Gitari (Suing as the Legal Representative of the Estate of Morris Murimi Gitari Deceased) v Njeru (Civil Appeal E057 of 2024) [2024] KEHC 14115 (KLR) (13 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14115 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E057 OF 2024

LM NJUGUNA, J

NOVEMBER 13, 2024

BETWEEN

JOHN GIRARI ..... APPELLANT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MORRIS MURIMI GITARI DECEASED

AND

SIMON MUCHIRI NJERU ..... RESPONDENT

(Appeal arising from the decision of Hon. S. Ouko in the Runyenjes SPMCC No. E053 of 2021 delivered on 05 th June 2024)

JUDGMENT

1. The appellant has filed a memorandum of appeal dated 02nd July 2024 seeking the following orders:
    1. That the appeal be allowed;
    2. That the honourable court do set aside and vacate the orders of the trial court through its judgment; and
    3. That this honourable court be pleased to reevaluate the evidence and make its own judgment on liability; and
    4. That the costs of the subordinate court and this appeal be borne by the respondent.
2. The appeal is premised on the grounds that the trial magistrate erred in law and fact:
    1. In apportioning 50%:50% liability between the parties without any basis therefore arriving at a wrong conclusion but awarding 100% liability against the respondent in the related case of Runyenjes SPMCC E054 of 2021;

2. By finding that the appellant contributed to the accident by failing to properly analyse the facts, documentary evidence, written submissions and the binding authorities made on behalf of the appellant thus leading to a miscarriage of justice; and

3. By applying wrong and inapplicable principles of law which did not form basis for her determination.

3. Through a plaint dated 01st July 2021, the appellant sought judgment against respondent for general and special damages. It was his case that on 12th March 2021, along Kathageri-Kigumo Murram road, the deceased was a lawful rider of motor cycle registration number KMDZ 051D when the respondent's authorized driver drove motor vehicle registration number KCE 491E recklessly and negligently that it lost control and hit the deceased's motor cycle, causing him fatal injuries. These facts were denied by the respondent through his statement of defense and the matter went to hearing.

4. PW1 was P.C. Samuel Irungu who stated that the investigating officer in the matter was P.C. Winnie Sambeyo on whose behalf he testified. He stated that the accident was a head-on collision and the driver of the lorry was to blame for the accident where the deceased sustained fatal injuries. He produced police abstract and stated on cross-examination that the deceased's motor cycle was insured.

5. PW2 was the appellant who testified that the deceased was working as a bodaboda rider transporting a customer when he was hit by the respondent's lorry. He stated that they took him to 3 hospitals where he was denied treatment before he was taken to Embu Level (5) hospital where he died while undergoing treatment. That the deceased was a graduate awaiting employment by the Teachers Service Commission but he earned Kshs 50,000 through his motor cycle business and selling milk from his cow, which money he used to support the appellant. On cross-examination, he stated that the deceased's motor cycle was insured and he recovered the wreckage which he sold as scrap metal.

6. PW3 was Moses Wachira Kamau who stated that he was the pillion passenger on the deceased's motor cycle at the material time. He stated that the motor cycle was on the left side of the road while the respondent's motor vehicle was oncoming on the right side trying to overtake another vehicle, thus the lorry moved to the deceased's lane. That the deceased flashed his lights but the lorry continued going and it hit them. That the driver of the lorry alighted and ran away and the deceased was taken to hospital. On cross-examination, he stated that he got the lorry's registration number from the police.

7. The testimony of the respondent as recorded in Runyenjes SPMCC E054 of 2021 was adopted as his evidence in the trial court. DW1 was the driver of the lorry who stated that the accident occurred while the deceased was trying to overtake a motor vehicle hence he veered onto his lane, causing the head-on collision.

8. The trial court, in its judgment, found that the issue of liability had not been proved by either party. It stated that there were no sketch plans or photographs of the scene to assist the court in establishing how the accident happened. Therefore, it found that the deceased and the respondent were equally liable for the accident.

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

10. The appellant submitted that in Runyenjes SPMCC E054 of 2021 which arose from the same accident and with PW3 as the plaintiff, liability was found to be 100% against the respondent. That PW3 was the only eye witness in both cases and his testimony is credible. That the driver of the respondent's motor vehicle was speeding and should be held responsible for the accident. He relied on the cases of *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR, *Florence Mutheu Musembi and Geoffrey Mutunga Kimiti v Francis Karenge* [2021] eKLR and *Charterhouse Bank Limited (Under Statutory*

Management) v Frank N. Kamau [2016] eKLR and *Halsbury Laws of England*, 4th Edition para.662 at page 476. It was his argument that he had proved his case on liability on a balance of probabilities.

11. The respondent submitted that the trial court did not err in finding 50%:50% liability since it made a decision based on the material placed before it. That the appellant did not attach proceedings from Runyenjes SPMCC E054 of 2021 in order to convince the court to find in his favour. That the appellant has not invited the court in this appeal to reexamine the evidence at trial, thus the decision should be upheld. He relied on the case of *Sonko v Clerk, County Assembly Of Nairobi City & 10 others* (Petition 11 (E008 of 2022) [2022] KESC38(KLR).

12. Here, the issue for determination is whether the trial court's finding on liability should be set aside.

13. As a first appellate court, it is the duty of this court to examine the evidence adduced at trial afresh. This was held in the case of *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123, thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

14. Liability is a matter of fact hence this court must re-look into the circumstances under which the accident in question occurred as appearing in the evidence. Matters of fact are determined from evidence and the burden of proof lies on the party alleging the facts to prove them. Section 107 (1) of the *Evidence Act* provides that:

> " Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

15. The evidential burden is further established under sections 109 and 112 of the *Evidence Act*. In the case of *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR the evidential burden was discussed and the court stated that:

> " As a general preposition 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 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

16. The standard of proof in civil cases such as this one is on a balance of probabilities. In the case of *Miller v Minister of Pensions* (1947) 2 All ER 372 (supra) discussing the burden of proof the court had this to say;-

> " 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. 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."

17. It was the appellant's argument that the same trial court that determined this case also determined Runyenjes SPMCC E054 of 2021, finding liability at 100% against the respondent. Both cases arose from the same accident in which the deceased herein, who was the rider of the motor cycle died while PW3 was a pillion passenger who sustained bodily injuries. According to PW3, the driver of the respondent's lorry was overtaking and so he veered onto the deceased's lane, knocking his motor cycle head on. According to DW1, the deceased was overtaking a motor vehicle when he veered into the oncoming lane, causing a head on collision. These 2 witnesses from the opposing sides were the only eye witnesses to the accident but they give diverse accounts of how the accident occurred.

18. The Court of Appeal in the case of *Micheal Hubert Kloss & another v David Seroney & 5 others* (2009) eKLR stated thus:

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd (2)* (1953) A.C. 663 at p. 681 as follows:
>
> > 'To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally..."'

19. From the evidence adduced, the trial court was not able to balance the probabilities of negligence on one party. It is not possible to say that the deceased or the driver of the lorry was wholly to blame for the accident. This is what the trial court, after considering the evidence, forced it to decide as it did. In the case of *Lakhamshi v Attorney General*, (1971) E A 118, 120 the court held;

> " It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents, it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence.... Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible, it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident."

20. The appellant strongly argued that the trial court should have adopted its finding on liability in Runyenjes SPMCC E054 of 2021. I took the liberty of perusing the court's decree in that case and I noticed that the plaintiff in that case was PW3 herein. Here, he stated that he was a pillion passenger on the motor cycle being ridden by the deceased. It is my understanding that as a pillion passenger, my thinking is that PW3 wouldn't have been liable for any contributory negligence in the accident since he was merely a passenger. On the other hand, the deceased, being the rider of the motor cycle, owed a duty of care both to other motorists and to his passenger.

21. Additionally, and as I have mentioned earlier, the evidence adduced at the trial court couldn't safely impugn liability to either party. Therefore, the trial court was not bound to apply its findings in Runyenjes SPMCC E054 of 2021 since every case is to be determined purely based on its own unique set of facts. I would however, wish to state that it is usually good practice for the Court to consolidate such related matters to avoid situations like the one that it found itself in, having two different judgments in two cases that are related. Had the matters been consolidated, the Court would not have found itself in this situation that it is in.

    This was resounded in the case of *Shah v Mbogo* (1967) EA 166 thus;

    > " .... the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique fact and circumstances.

22. Therefore, I find that the appeal herein lacks merit and the same is hereby dismissed with costs to the respondent. The judgment and orders of the trial court are hereby upheld in its entirety.

23. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent