Oduol v Ochola (Civil Appeal E031 of 2022) [2023] KEHC 21103 (KLR) (25 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21103 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E031 OF 2022

DO OGEMBO, J

JULY 25, 2023

BETWEEN

DANIEL OCHAR ODUOL .... APPELLANT

AND

JOHN ONYANGO OCHOLA .... RESPONDENT

(Being an appeal from the Judgment and decree of the Hon. J.P. Nandi (PM) dated 8-7-2022 and delivered on 8-7-2022 in Bondo PMCC No. 56 of 2020)

JUDGMENT

1. The appellant, Daniel Ochar Oduol was sued by the Respondent John Onyango Ochola, before the lower court in the above case for General damages. In the judgment delivered by the court, liability as between the parties was determined at 100% against the appellant. General damages were assessed in favour of the Respondent Kshs. 80,000/=.

   The appellant, aggrieved, has appealed to this court. In the memorandum of appeal filed on August 3, 2022, the appellant has raised 3 grounds of appeal as follows:

   1. That the learned trial magistrate erred in fact and in law by apportioning 100% liability to the appellant (Defendant) without considering the circumstances of the case.
   2. That the learned trial magistrate erred in law and in fact in finding in favour of the Respondent (Plaintiff) against the Appellant (Defendant) when there was totally no credible evidence or proof of negligence on the part of the Appellant.
   3. 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 and authorities of the Appellant and as a result arrived in unjustified decision on liability.

2. The appellant prays that this appeal be allowed with costs to the appellant and that this court be pleased to re-assess the award on liability in view of the evidence tendered. The Respondent opposes this appeal.

3. This appeal was canvassed by way of written submissions.

4. On the appellant's side, it was submitted that as a first appeal, this court is to re-evaluate, re-assess and reconsider the evidence adduced and come up with its own conclusions bearing in mind that the court did not have the opportunity to hear the witness testify in the first instance before the subordinate court (*Selle & Another v Associated Motor Boat Co. and Others* [1968] EA 123). That the plaintiff had testified that on the material date, he had been riding motor cycle registration number KMCP 575P carrying 1 pillion passenger, Jane Amondi Owano, headed to the same direction as the matatu which stopped and changed lane.

5. That he indicated as he wanted to overtake and duly indicated, but that the driver did not indicate, but that the driver did not indicate that he wanted to branch to the junction. That as he indicated to overtake, the vehicle suddenly entered the road and knocked him. The point of impact was on the right side in the middle.

6. It was denied the evidence of the plaintiff (Respondent, that the vehicle had been parked off the road since had this been the case, the Respondent had no reason to indicate intention to overtake. And the fact that the motor cycle was damaged on the front side means that it is the motor cycle which followed the motor vehicle which had already entered into a junction and hit it on the right side near the rear tyre.

7. That the evidence of the investigating officer, PW3, PC Sabastian Muloba, was that the motor vehicle KBH 611C indicated to join Madiany-Mituri Road and entered 3 meters but was hit on the right side of the matatu by the motor cycle. That the case was still pending under investigations. That in his opinion, the Respondent was wholly to blame for the accident as he followed and knocked the right side of the matatu which had already entered the junction.

8. The appellant also submitted on the evidence in defence (DW1) of Moses Oluoch, that he had indicated to join Madiany-Mituri road and had joined the said road when the motor cycle hit his vehicle on the right side behind right side passenger window.

9. In the circumstances, it was submitted that the appellant was entirely blameless and that this appeal should be allowed with costs as well as costs of the case before the lower court.

10. The Respondent, on the other hand, has submitted that according to PW1, he had indicted to pass the stationary matatus KBN 611C, which suddenly and without checking or indicating, suddenly dashed into the right and violently hit the motor cycle with the right side of the vehicle. Also that PW3, did not produce any sketch plan.

11. Counsel submitted further, that the evidence on record shows that whereas the Respondent had seen the vehicle ahead of him, it is admitted by DW1 that he never saw the motor cycle approach and only heard the bang. That this proves negligence on the part of the driver. That the part of impact clearly prove that it is the appellant who was negligent and that the finding of 100% liability was proper.

12. Lastly, based on *Mwangi v Wambugas* [1984] KLR 453, it was submitted that on appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence, or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estate of the evidence. The court was urged to uphold the finding of the court below.

13. I have considered the record of proceedings of the trial court. I have also considered the submissions of both sides and the authorities relied on. This court sits on this matter as first appellate court, jurisdiction of which is well settled (see *Siele v Associated Motor Boat Co. Ltd* [1968] EA 123).

14. This appeal is only in the issue of liability between the parties. Both sides are agreed that both the motor vehicle KBH 611C of the appellant and the motor cycle KMCP 575P of the Respondent had been handled towards the same general direction. The variance comes in when the evidence of the Respondent (Plaintiff) while at Mituri-Madiany junction, he saw the motor vehicle parked besides the road. That he indicated to pass and in the process, the vehicle suddenly and without indicating moved onto the road to join the junction towards Madiany leading to the collision. He blamed the driver of the vehicle (DW1) for the accident.

15. The appellant on the other hand, has maintained that he had indicated (DWI) to join the junction to the right when the motor cycle suddenly hit his motor vehicle. On his part, he blamed the Respondent for the accident.

16. In determining the issue of liability herein, it is important to consider certain material factors appertaining at the time of their accident. It is on record that there were no other motor vehicles on this road at the relevant moment. This, in my view, gave both the matatu driver and the rider opportunity to see the other on the road. Where the Respondent testifies that he saw the matatu ahead of him, DW1 admits that he did not see the cyclist approach, further, it is on record that the collision took place on the right side of the road. To me, this would confirm, the fact that the motor vehicle cyclist, who was riding straight on had infact moved to his right to overtake the matatu. On the contrary, it actually proves that the motor vehicle had suddenly moved onto the road in the face of the oncoming motor cyclist, whom he had not spotted. The point of impact on the motor vehicle is also material.

17. It was on the rear right side of the motor vehicle. Again this proves that the driver must have suddenly moved onto the road. Had he moved onto the road at a slow speed, he would have spotted the motor cyclist. The motor cyclist would also have spotted him move onto the road in good time as to avoid the collision.

18. The above circumstances convinces this court that the driver of the motor vehicle (DW1), the agent of the appellant was largely to blame for causing this accident. However, the Respondent also shares responsibility. This was at a junction. He had a responsibility to drive with caution. He failed to do so, making him ram into the vehicle as if crossed into the junction to the right.

19. Had the trial court considered these factors, it would have apportioned liability between the 2 parties. Whereas the appellant herein takes more responsibility for this accident, the Respondent must share in the same. Considering the above, circumstances, I find and hold that the appellant is liable herein to the extent of 80% while the Respondent is liable to the extent of 20%.

20. I consequently set aside the judgment and finding of the lower court and enter judgment in favour of the Respondent and against the appellant at 80:20. The quantum of damages awarded by the trial court would remain as ordered as the appeal was limited to liability only. I also award costs of this appeal to the Respondent. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 25TH DAY OF JULY, 2023

D.O. OGEMBO

JUDGE

25.7.2023

Court:

Judgment read out in Open court in the presence of Mr. Alego for Respondent and Ms. Turgutt for the appellant.

D.O. OGEMBO

JUDGE

25.7.2023

Ms. Turgut:

We have agreed on 30 days stay.

Court:

Stay ordered of 30 days.

D.O. OGEMBO

JUDGE

25.7.2023

Court:

Since this is test case for HC Appeal No. E030/2022, this judgment and the orders herein to also apply in HC Appeal No. E030/2022.

D.O. OGEMBO

JUDGE

25. 7. 2023