: Mr. Muli

C/A: Carol