



REPUBLIC OF KENYA



EM (Minor suing through his next friend and father ACM) v Chege (Civil Appeal E076 of 2021) [2023] KEHC 23982 (KLR) (20 June 2023) (Judgment)

Neutral citation: [2023] KEHC 23982 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E076 OF 2021**

GL NZIOKA, J

JUNE 20, 2023

BETWEEN

**EM (MINOR SUING THROUGH HIS NEXT FRIEND AND FATHER
ACM) APPELLANT**

AND

PATRICIA NDATA CHEGE RESPONDENT

(Being an appeal against the judgment delivered by Hon. Y. M. Barasa (SRM) dated 2nd December 2021 in the Chief Magistrate's Court at Naivasha vide Civil Case No.593 of 2019)

JUDGMENT

1. By a plaint dated 10th July 2019, the plaintiff (herein “the appellant”) sued the defendant (herein “the respondent”) seeking for orders that, he be awarded Kshs 12,375,000 as special damages, general damages, costs of the suit and interest on the damages and costs from the date of filing the suit.
2. The suit arose as a result of an accident that occurred on 2nd June 2019, at about 3.00pm, where in the appellant who was cycling along Kinangop-Naivasha was involved in an accident with motor vehicle registration No KCQ 013U driven and owned by the respondent.
3. It is the appellants’ case that the defendant drove the subject motor vehicle negligently and caused the accident in that he drove at an excessive speed without due care and attention, failed to look out for other road users, to brake, stop, swerve, slow down and/or avoid the accident. Further he allowed and/or permitted an accident to occur, by knocking down the appellant. He relies on the doctrine of *Res Ipsa Loquiter*.
4. That, as a result thereof he sustained soft tissue injuries on the face, neck, left and right hand, blunt injury to the left eye and a cut wound to the lower lip.



5. The Respondent filed a statement of defence dated 1st October 2019 and denied each and every allegation in the plaint and put the appellant on strict proof thereof. It was the defendant's case that, the suit is bad in law, incompetent, inept and did not disclose any cause of action.
6. The defendant further denied that, the appellant was cycling along the Kinangop-Naivasha road and was involved in an accident and/or was injured as a result of his negligence. He denied all the particulars of negligence as outlined in the plaint.
7. However, on a without prejudice basis, the respondent averred that, if an accident occurred, it was wholly caused and/or substantially contributed to by the negligence of the appellant in that, he cycled, without due care and attention, too close to the motor vehicle registration No KCQ 013Y, failed to observe the Highway Code, cycled on the wrong side of the road, being generally careless and negligent, and/or failed to observe the traffic regulations and signs and/or warning on the road. That he cycled under influence of alcohol or failed to have effective control of the bicycle. That the doctrine of *Res Ipsa Loquiter* applies and sought for the dismissal of the suit.
8. The case proceeded to full hearing with the appellant adopting his statement and documents filed. He also called PW2 No 76934 PC Rodgers Wafula to produce the P3 form. The Respondent on her party relied on her statement and documents annexed thereto. The evidence adduced by the parties was a replica of their respective pleadings.
9. The suit was disposed of by filing of submissions and subsequently the trial court delivered its judgment dated 2nd December 2021 wherein judgment was entered on liability in favour of the respondent as against the appellant in the ratio of 60:40. The appellant was awarded general damages of Kshs 200,000 less 60%. The special damages were awarded in the sum of Kshs 12,375,000 as pleaded. Each party was ordered to meet their own costs.
10. However, the appellant is aggrieved by the decision of the trial court mainly on liability based on the grounds stated in the memorandum of appeal as herebelow verbatim reproduced that: -
 - a) That the learned magistrate erred in law and fact in failing to consider adequately or at all the submissions by the appellant and the authorities submitted.
 - b) That the learned magistrate erred in law and fact in apportioning liability at 40.60 in the absence of any evidence supporting such a finding.
 - c) That the learned trial magistrate erred in law and fact in failing to properly consider the issues before him and thereby reaching a decision based on the wrong principles of law.
 - d) That the learned magistrate erred in law and fact in the way he weighed the evidence produced before the court on the issue of liability.
11. As a result the appellant prays that, the order of the trial court and finding on liability be set aside and be substituted with a judgment that, the respondent is 100% to blame for the occurrence of the said accident. That costs of this appeal and in the subordinate court be awarded to the appellant.
12. The appeal was disposed of by filing of submissions. The appellant filed submissions dated 31st October 2022, and argued that the conclusion reached by the trial court on the occurrence of the accident and alleged contribution by the appellant was not supported by the evidence present before the court.
13. That the trial court erred in relying on un-pleaded particulars of negligence. That, the respondent in her evidence alleged the appellant made an abrupt "U" turn and/or crossed the road without checking



- causing the accident, which allegation was not in her pleadings and was therefore an afterthought that should have been disregarded.
14. Further, that the trial court ignored and failed to consider his submissions and authorities that the trial court was bound to ignore the respondent's evidence which was not in consonance with the defence. That, at the trial he relied on the case of Kisumu Court of Appeal No 168 of 2011 *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* where it was held that parties are bound by their pleadings and any evidence not based on the pleadings must be disregarded. That the trial court ought to have carefully considered the case cited or if for good reason distinguish it but failed to do so.
 15. He submitted that it is a cardinal rule of pleadings that a party can only depart from its pleadings by amendment. He relied on the decision in Court of Appeal No 219 of 2013 *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & another* where the court quoted with approval the decision in Nigeria Supreme Court *Adetoun Oladeji (NIG) Ltd v Nigeria Breweries PLC* S.C 91/2002 where it was held that, it is a trite principle of law that parties are bound by their pleadings and any evidence led by any party that does not support or is in variance with the averments must be disregarded.
 16. He further relied on the case of Nairobi HCCA No 589 of 2010 *Jonah Venzi Nguko & another v John Mwaka Amisi & another* where the court held that, the evidence of the defendant's witness was an afterthought as it was not specifically pleaded nor did the defendant amend his defence to include in it the particulars of negligence.
 17. The appellant further submitted that the trial court misapprehended the evidence adduced before the court in holding that, he was largely to blame as he failed to check oncoming traffic before crossing the road. That, the respondent's motor vehicle was not oncoming traffic as defined in *Longman Dictionary of Contemporary English* since she was heading in the same direction as the appellant, and driving behind the appellant's bicycle. That, the Trial Court erred in holding that the appellant was to blame yet he could not see the motor vehicle that was behind him.
 18. Furthermore, that the trial court also failed to note the rule of the road is that, every driver must keep a reasonable and safe distance between it and the vehicle ahead. The fact that the respondent was unable to stop or avoid the collision with his bicycle confirmed that the respondent was not keeping 70 meters distance as alleged.
 19. That, the respondent in her defence pleaded specific acts of negligence against him but she had the onus to prove the same. However, the respondent did not do so.
 20. However, the respondent in submissions dated 24th January 2023 opposed the appeal and argued, that the facts of how the accident happened were not disputed as her evidence and of the appellant and were similar. However each party blamed the other for causing the accident. That the learned trial Magistrate evaluated the evidence and found the appellant largely to blame and apportioned liability in the ratio of 60% for the appellant and 40% for the respondent.
 21. The respondent relied on the case of *Staply v Gypsum Mines Limited* (2) [1953] A.C.663 where Lord Reid (as he then was) stated that legal liability must be determined by applying common sense to the fact of each particular case and sometimes it is proper to regard two or more people are at fault having jointly caused the accident.
 22. Further reliance was placed on the case of *Chan v Peters and Advantage Insurance Co. Ltd* [2021] EWHC 2004 QB where Cavanagh J, set out the legal principles in determining liability and contributory negligence and stated that: the burden of proof rests with the claimant; the defendant will be liable if she fails to attain the standard of a reasonable careful driver and the accident was as a result;



- the claimant is to establish on a balance of probabilities that the defendant was negligent; the standard of care is that of a careful driver armed with common sense and experience of the way pedestrians are likely to behave; if a real risk of danger emerging would be reasonably apparent then reasonable precautions must be taken but there is no obligation if such danger was a mere possibility that would not have occurred; drivers know the principles of the highway code; assessment of whether the defendant driving was below the requisite standard must be done to reference of actual circumstances of the collusion; and that for contributory fault the apportionment of responsibility is inevitable and somewhat rough and ready exercise.
23. The respondent submitted that Order 2 Rule 3 (1) of the *Civil Procedure Rules, 2010* sets out the fundamental or basic rules for pleadings being that they should state facts, which facts must be material facts stated in a concise form but should not state evidence.
 24. Further, it is established principles that, it is the duty of the court to apply the law to the facts. That, the authorities relied on by the appellant are not relevant as they deal with situations where there has been a general departure from pleadings or an allegation is inconsistent with the pleadings.
 25. That, the particulars of contributory negligence as set out in paragraph 6 of the statement of defence supported the evidence of the appellant crossing the road without checking and making an abrupt U-turn. Furthermore, the trial Magistrate took into account the evidence of the appellant that he was attempting to cross to the right side in front of the respondent's motor vehicle.
 26. Further, that the paragraph 6 of the statement of defence setting out the particulars of negligence and the paragraph 4 of the respondent's witness statement used the exact same word and were served upon the appellant and therefore he cannot be said to be an ambush and an afterthought.
 27. The respondent further argued that the use of the word oncoming traffic by the trial Magistrate in the judgment was an error and can be covered and/or explained under the slip rule in section 99 of the *Civil Procedure Act*. That, even if the slip was to be corrected it is highly unlikely it can change the intentions of the court and final award. He relied on section 79A of the *Civil Procedure Act* which states that a decree shall not be reversed or substantially varied for any error not affecting the merits of the case.
 28. Lastly, it was submitted that apportionment of liability is an exercise of judicial discretion and the appellate court should not interfere with a discretionary award handed by the trial court. The case of *United India Insurance Company Limited v East African Indemnities (Kenya) Limited* [1985] E.A was relied on where it was held that an appellate court is only entitled to interfere where the judge misdirected himself on law or; he misapprehended facts or; he took into account considerations which he should not have; or his decision albeit discretionary is plainly wrong.
 29. That in the instant case, the trial Magistrate took into account the evidence tendered by the parties and established that the accident was substantially contributed by the appellant and therefore the apportionment of liability in favour of the respondent was reasonable and based on the facts.
 30. Having considered the material placed before the court I find that, the role of the appellate court was well articulated by the Court of Appeal in the case of; *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123, that is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.
 31. The Court of Appeal thus observed: -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 demeanour of a witness is inconsistent with the evidence in the case generally."

32. Be that, as it were, in apportioning liability the learned trial magistrate stated that the appellant was largely to blame for the accident as he ought to have checked the road first for oncoming traffic before crossing the road. However, the main argument by the appellant is that, the evidence adduced by the respondent that he made an abrupt "U" turn to the right and that, he crossed the road without checking this causing the accident was not consonance with the respondents pleadings. That it is an afterthought, which the trial court should have disregarded.
33. Further, the trial court failed to address the subject issue of the parties being bound by their pleadings as stated in the decision of *Dakianga Distributors (K)Ltd v Kenya Seed Co. Ltd*, Court of Appeal No 168 of 2011 at Kisumu, where the court held that, parties are bound by their pleadings. Further, the trial court misappropriated the facts, by holding that, the appellant should have been on the lookout on oncoming traffic, yet both the appellant and respondent were travelling from the same directions. Finally, that, the respondent did not adduce any evidence to support the particulars of negligence in the statement of defence.
34. However, the respondent argued that, the appellant adopted his own statement wherein he states that, he decided to cross to the other side of the tarmac road and was knocked down. That during cross-examination he testified that, he was on the left side of road and his friends he was going to greet were on the right side, so he decided to cross to where there were. Again PW2 stated that the OB indicated the appellant/cyclist turned to the opposite left side of the road and collided with the motor vehicle and sustained injuries.
35. Furthermore, the respondent testified that, the appellant crossed abruptly in front of her and this caused the accident. Therefore, each party blamed the other for the accident and the finding of the trial court on liability should be upheld.
36. Having considered the entire evidence adduced in the trial court, the documents produced, the submissions in the trial and appellate court I find that there is no dispute an accident occurred on 2nd June 2019 involving the appellant who was cycling and respondent driving motor vehicle registration No KCQ 013U, along Kinangop/Naivasha road. The only issue to resolve herein is who caused the accident.
37. In that regard, I entirely concur with the submissions that, the parties are bound by their pleading and in the same vein, they expect the court to use the evidence adduced to decide the issues before it. It is a fact that the respondent never expressly plead that the appellant carelessly crossed the road thus causing the accident. In fact, the particulars of negligence are pleaded in such general phrases such as "driving without care and attention" that one is only left to wait for evidence to prove or elaborate on the same. In view of the aforesaid, it can only be found in favour of the appellant that, if the defence is based purely on the pleadings and in particular the particulars of negligence attributed to the appellant, then, the appellants' argument will carry the day.
38. However, it is the appellant who was duty bound to adduced evidence to prove the case. He adopted his own statement to support his case. He also relied on the police abstract. Therefore it is only fair and



just that, both documents be analysed for evaluation. I note from the appellant's statement dated 10th July 2019, at paragraph 2 he states as follows

“I was cycling at the edge of the left side of the tarmac road while one faces Naivasha along Naivasha -Kinangop road. While cycling at Karate area, near St Joseph Primary I decided to cross the other side of the tarmac road. While crossing the road, while at the extreme edge of the tarmac road on the side used by the vehicles coming from the opposite direction, I was hit by a motor vehicle that was coming from Kinangop direction”. The motor vehicle was KCQ 013U it hit my bicycle at the middle cutting into 2 pieces (emphasis added).

39. It is therefore clear that, the appellant in his own evidence in chief stated he was hit while crossing and before fully crossing the road. That he was hit by a motor vehicle from the opposite direction. Therefore for the appellant to argue that the trial court misdirected itself or misapprehended the facts by holding that “he crossed the road without checking” is not tenable. In that case whether the defendant pleaded to the same or not, it is the appellant who shot into his own goal by admitting the accident occurred while he was crossing the road. In deed, when one considers that evidence, it clearly reveals that, the respondent was on the main road when the accident occurred. The appellant did not state the respondent veered off the road, therefore, it is clear the accident occurred before he could fully cross the road.
40. In cross-examination the appellant stated that, the friends whom he was going to greet were on the opposite side of the road and he “decided to cross to where they were” That the vehicle hit him “on the road”
41. It also suffices to note that, (PW2) PC Wafula who produced the police abstract form, stated that the form does not indicate who was found to blame fully for the accident. The matter is still under investigation, which clearly shows that, none of the parties involved in the accident was held to blame and at that point, the apportionment of liability can only have been at 50:50 But, a further analysis the evidence reveals that, the respondent was on the main road, if the cyclist did not cross the road to collide with respondent's motor vehicle then the accident would not have occurred. Therefore, I am in agreement with the finding of the trial court that, the appellant bore higher responsibility than the respondent and I find that the apportionment of liability at 40:60 well guided, reasonable and just. I decline to interfere with it. The award on damages is not contested. It is upheld. I therefore dismiss the appeal with costs to the respondent.
42. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 20TH DAY OF JUNE 2023.

GRACE L. NZIOKA

JUDGE

In the presence of;

Mr. Wainaina for the Appellant

Mr. Ombui for the Respondent

Ms Ogutu -Court assistant

