



REPUBLIC OF KENYA



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**Ainea v Beldina & another (Civil Appeal 18 of 2016)
[2023] KEHC 21870 (KLR) (1 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 21870 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 18 OF 2016
JRA WANANDA, J
SEPTEMBER 1, 2023**

BETWEEN

ELISHA SHISANYI AINEA APPELLANT

AND

WANYAMA BELDINA 1ST RESPONDENT

TIM EZRON SIFUNA 2ND RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement delivered in Eldoret Chief Magistrate’s Court Civil Case No. 36 of 2012 on 12/01/2016 in which the Appellant’s suit was dismissed.
2. The background of the matter is that vide the Complaint filed on 19/01/2012 through Messrs Chepkwony & Co. Advocates, the Appellant pleaded that at all material times the 1st Respondent was the owner of the motor vehicle registration number KBK 225 Matatu (public service vehicle) and the 2nd Respondent was the driver thereof, that on 16/08/2010 he was lawfully travelling as a passenger aboard the said motor vehicle (hereinafter referred to as “the matatu”) when at a spot near Mukhonje, the 2nd Respondent negligently drove, managed or controlled the matatu causing it to violently lose control and overturn and thus causing the Appellant to suffer serious injuries. Accordingly, the Plaintiff sought general damages, special damages at Kshs 2,000/-, costs of the suit and interest.
3. Initially, upon the Defendants’ failure to file a defence, default Judgment was entered followed by formal proof resulting into the Appellant being awarded general damages at Kshs 100,000/- plus costs and interest. However, subsequently, upon the Defendants’ Application, the Judgment was set aside by consent and the Respondents filed their Defence on 20/11/2013 denying liability. The defence was filed through Messrs A. W. Kituyi Advocates.
4. The matter then proceeded to full trial in which two witnesses testified for the Appellant and one witness for the defence.



5. PW1 was the Appellant. He testified that on 16/08/2010 he was travelling from Bungoma to Eldoret aboard the matatu, that it was being driven at high speed, when they reached Muhonje area the driver attempted to overtake but there was a trailer oncoming, the driver veered off the road and lost control, it rolled three times and halted with the wheels facing upwards, he was injured on his knees and head, he was taken to U.G hospital where he was treated and discharged, he reported the same at Turbo Police Station, he was issued with a P3 Form and Police Abstract. He then blamed the driver for overspeeding and overtaking when it was not safe and also produced several documents in support of his case.
6. PW2 was one Corporal James Momanyi. He testified that he is attached at Turbo Police Station performing traffic duties, that on 16/08/2020 a report was made of a road accident which was self-involving, it involved the matatu driven by the 2nd Defendant from Bungoma to Eldoret with fare paying passengers on board, the accident occurred at Muhonje, police officers from Turbo police station visited the scene where they found the matatu on the right side off the road facing Eldoret from Webuye, it had overturned and the wheels were upside down, they took sketch plans of the scene, the matatu was inspected and a report issued. He testified that he took a statement from the Appellant who was then issued with a P3 form and a police abstract, the officers who visited the scene did not find the passengers as they had been rushed to hospital, the Appellant was one of the passengers, no one was charged with any traffic offence, the Investigating Officer recommended that the file be closed without charging anybody and the aggrieved parties to seek remedies by filing civil claims. He then produced the police file. In cross-examination he stated that he was not the investigating officer in the case, the driver had a valid traffic driving licence, no defects were noted on the matatu upon inspection, the investigating officer is deceased
7. The 2nd Respondent then testified for the defence as DW1. He testified that on 16/08/2010 he was driving the said matatu along Webuye-Eldoret road, upon reaching Mukhonje area he saw a trailer ahead of him, the trailer was negotiating a hill, it began moving on reverse, it then knocked the matatu on the matatu's left side, the matatu landed off the road, he sought help from members of the public, they retrieved the passengers, he changed them to another vehicle, police officers came to the scene, they drew a sketch plan, the matatu was towed for inspection, the matatu was given a clean bill of health, the trailer smashed the windscreen, the driver of the trailer ran away. He then stated that he was not charged with any traffic offence and blamed the driver of the trailer for causing the accident. In cross-examination, he confirmed that the matatu was owned by the 1st Respondent. He stated that he had carried 14 people at the time of the accident, he was 5 metres behind the trailer when it started reversing, he could not remember the registration number of the trailer.
8. At this juncture, by consent of the parties, the Plaintiff's further supporting documents exhibits were produced in evidence without calling the makers thereof.
9. After close of the trial, the Learned Magistrate delivered his Judgment. He held that parties are bound by their pleadings and that although in his testimony the Appellant based his case on the allegation that the driver was overtaking, the Plaintiff did not contain any such pleading. He therefore found that the Appellant had failed to prove his case on a balance of probabilities and accordingly, dismissed the suit with costs.
10. Being aggrieved by the Judgment, the Appellant instituted the present Appeal *vide* the Memorandum of Appeal filed on 11/02/2016. The grounds listed therein are as follows;
 - i. The learned trial magistrate erred in law and facts in dismissing the suit.
 - ii. The learned magistrate erred in law and fact in finding that the plaintiff never pleaded negligence of overtaking when it is properly pleaded in particulars of negligence.



- iii. The learned magistrate erred in law and fact by dismissing a suit which the Defendant has testified accepting liability.
- iv. The learned magistrate erred in law and fact in disregarding the principles of law after acceptance of liability.
- v. The learned magistrate erred in law and fact in not considering the plaintiff's evidence of proof of balance of probability.
- vi. The learned trial magistrate erred in Law and fact in failing to consider the circumstances of the case and the submissions tendered by the counsel.
- vii. The trial magistrate erred in Law and fact by not considering the merits of the case.

Hearing of the Appeal

- 11. Before the Appeal could be heard, the Advocates for the Respondents, Messrs G&A Advocates applied to cease acting which Application I duly allowed on 14/03/2023. I then directed that forthwith the Respondents be served directly with Notices.
- 12. I then directed that the Appeal be canvassed by way of written Submissions. Pursuant thereto, the Appellant filed his Submissions on 16/01/2023 through Messrs Chepkwony & Co. Advocates. Despite there being evidence of having been directly served, the Respondent did not file any Submissions.

Appellants' Submissions

- 13. Counsel for the Appellant submitted that the trial Magistrate erred in finding that the Appellant never pleaded the issue of negligence in overtaking when the same is properly pleaded in the particulars of negligence, by dismissing a suit in which the Respondents had testified accepting liability, in disregarding the principles of law after acceptance of liability, in not considering that the Appellant had proved his case on a balance of probability and in failing to consider the circumstances of the case and the submissions tendered by the Appellant's Counsel.
- 14. He submitted further that the Appellant gave oral testimony in support of his case and produced documents in support, that he gave evidence to prove the particulars of negligence, that he testified that the matatu was being driven at a high speed and that it lost control and overturned severally (3 times) causing him to suffer serious bodily harm, that the Appellant blamed the Respondents for causing the accident, the trial magistrate never looked at the evidence on record and did not give any cogent reasons for dismissing the suit, the Magistrate therefore failed to find that the Appellant deserved all the prayers sought in the Plaint.

Analysis & Determination

- 15. This being a first appeal, the duty of the Court is as was set out in the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where 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 re-analyze 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.”



16. Upon considering the Memorandum of Appeal, Record of Appeal and the Submission filed, I find the following to be the issue that arises for determination:

Whether the trial Court erred in dismissing the suit on the ground of failure to prove the case on a balance of probabilities.

17. I now proceed to analyse and answer the said Issue.

18. Insofar as the Appellant is challenging the trial Court's findings on liability, he is inviting this Court to interfere with the trial Court's findings of fact. In respect to the extent and limits to which an Appellate Court can so interfere, the Court of Appeal in *Mwangi v. Wambugu* (1984) KLR 453, pronounced itself as follows:

“A court of Appeal 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 the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

19. It is also trite law that “he who alleges must prove” and this maxim is grounded under Section 107 of the Law of *Evidence Act*. For a case where this principle was reiterated, I refer to the decision of the Court of Appeal in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2004] eKLR where the following was stated:

“...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 purport of section 107 (1) of the *Evidence Act* Cap 80, which provides:

“107. Whoever desires any court to give judgment as to any legal right or
(1) liability dependent on the existence of facts which he asserts must prove that those facts exist...”

20. At the trial, the Appellant's testimony was hinged on the allegation that the accident occurred because the 2nd Respondent as the driver was carelessly overtaking and, in the process, lost control thus causing the matatu to overturn. In the Plaintiff, the particulars of negligence pleaded against the Respondents were that the matatu was driven at a speed which the Respondents knew or ought to have known to be excessive in the circumstances, failing to steer the matatu properly and/or to have proper or sufficient control thereof, driving the matatu without due care and attention to the condition of the road, failing to apply brakes in sufficient time so as not to get involved in the accident, driving the matatu in a meandering manner, driving without due regard to the safety of other road users, driving on the wrong side of the road, driving a defective motor vehicle and driving the matatu while intoxicated.

21. It may be therefore be swiftly deemed that the Appellant's testimony that the matatu was overtaking is at variance with the pleaded particulars of negligence. However, since the 2nd Respondent and also the traffic police officer confirmed that indeed the accident occurred while the 2nd Respondent was overtaking and that he lost control of the matatu when the trailer that the 2nd Respondent was trying to overtake suddenly swerved to the matatu's lane, I find that the particulars pleaded in the Plaintiff were wide enough to accommodate the allegation of “overtaking”. For this, I have in mind the particulars



- alleging that the driver was negligent in failing to steer the matatu properly and/or to have proper or sufficient control thereof, driving the matatu without due care and attention to the condition of the road, failing to apply brakes in sufficient time so as not to get involved in the accident, driving the matatu in a meandering manner and driving without due regard to the safety of other road users. In my view, dangerous or careless overtaking can very sufficiently fall within these allegations.
22. I therefore find that the trial Magistrate erred in finding that the Appellant did not plead the allegation of overtaking. In my view therefore, the issue for my determination is not whether the allegation of overtaking was pleaded but whether the Appellant proved the allegation that the overtaking was done when it was not safe to do so or was done carelessly, or recklessly or negligently
 23. I have perused the police file that was produced in evidence. The contents of the police Report contained therein lends credence to the 2nd Respondent's description or explanation on how the accident occurred. The narrative noted therein and which was also given by the 2nd Respondent was that there was a fuel tanker trailer ahead of the matatu moving towards the same Eldoret-Webuye direction as the matatu, that the 2nd Respondent moved to the right so as to overtake the fuel tanker, that suddenly the driver of the tanker too swerved to the right side into the lane of the matatu, that in trying to evade the imminent collision the 2nd Respondent swerved further to the right and, in the process, lost control and the matatu overturned. According to the police file, the Investigating officer did not find any culpability on the part of the 2nd Respondent and instead, recommended that the driver of the fuel tanker be traced and be charged for causing the accident.
 24. The police file also contains the hand-written statement of the 2nd Respondent's turnboy who was also in the matatu when the accident occurred. He too gave a similar narrative to the above one given by the 2nd Respondent and by the traffic police officer.
 25. Granted, the alleged fuel tanker was not identified and neither was its registration number established. Besides, the police Report may be deemed to be inconclusive considering that the police only visited the scene after occurrence of the accident and only relied on accounts given to them by third parties. In reconstructing the occurrence of the accident, the police therefore appear to have only relied on the statements given to them by the Appellant and the 2nd Respondent and his turnboy. I say so because it is only the statements of these 3 people that are contained in the police file. Further, the Investigating Officer was also said to be deceased and could not therefore attend Court for cross-examination. Be that as it may, the law is that the 2nd Respondent cannot be found liable in the absence of sufficient evidence that he was negligent. Being the Plaintiff therefore, it is the Appellant who bore the burden of proof and I am not satisfied that he proved his case to the required standards.
 26. Overtaking per se is not illegal nor a traffic offence. What is illegal or an act of negligence is overtaking when it is not safe. It was therefore incumbent upon the Appellant to prove that the 2nd Respondent's act of overtaking was carried out carelessly or recklessly or negligently. However, no such evidence was placed before the Court. It was not alleged that the spot where the overtaking was attempted was an overtaking-prohibited spot such as for instance where there was a continuous yellow line or a pedestrian crossing or that there was any sign prohibiting overtaking. The Appellant did not also prove his allegation that the overtaking was carried out without proper lookout.
 27. Of significance is the Appellant's own handwritten statement contained in the police file in which he stated that he was asleep when the accident occurred and only woke up to find the matatu off the road. Since the Appellant did not challenge the authenticity of the said statement, I take it to be genuine. I therefore find that having revealed that he was asleep when the accident occurred, the Appellant could not give an accurate description of how the accident occurred. His testimony that the 2nd Respondent was driving recklessly can only at most be termed speculative.



28. The Appellant's allegation that the 2nd Respondent was driving at an excessive speed was also not proved. At the trial, the Appellant did not even give an estimate of what speed the matatu was being driven at to enable the trial Court make an assessment on the issue. I however note that in his said handwritten statement contained in the police file, the Appellant stated that the 2nd Respondent was driving at 80 km/h. How this amounted to excessive speeding beyond reasonable limits the Appellant did not explain.
29. The only independent witness called by the Appellant, the traffic police officer, instead exonerated the Respondents from any blame. He confirmed that the police concluded that the accident was caused, not by the Respondents, but by the driver of the elusive fuel tanker trailer and recommended that he be traced and charged. The witness also produced a sketch plan which, too, vindicated the Respondents.
30. In *Karugi & Another V. Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal stated as follows:
- “[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”
31. The same Court, in *Eastern Produce (K) Ltd V. Christopher Atiado Osiro* [2006] eKLR, stated that the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant.
32. From the foregoing and upon considering the evidence presented before the trial court, I find myself to be in complete agreement with the finding of the trial court that the Appellant failed to prove his case against the Respondents on a balance of probabilities.

Final Order

33. In the premises, I find this Appeal to be without merit and dismiss the same with costs.

DATED AND SIGNED AT ELDORET THIS 1ST DAY OF SEPTEMBER 2023

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WANANDA J. R. ANURO

JUDGE

