Indakwa v Omusale Limited (Civil Appeal E116 of 2023)
[2024] KEHC 14029 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14029 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E116 OF 2023

AC BETT, J

NOVEMBER 8, 2024

BETWEEN

SHADRACK SHIKUKU INDAKWA ..... APPELLANT

AND

OMUSALE LIMITED ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. V. Amboko (SRM) in Kakamega CMCC No. E256 of 2021 and Kakamega CMCC No. E085 of 2020 delivered on 12th July 2023)

JUDGMENT

Background

1. The two appeals, HCCA. No. 116 of 2023 and HCCA. No. 117 of 2023 arise from the same accident. The Appellant's case is that on 14th October 2020, while he was lawfully and carefully driving his motor vehicle registration number KAE 465L Nissan Cherry, the Respondent's agent, servant, employee or driver so negligently, carelessly and or recklessly drove the Respondent's motor vehicle registration number KCN 043A Toyota Pick-up that he caused an accident at Joyland area along Kakamega – Mumias Road as a consequence of which the Appellant's motor vehicle was damaged and the Appellant sustained physical injuries.

2. The Respondent's defence was to deny all the Appellant's allegations. In particular, the Respondent denied that it was the registered owner of the accident motor vehicle registration No. KCN 043A and that it was being driven by its agents or servants. The Respondent further denied that the accident occurred as alleged in the plaint and that it was vicariously liable for the acts or omissions of the agent, servant or driver. The Respondent also denied the particulars of negligence attributed to it and averred that the Appellant solely and or substantially contributed to the accident by his acts of negligence as more particularly set out in the defence.

3. The two matters were heard separately and after submissions, the trial Magistrate delivered her Judgements in which she apportioned equal liability to the parties and on quantum, made the following determinations:-

(a) Kakamega CMCC. No. E256 of 2021

(Now HCCA. No. 116 of 2023)

(i) Liability 50:50

(ii) Special Damages Kshs. 74,000/=

Less 50% contribution Kshs. 37,025/=

Total KSHS. 37,025/=

Plus costs and interest

(b) Kakamega CMCC. No. E85 of 2020

(Now HCCA. No. 117 of 2023)

(i) Liability 50:50

(ii) General Damages Kshs. 700,000/=

(ii) Special Damages Kshs. 43,000/=

Total Kshs. 743,005/=

Less 50% contribution Kshs. 371,510/=

Total KSHS. 371,510/=

4. Being dissatisfied with the aforesaid two sets of Judgments, the Appellant filed appeal against each of them. Both appeals have the same two grounds of appeal which are as follows:-

(1) That the learned trial Magistrate erred in law and fact by failing to find the Respondent wholly liable for the accident.

(2) That the learned trial Magistrate erred in law and fact by holding the Appellant to a higher standard of proof than is required in civil cases.

5. When the appeals came up for mention for directions, the court ordered that the two appeals be consolidated and the appeals be canvassed by way of written submissions. Since the appeal relates to one accident, the submissions with respect to liability in both appeals are the same.

Appellant's Submissions

6. The Appellant submits that the initial burden of proving negligence on the part of the Respondent lies with the Appellant and from the evidence adduced by the Appellant, he discharged the burden of proof. The Appellant submits that the Respondent did not rebut the Appellant's evidence but instead tendered evidence which had glaring inconsistencies with his written statement. The Appellant's submissions are also that the Respondent confirmed during cross-examination that he pleaded guilty to traffic charges relating to the accident. The Appellant submits that PW1 produced a Police abstract which stated that the Plaintiff's motor vehicle registration No. KAE 465L Toyota Vannete was being driven towards Mumias direction when it was hit by the oncoming motor vehicle registration No. KCN 043A Toyota Pick-up being driven by DW1.

7. The Appellant submits that the totality of the evidence before the trial court clearly converged against the Respondent in terms of liability. The Appellant further submits that the trial court erred in finding that since PW2 was not an eye witness and failed to produce a sketch plan indicating the possible point of impact of both vehicles, then his testimony remained an opinion when PW2's evidence was clear that the area where the accident occurred is a no-overtaking area, and the fact that DW1 was charged and pleaded guilty to the offence of careless driving.

8. It is the Appellant's further submissions that in view of the testimonies and evidence before the court, it is more probable than not that the accident was caused entirely as a result of the Respondent's sole negligence and therefore the trial court's apportionment of liability was flawed since the trial court held the Appellant to a higher standard of proof than is required in civil cases. The Appellant relied on the case of Treadsetters Tyres Ltd -vs- John Wekesa Wephukuklu [2010] eKLR where the Court held thus:-

> " In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

9. The Appellant also relied on the case of Board of Governors of Kangubiri Girls High School & Another -vs- Jane Wanjiku Muriithi & Another [2014] eKLR where the Court held thus:-

> " When a car is proved to have caused damage by negligence, a presumption arises that the owner is responsible for the driver's liability."

Respondents' Submissions

10. The Respondent in turn submits that both PW2 and DW1 confirmed that the accident occurred when the Appellant tried to avoid a tuk-tuk in front without properly assessing the distance of the Respondent's vehicle and that both parties' witnesses confirmed that the accident occurred in the middle of the road. According to the Respondent, the Appellant had the onus of proving that not only did the accident occur, but that it was a result of the Respondent's negligent acts or omission which the Appellant did not do. It is the Respondent's submissions that the production of a police abstract that classified the matter as pending under investigations and named the driver as Joseph Wafula with no eye witness meant that the Appellant's case was not corroborated.

11. The Respondent further submits that the fact that the Respondent's witness was arrested, accused, detained and coerced into pleading guilty to the offence of careless driving more than two years after the accident did not absolve the Appellant from his duty to prove that the Respondent was negligent.

12. The Respondent relies on the case of Simon Waweru Mugo -vs- Alice Mwongeli Munyao [2020] eKLR where the Court held that a careful person on the road will not normally be involved in an accident and the case of Songole Elam -vs- Paul Kirisi Lunalo [2020] eKLR where Justice W. Musyoka stated:-

> " 10. ... the respondent was driving fast, and that explained why he was able to get to the spot so soon after the appellant had seen him. It could be that the respondent was riding his motorcycle fast, but the fact of the matter is that he had a right of way, the appellant had seen him and should have given way to him. I agree that it was the appellant who either underestimated the distance between him and the respondent before he made the turn, or otherwise he

> underestimated the speed of the motorcycle. The trial court took into account the possibility of the respondent riding at a high speed in the circumstances, and hence assessed him to have been 10% liable for the accident."

13. The Respondent submits that there was nothing in the Appellant's evidence to indicate that he stopped to allow the approaching vehicle to pass or that he made any other attempts to avoid the accident and this amounted to negligence on the Appellant's part.

14. The Respondent submits that in absence of proof of the Appellant's evidence, then it is the Appellant who suddenly and without warning and in ignorance of the Respondent's right of way entered into the Respondent's rightful lane and so the Appellant should have borne a greater liability compared to the Respondent who took all reasonable steps and made all efforts expected of a reasonable and competent driver to avoid the accident, a fact corroborated through the Respondent's motor vehicle Inspection report. The Respondent further relies on the case of Henderson -vs- Henry E. Tenkins and Sons [1970] AC 232, Simpson -v-s Peat [1952] 1 ALL ER 447, Bambhai Shivabhai Patel & Another -vs- Brigadier General Arthur Corne Lewin [1943] 10 EACA 36 in which cases it was held that the mere fact that an accident has occurred does not amount to careless driving nor is it evidence of negligence. According to the Respondent, there must be evidence of negligence.

15. The Respondent agrees with the trial court's finding that faced with two versions of evidence from both the Appellant and Respondent as to how the accident occurred, and since both versions remained uncorroborated at the end of the trial, then the trial court was right to find both parties equally liable as the accident could have possibly been caused when the Respondent's driver failed to take adequate steps to avoid the Appellant's vehicle.

Analysis and Determination

16. This being a first appeal, the duty of the court is to re-evaluate the evidence before the trial court and subject the same to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court bearing in mind the fact that it did not see and hear the witnesses first hand. This was espoused in the case of Selle -vs- Associated Motorboat Company Ltd [1968] EA 123 where the Court held as follows:-

> " The appellate 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 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 aspect. 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 witness is inconsistent with the evidence in the case generally."

17. In exercise of its mandate, this court must therefore re-evaluate the evidence subject to the caveat that it did not have the benefit of seeing and hearing the witnesses as they testified.

18. The appeal herein is against liability only although the Appellant has submitted on quantum also. It is trite law that a party is bound by his pleadings. The Appellant in his Memorandum of Appeal has faulted the trial court's finding on liability. He has not laid out any grounds with respect to the trial

court's finding on quantum. The submissions on quantum are therefore an afterthought. In the case of Daniel Otieno Migore -vs- South Nyanza Sugar Co. Ltd [2018] eKLR Justice A. C. Mrima held thus:

> "It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded."

In the same vein, this court will disregard the Appellant's submissions on quantum in both appeals. The court deduces the issues for determination therefore as follows: -

(a) How did the accident occur?

(b) Whether the trial court erred in law and in fact in failing to find the Respondent wholly liable for the accident.

19. In determining liability in a civil claim, the burden of proof lies on the party who asserts the affirmative of the issue. Under Section 107 of the *Evidence Act*, the burden of proving that the accident occurred is upon the Appellant because it is the Appellant who desires the court to believe that the accident occurred due to the negligence of the Respondent's driver.

20. The Appellant relied on the witness statement dated 18th December 2020. The statement was a brief reproduction of paragraph 4 of the plaint. In his evidence-in-chief, he stated that on the material day, he was at Jamindas driving to Mumias after Kakamega when an on-coming Pick-up hit his side mirror and driver's door. On cross-examination, he said that the tuk-tuk was on his right side of the road going towards Kakamega while the Pick-up was also going towards Kakamega. He said that the Pick-up was moving at a high speed and hit him although he had moved to the edge of the road.

21. To corroborate the Appellant's evidence, was a police officer, PW2 who produced the police abstract. He said that he was not the investigating officer but testified that the Appellant's motor vehicle was hit by the Respondent's on-coming Pick-up being driven by one Joseph Wafula when the driver of the motor vehicle tried to overtake an un-known vehicle. According to him, the Respondent's driver attempted to overtake when it was not safe to do so and so he was to blame for the accident.

22. In defence, DW1 who was the driver of the Respondent's motor vehicle at the time of the accident adopted his statement filed on 3rd June 2021 as his evidence-in-chief. The statement is handwritten and in it, DW1 states that on 14th October 2020 while coming from Mumias to Kakamega, at Joyland area, "motor vehicle registration No. KAE 465L which was trying not to hit a tuk-tuk hit the vehicle KCN 043A which I was driving and damaged the body and the side mirror ..."

23. DW1 stated that the tuk-tuk was on the same side he was and was in front of him. He conceded that he was charged with careless driving and paid a fine of Kshs. 2,000/= upon pleading guilty.

24. I have carefully evaluated the evidence of the two parties herein. It is undisputed that at the time of the accident, the Appellant was driving towards Mumias while the Respondent's driver, DW1, was driving from Mumias direction towards Kakamega. Despite their conflicting evidence, it came out clearly and it was conceded by DW1, that at the time of the accident, the tuk-tuk was driving in the same direction

that he was and was ahead of him. However, it is not clear from the proceedings how the accident occurred. During cross examination, the Appellant stated as follows:-

> " the tuk-tuk was on my right side going towards Kakamega. The Pick-up was also coming to Kakamega. I moved to the edge of the road and it still hit me. The Pick-up was moving at a high speed."

25. The Appellant did not state what caused the Respondent's motor vehicle to hit him save for stating that it was at a high speed. He did not say to which edge of the road he moved. It may as well be that he moved to the edge of the oncoming vehicles' side. The Appellant's evidence is at variance with the evidence of PW1, the traffic police officer. According to PW1, the accident occurred when the driver of the Pick-up tried to over take an unknown vehicle when it was not safe to do so. At the end of the Appellant's case, the court is left with more questions than answers. If at all the Pick-up was overtaking another vehicle when it was not safe to do so, then why did the Appellant not state so in his evidence and in the particulars of negligence set out in his plaint? Was the vehicle being overtaken an unknown motor vehicle or the tuk-tuk? If the Pick-up was being driven by one Joseph Wafula then why is it that it is DW1 who was charged with the offence of careless driving with respect to the particular accident?

26. PW1, who testified that the accident occurred due to the negligence of the driver of the Pick-up was not at the scene of the accident. He did not say that he was the investigating officer. He did not produce the sketch map nor the investigations file. Without a sketch map, it is impossible for the court to determine the exact point of impact. I am in agreement with the trial court that without the sketch plant and the investigation diary, PW1's evidence held little probative value to the court as it did not aid the court to establish the causation of the accident. His evidence was hearsay and it was disproved by the fact that although he stated that one Joseph Wafula was the driver of the pick-up when the accident occurred, it was DW1 who was eventually arrested and charged over the accident.

27. Although the Appellant stated that at the time of the accident he was taking his child to school, he did not call the child as a witness. Perhaps the child would have shed more light on how the accident occurred and assisted the Appellant to prove negligence on the part of DW1.

28. In the case of Statpack Industries -vs- James Mbithi Munyao [2005] KEHC 2043 (KLR) (Civ), the court held as follows:-

> " Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same.
>
> Here, in this case, the Respondent did not lead any evidence to connect his injuries or accident to an act or omission on the part of the Appellant. The real cause of the accident was not established. The learned Magistrate ought to have asked herself, as I have repeatedly tried to ask myself, "so what exactly did the employer do or did not do that caused this accident?" And I cannot find the answer in the testimony adduced before the lower court."

29. Flowing from the above case, to determine whether the Respondent was negligent as claimed, the Appellant needed to demonstrate that it was more likely than not that the accident occurred as he stated in his evidence. A review of the Appellant's evidence which flows from his pleadings and witness statement finds that the evidence fell short of the required standard to prove that the accident occurred

as a result of the sole negligence of the Respondent. I therefore find that the trial court did not hold the Appellant to a higher standard as claimed in his appeal.

30. In reaching the conclusion that the Appellant failed to prove sole negligence on the part of the Respondent's driver, this court bears in mind the holding in the case of Peters -vs- Sunday Port Limited [1958] EA 424 where the court stated as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact of the Judge who had the advantage of seeing and hearing the witnesses... But the jurisdiction to review the evidence should be exercised with caution. It is not enough that the appellate court might have come to a different conclusion..."

31. On its part, the Respondent adduced evidence through DW1, one Ignatius Kemu who testified that he was the driver of the Pick-up on the material date. According to him, on 14th October 202020, he was driving from Mumias towards Kakamega at about 6.00 p.m. when motor vehicle registration number KAE 465L which was trying to avoid a tuk-tuk hit motor vehicle registration number KCN 043A which he was driving thereby damaging the body and the side mirror and in the process, he sustained an injury to his eye. On cross-examination, he said that the tuk-tuk was in front of him. DW1's evidence was that the tuk-tuk was ahead of him and also heading towards Kakamega direction from Mumias. DW1 attributed the accident to the Appellant and on re-examination, said that the Appellant's vehicle was trying to overtake the tuk-tuk. I have tried to apply my mind to the facts and find it difficult to fathom how the Appellant could have been overtaking a tuk-tuk that was coming from the opposite direction. Be that as it may, the totality of the evidence is such that each party has a divergent version as to how the accident occurred. The impression left in the court's mind is that each driver was not entirely truthful as to how the accident really occurred. In absence of an independent eye witness and the sketch map, it is difficult for the court to establish how the accident occurred.

32. DW1, conceded that he was charged with the traffic offence of careless driving and paid a fine of Kshs. 2,000/= upon his plea of guilty. He claimed he was harassed in court and decided to plead guilty.

33. It has been held severally that a conviction for the offence of careless or dangerous driving per se does not preclude the driver from subsequently pleading negligence on the counterpart's side. In the case of Robinson -vs- Oluoch [1971]EA 316, the Court of Appeal held as follows:-

> " It is quite proper for a person who has been convicted of an offence involving negligence in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the Plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."

34. In the same vein, a guilty plea to the charges of careless driving could not bar DW1 from raising a counter-claim in the ensuing civil proceedings, that the Appellant contributed substantially to the accident by an act or omission that led to its occurrence.

35. The absence of a cogent description by the Appellant either in his pleadings or in his evidence of how the accident did occur points to a likelihood that he contributed it its occurrence by an act or omission that rendered the accident inevitable. I agree with the trial court that there is nothing in the Appellant's evidence to prove that DW1 was solely liable for the accident.

36. The Appellant had the onus of proving the facts constituting negligence on the part of the Respondent. His evidence fell short of that proof. He did not demonstrate, on a balance of probabilities that the accident was wholly or substantially contributed by the Respondent.

37. In the case of Palace Investment Ltd -vs- Geoffrey Kariuki Mwenda & Another [2015]eKLR, the court, citing Denning J. stated thus:-

> " 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 the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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 loose, because the requisite standard will not have been attained."

38. The trial court considered the evidence adduced by the parties and rightly came to the conclusion that it was impossible, based on the evidence to decide who between the two drivers was to blame. In Hussein Omar Farah -vs- Lento Agencies [2006] eKLR, the Court of Appeal held as follows:-

> " In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

The trial court relied on the same case and cited a different paragraph.

39. The court in Khambi & Another -vs- Mahithi & Another [1986] EA 70 held as follows:-

> " It is well settled that where a trial court has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous."

40. This court finds that the trial court did not err in its apportionment on liability as there was no error in principle or exceptional circumstances that would warrant this court's intervention with the trial court's decision. The appeal therefore must fail and it is therefore dismissed. Each party shall bear its costs of the appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF NOVEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

Mr. Abok for the Appellant

Mr. Okong'o for the Respondent

Court Assistant: Polycap