REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. E006 OF 2020

AMANI KAZUNGU KAREMA.....APPELLANT

VERSUS

JACKMASH AUTO LTD

AGOSTIN DAVID.....RESPONDENTS

(Being an Appeal from the Judgment of the Honourable D.Wasike - Resident Magistrate in Malindi Civil case No.146 of 2019 delivered on the 30th September, 2020)

Coram: Hon. Justice R. Nyakundi

Wambua Kilonzo & Co. Advocates for the Appellant

A.B. Patel & Patel Advocates for the Defendants

JUDGMENT

The Appellant Amani Kazungu Karema appeals to this Court on Liability from the Judgement of Honourable ***D.Wasike (SRM)*** delivered on ***30.9.2020*** in ***Cmcc No. 146 of 2019***, in which she apportioned Liability as between the Appellant and the Respondents on equal basis of 50%:50%.

BACKGROUND

The principal claim in a Plaint dated 8th July, 2019 was for the award of damages arising out of an accident which occurred on 26th April, 2018 at Ngomeni area. It is asserted that the appellant was lawfully riding a motor cycle registration number KMEE 318E, when the 2nd Respondent so negligently drove, managed and or controlled motor vehicle registration No. KBU 545U, that the same lost control, veered off his lane and hit motor cycle registration No. KMEE 318E. As a result, whereof the appellant sustained personal severe injuries that were tabulated as fracture of the left femur thigh bone, (upper 1/3) and fracture of the right tibia lower 1/3 (malleolus medial).

On consideration of the matter as a whole Learned trial magistrate awarded general damages of Kshs.1,000,000/-, specials of Kshs.194,450/-. Costs of future operation at Kshs.120,000/- plus costs and interest.

THE APPEAL

Aggrieved by the decision on liability of the trial Court the appellant appealed to this Court putting forward seven grounds of appeal all of which are pivotal only to the issue whether or not the Learned trial magistrate was right in the apportionment of Liability on equal percentages of 50%.

At the hearing of the appeal Learned Counsel stated in his written submissions to pursue the reversal of the judgement by this Court and to be substituted with 100% Liability. Mr. Wambua argued cumulatively on the seven grounds of appeal and submitted that the rejection of the Appellant evidence was an error on the part of the Learned trial magistrate. It was his contention that at the trial there was no dispute as to who was negligent in causing the accident but all that was ignored for an apportionment of liability to a wrong party to the accident.

In this regard Learned Counsel submitted that both the appellant and his witness testified that the 2nd Respondent left its lane while avoiding the pothole to collide with the Appellant's motor cycle. Learned Counsel further submitted that on this there was no quarrel in which lane the two motor vehicles were being driven. In this regard argued Learned Counsel in absence of a head on collision, the 2nd Respondent

carried a higher weighted percentage on Liability in comparison with the Appellant.

This evidence submitted Learned Counsel was in tandem with the principles in ***Boniface Waiti V Michael Kariuki Kamau (2007) eKLR, Embu Public Road Services V Riimi (1968) EA 22, Kennedy Okungo & Another V Hamisi Misa Maloba*** suing as the ***personal representative and Administrator of the estate of Hassan Hamisi***, ***CA No. 6159 of 2016 Stella Muthoni V Japhet Murugi (2016) eKLR.*** In Learned Counsel contention, notwithstanding the record of the accident referred to by the witness, the Learned trial magistrate went against it, to make a finding by misapprehending the evidence. To that extent learned counsel urged this Court to interfere with the decision on Liability.

The Respondents on their part contended that the evidence presented by the appellant had no clear-cut line as to whom of the two parties was responsible for the accident. It was the Respondent's submissions that the proceedings and the evidence so far tendered at the trial court failed to discharge the burden of proof that the 2nd Respondent was wholly to blame for the accident. The Respondent submitted that the issue of liability was determined based on the evidence as appraised by the Learned trial magistrate, in which the Appellant has failed to demonstrate any error or application of wrong principles of law. Having considered the grounds of appeal and respective submissions it is now my task to delve into the merits of the appeal.

DETERMINATION

It is trite this is a first appeal to the Court and as provided in the well settled principles, I am entitled to rehear the dispute, but must remember that the Learned trial magistrate had the advantage of hearing and seeing witnesses testify before her, that advantage is not availed this Court ***(See Peters Vs Sunday Post Limited [1958] EA 424.***

The Court also in the cases of ***Bundi Murube V Joseph Omkuba Nyamuro [1982-88]1KAR 108*** had this to say; -

> ***"However, a Court on appeal will not normally interfere with a finding of fact by the trial Court unless, it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably, to have acted on wrong principles in making the findings he did." And also, in Rahima Tayabb & Another V Ann Mary Kinamu [1982-88] 1KAR 90 Law JA also stated; -***

> ***"An appellant Court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanor of witnesses who has given evidence before him."***

There is no doubt that these principles lie at the heart of this appeal. Whereas it is true that the accident involved two vehicles the burden of proof that the accident was caused by the negligence on the part of the 2nd Respondent lay squarely with the Appellant. That is the issue which stood out throughout the trial before the Learned Magistrate.

From the Judgement, the Learned trial magistrate had to decide on a balance of probabilities who between the Appellant and the 2nd Respondent caused the accident. The starting point was for the Appellant under section 107 (i) of the evidence Act to present admissible material evidence for the trial court to give judgement in his favour on the proven facts to support negligence on the part of the 2nd respondent. The Court in ***Ciabaitani M'Mairanyi & Others V Blue Shield Insurance Co. Ltd CA No.101 of 2000(2005) 1EA 280*** held that; -

> ***"Whereas under section 107 of the Evidence Act, which deals with the evidentiary burden of proof, the burden of proof lies upon the party who invokes, the aid of the law and substantially asserts the affirmative of the issue. Section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."***

In my interpretation of sections 107 and 108 of the Evidence Act it places the burden of proving a fact on the party who asserts the existence of any fact in issue relevant to form the onus of prove which may shift from him or her to the Defendant. ***Lord Denning in Miller V Minister of Pensions [1947] 2 All ER at 374*** held as follows;

> ***"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to determinate conclusion the way or the other, then the man must be given the benefit of doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. The 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 probably than not', the burden is discharged, but, if the probabilities are equal, it is not."***

Thus, in civil cases pleadings continue to play an essential part as the basis in which evidence is adduced to prove matters in issue. From this perspective the appellant had the burden to prove the existence of a fact on occurrence of the accident and the interaction of it was due to the negligence on the part of the second respondent. It is also important under section 109 of the Act the court to presume existence of certain facts. Herein the act states that; -

> ***"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case."***

In the case of ***Raila Amolo Odinga & Another V IEBC & 2 Others [2017] eKLR*** *the Supreme Court* expounded the evidential burden of proof as follows;

> ***"[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, this, evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."***

From this exposition it is understandable that the form of proof that is placed upon litigating parties differs greatly and the duty that each form of burden of proof imposes upon a party varies substantially. In the instant case the question before the Learned Trial Magistrate was whether the appellant had established existence of a fact that signifies negligence on the part of the 2nd Respondent. In the event of a prima facie case the appellant establishes existence of a fact that signifies transfer of the evidential burden to the Respondents to bring into question the truthfulness of the presumed facts, otherwise the trial court is required to uphold the drawn conclusion.

The entire trial was basically on the law of negligence and liability on the part of the 2nd Respondent. The correct statement of the test on the ingredients of this tort is as defined by ***Clerk & Lindsell on Torts 18th Edition*** in the following passage; -

There are four requirements for the tort of negligence namely; -

> ***1. the existence of law of a duty of care situation i.e., one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.***
>
> ***2. breach of the duty of care by the defendant, i.e. that it failed to measure up to the standard set by law;***
>
> ***3. a causal connection between the defendant's careless conduct and the damage;***
>
> ***4. that the particular kind of damage to the particular claimant is not so unforeseeable as to bee too remote. When these four requirements are satisfied the defendant is liable in negligence.***
>
> > ***"A defendant will be regarded as in breach of a duty of care if his conduct fails below the standard required by law. The standard normally set is that of a reasonable and prudent man. In the off cited words of Baron Alderson; "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do; or doing something which a prudent and reasonable man would not do". The key notion of "reasonableness" provides the law with a flexible test, capable of being adapted to the circumstances of each case."***

As a matter of fact, to begin with these were the ingredients of the Appellant's claim.

What was the implication on the finding on liability apportioned at 50% contributory negligence on the part of the Appellant? In the strict and proper sense, it means the Respondent raised rebuttal and presumptive evidence on the pleaded facts that the Appellant contributed equally to the cause of the accident. The objective on contributory negligence is an aspect of assumption of risk so that the Appellant is barred from the whole recovery in damages for pain and suffering.

The applicability of contributory negligence against the appellant had the effect of reducing the claim for damages thereby in proportion to the degree or percentage of negligence attributable to him at 50%. That indeed is the corner stone in this appeal.

The question before me is whether there was cogent evidence to show the existence of sufficient cause of connection between the Appellant and the Respondent breach duty of care to trigger the element on contributory negligence. A case involving contributory negligence calls upon the trial court to question of what the other party ought or ought not to have done under the circumstances in that particular accident to apportion negligence. Two things must concur to support a finding on contributory negligence, an obstruction on the road being used by the parties and the default of each of the drivers, and their want of ordinary care to avoid it.

What transpired at the trial court, was a demonstration by the Appellant that he kept onto his lane but the Respondent while driving from the opposite direction encountered a pothole, which on taking evasive motion drove outside the bounds of his lane, to collide with the motorcycle.

In the case of ***MacDrugall App V Central Railroad Co. Rbr 63 Cal 431*** the court held that; -

> ***"In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".***

Therefore, in my view where any person suffers damage as the result partly of his own fault and partly of the fault of the Defendant the Court can only apportion contributory negligence based on the pleadings and evidence. It is for the Plaintiff in this case being the Appellant who had the burden to prove that the 2nd Respondent was negligent in not taking positive steps while negotiating a pot hole to avoid the accident. The question confronting the Learned Trial Magistrate when considering whether the Appellant was negligent was whether the Appellant had acted in breach of duty of care in a situation which ultimately gave rise to contributory negligence.

In the case at bar the defence of contributory negligence was only available if it was pleaded and proved in all circumstances that satisfied the criteria that the Appellant was partly to blame for the Accident. Fortunately, in that case there was an eye witness being the Appellant and the favourable findings made by the investigating officer who visited the scene and opined that the 2nd Respondent was wholly to blame for the accident. So, where a person drives his motor vehicle at a speed in the circumstances which he fails to keep a proper look out and ran into the lane of another vehicle and a collision occurs that kind of behavior would very unlikely attract contributory negligence. I find the facts as accepted by the Learned Trial Magistrate on apportionment cannot be really supported by any evidence on the part of the Respondents. I am of the further view that the Appellant's motor cycle did not approach the scene of the accident without due care and attention to possibly call for apportionment on liability. On review of the record, it was necessary for the Learned Trial Magistrate to carefully consider the physical evidence as prominently alluded to by the police investigations. In the comparative jurisprudence in the case of ***Calvin Grant V David Pareedon et al Civil Appeal 91 of 1987 where Theobalds J enunciated*** as follows; -

> ***"Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth."***

In the evidence adduced by Pw 1 as corroborated by Pw 2 the accident which caused injuries to the Appellant was not the result of contributory negligence or want of reasonable care and caution on his part. The Respondent himself did not rely upon the contributory negligence as a defence for the trial magistrate to make a finding to that effect. Irrespective of the status in the criminal investigations, to me is not a bar to rest the doctrine on contributory negligence in absence of credible material evidence in support of that suit.

It is settled in this country that the burden of proving contributory negligence on the part of the plaintiff is on the defendant. This is the rule in ***Embu Road Services V Riimi (1968) EA22 and 25 Mzuri Muhhidin V Nazzar Bin Seif (1961) EA 201, Menezes Stylianicers Ltd CA No.46 of 1962*** in which the courts held inter alia; -

> ***"Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence".*** See also ***Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).***

The approach to the facts to the case in issue on appeal was for the trial court to determine whether a prima face case exist requiring the Respondents to give a rebuttal. Here, the Respondents failed to give any response to the direct evidence offered by the appellant on the proximate cause of the accident. ***"Failure to respond to the allegations of negligence made by the applicant means the same was admitted (See Mount Elgon Hardware Ltd V United Millers CA No. 19 of 1996)".***

In the instant case the Learned trial magistrate in determining liability erred in concluding that the Appellant contributed negligently to the accident at a ratio of 50% without any credible evidence to that effect. The Learned trial magistrate was wrong in finding that the point of impact was sudden, whereas the police investigations found as a fact that the 2nd Respondent was vicariously liable to the wrongful conduct while acting in the ordinary course of employment. There are no inaccuracies or obstruction in estimating the position of a pothole especially during the day that should have impaired the 2nd Respondent to act in time to avoid colliding with another vehicle being driven on its lane. The proper look out was in all probability the duty of the 2nd Respondent not to trespass to the opposite lane.

As far as the course and scope of enquiry is concerned, I am persuaded with the dicta in ***Jones V Livox Quarries Ltd [1952] 2 QB608*** in which the Court stated that; -

> ***"An appellate court will generally only interfere with a finding of contributory negligence in the event of a substantial misjudgment of the factual basis of the apportionment by the trial court. In such circumstances the appellant Court may reassess the apportionment if it is satisfied that the assessment made by the Judge was plainly incorrect"***

In the instant case from the evidence of Pw 1 and Pw 2 there isn't uncertainty as far as the establishment of a relationship capable of finding liability is concerned. Applying the multifaceted test in this case the 2nd Respondent had control over his motor vehicle. He drove from his lane while trying to avoid a pot hole into the opposite lane and thereafter a collision occurred. Therefore, in all circumstances this accident was substantially if not wholly contributed to by the 2nd Respondent.

The trial Court should have been mindful of the risk of over concentration on a particular form of terminology as ***"it is not clear where the impact was, further, if the motor vehicle was not going at a high speed and was swerving to avoid an accident, it means, the plaintiff who is a rider ought to have seen the motor vehicle as it approached that the plaintiff had also ample space to swerve***."

In my appraisal there was simply a risk in attempting to over refine the evidence laid down by the Appellant. In the present case the aspect of the two motor vehicles being driven at opposite direction and keeping to their lanes was left out in the evaluation of evidence carried out by the Learned Trial Magistrate. The view I take and it is still the law that while reasonable foreseeability is essential to any liability for negligence, such foreseeability by itself should not in all circumstances impose a duty of care. Likewise, this consideration seems to have dictated the inference made by the Learned Trial Magistrate to apportion liability against the Appellant.

The police sometimes do visit a scene already interfered with to draw any inferences on the point of impact as demanded of the Learned trial

magistrate. In the present case, the impact of the vehicles being driven at opposite directions was left out in the evaluation carried out by the Learned trial magistrate.

As indicated, earlier there is no doubt as to that the Learned trial magistrate on a close analysis of the principles shows that the factual causation assumed the trajectory of unknown. In her vary judgement on the scope of liability she ignored to give weight to the nature of the cause of connection between the breach and the harm. In my view the trial begged the question whether the 2nd Respondent failure to stop at the pothole was the factual cause of the appellant's injuries. To me the answer is in the affirmative, that the appellant established on a balance of probabilities that the negligence was a necessary condition of the occurrence of the harm. The 2nd Respondent altered behavior while driving on the said road was just enough to bring it into conformity with his duty as mandated by law. Ultimately the analysis of the evidence by the Learned Trial Magistrate failed to demonstrate that she failed to demonstrate that she conducted a proper analysis of the evidence before her to come to the conclusions that the critical issues of the duty of care, breach of duty and the resulting damage was due to contributory negligence. The decision went against the claim of the principle in ***Hay or Bourhill V Young [1942] 2 ALL ER 396*** the Court had this to say on ***proper care*** that; -

> ***"Proper care connotes avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on. Then to whom is the duty owed? Again, I quote and accept the words of Lord Jamieson:***
>
> ***"……to persons so placed that they may reasonably be expected to be injured by the omission to take such care"***
>
> ***"The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those whom injury may reasonably and probably be anticipated if the duty is not observed."***

So far as the case stands and giving effect to the principles ***Jones V Livox Quarries Ltd***, ***Peters V Sunday Post [1958] EA*** am reminded of the advantages enjoyed by the learned trial magistrate who saw and heard the evidence of the two critical witnesses in support of the Appellant's case. Notwithstanding that position the reasons given by the learned trial magistrate are unsatisfactory on the findings made on contributory negligence. In so saying in respect of this appeal my assessment and scrutiny of the evidence calls for interference on the findings arrived at by the trial court on liability. If one has to evaluate the process of motoring in this case on the basis of the judgement and the evidence adduced any apportionment of liability could not have attracted more than 10% ratio.

Given the emphasis alluded to elsewhere in this judgement on the elements to be proven both on negligence and weight on contribution in the circumstances of this particular case and on the hindsight the scope of duty of care on liability the appellant bears the burden of breach at 10% and the respondent jointly and severally 90%.

For the foregoing reasons it is my conclusion that the facts and the evidence in the case did not warrant equal apportionment of contributory negligence. In the upshot the appeal is allowed to the extent that the appellant shoulders a minimum ratio of 10% for loss and damage. An overview of how the learned magistrate went about assessing compensation in this personal injury claim I find no reason to interfere with the award. The costs of this appeal shall be shared equally by the Respondents. It is so ordered.

DATED, SIGNED AND DELIVERED via Email AT MALINDI THIS 7th DAY OF JUNE,2021

.....

R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.