



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 71 OF 2018

JOSHUA OKELLO OCHIENG.....APPELLANT

VERSUS

FRANCIS OUKO ODIRA.....RESPONDENT

(Being an appeal against part of the Judgment and decree of Hon. J. N. Wambilyanga PM

in KISUMU CMCC NO. 66 OF 2015 delivered on 5th July 2018)

JUDGMENT

The Appellant, **JOSHUA OKELLO OCHIENG**, was the Plaintiff in the case before the trial Court. He had sued the Respondent, **FRANCIS OUKO ODIRA**, following an accident between his motor-bike and the Respondent's vehicle.

1. The Appellant had blamed the Respondent for the accident, as the Respondent had allegedly been negligent in the manner he drove the vehicle.
2. On his part, the Respondent denied all the particulars of negligence. In the alternative, the Respondent asserted that the Appellant either caused the accident or greatly contributed to its causation, due to his negligence and carelessness.
3. After giving consideration to the evidence tendered, as well as the submissions, the learned trial magistrate apportioned liability equally between the 2 parties.
4. Being aggrieved, the Appellant lodged an appeal at this Court, challenging the findings on liability.
5. It is the Appellant's position that;
 - (a) *The trial court relied on irrelevant facts which did not arise from the pleadings;*
 - (b) *The trial court disregarded the evidence tendered by the plaintiff, yet the said evidence was uncontroverted;*
 - (c) *There was no evidence of any negligence on the plaintiff's part;*
 - (d) *The trial court treated submissions as if they were evidence.*

6. In determining the appeal, this Court is enjoined to re-evaluate all the evidence on record, and to draw therefrom my own conclusions. Of course, unlike the trial court, I did not have the benefit of seeing the witnesses as they testified: therefore I have got to bear that fact in mind, especially if any particular finding by the trial court was premised on the demeanour of the witness.

7. Secondly, the appellate court must appreciate that the trial court had the right, duty and mandate to exercise its discretion when making a determination. Therefore, unless it can be demonstrated that the trial court had misdirected itself, leading to a wrong decision; or it had taken into consideration irrelevant matters; or it had failed to take into account some material relevant matters, the decision ought not to be disturbed by this appellate court.

8. In this case, I would need to determine whether or not there was evidence before the Court that could support the apportionment of

liability on a 50:50 basis.

9. The case starts with pleadings. The plaintiff constitutes the Plaintiff's case, whilst the defence constitutes the case of the defendant.

10. The Defendant is expected to answer to the case put forward by the Plaintiff. In other words, the Plaintiff cannot put forward a claim in his pleadings and then bring evidence that goes beyond the pleadings as the Defendant would not be expected to answer to something which had never been set out in the pleadings. In law, we say that each party is bound by his pleadings.

11. Just as much as the Plaintiff should bring evidence to support the claim, the Defendant's evidence should advance what has been set out in the defence.

12. Justice is not about taking the other party by surprise.

13. Procedures have been put in place to ensure that each party discloses his case to the Court and to the other party, at the earliest opportunity. That is why there is a requirement that the pleadings be filed together with the Witness Statements of the Plaintiff's witnesses. The Plaintiff is also supposed to file his Bundle of Documents which he would be relying upon to prove his case.

14. Upon service with the pleadings together with all the supporting evidence, the Defendant will have been made aware of the nature and scope of the case which he is faced with. In answer to that case, the Defendant is expected to put forward his defence, together with his Witness Statements and his Bundle of Documents.

15. When the case gets to the stage of trial, the witnesses are supposed to adopt their respective Witness Statements, as their evidence-in-chief. By limiting each witness to his said statement, the justice system is ensuring that nobody is taken by surprise.

16. When fresh evidence is sprung up by a witness, it is probable that the opposite party would require time and opportunity to find the answer to any new stuff. In effect, when a party introduces new evidence, at the stage of a trial, that would most probably result in an adjournment; hence delays that could otherwise have been avoidable.

17. It must be appreciated that evidence which is not supportive of the pleadings already on record, cannot be said to be advancing the case for the party who is adducing such evidence.

18. Furthermore, it is only that which has been asserted by the Plaintiff, and been denied by the Defendant, which becomes an issue for determination by the Court.

19. An assertion which has not been controverted by the other party cannot call for any determination.

20. In this case the Plaintiff had asserted that the accident was caused by the Defendant, through the negligent manner in which the Defendant drove or managed his vehicle at the material time.

21. In his defence, the Defendant denied all the particulars of the alleged negligence.

22. Secondly, and in the alternative, the Defendant asserted that it was the Plaintiff who caused the accident, due to his negligence. The Defendant also asserted that if the accident cannot be wholly attributed to the Plaintiff's negligence, the Court ought to find that the Plaintiff "greatly contributed" to the accident, by his negligence and carelessness.

23. The particulars of the alleged negligence attributed to the Plaintiff, by the Defendant were as follows;

"a) Creating disruption thus causing the accident.

b) Losing control of the bicycle.

c) Cycling on the wrong side of the road without regard to other road users.

d) Failing to exercise sufficient care, skill and prudence or at all while cycling.

e) Otherwise causing injury to himself."

24. The Plaintiff testified that he was riding his motor bike on the material day. He said that the Defendant's vehicle swerved to avoid pot holes, and it hit him from the side.

25. During cross-examination the Plaintiff admitted that he did not have a valid Driver's Licence at the material time.

26. However, during re-examination he said that, whilst the driver's licence qualifies him to ride his motor bike, the fact that he did not have a valid driver's licence did not imply that he lacked knowledge on how to ride a motor bike.

27. PW2 testified that he was an eye-witness to the accident. He said that the Defendant's vehicle was being driven at a high speed, when it

left its side of the road, drove onto the other side of the said road and it hit the Plaintiff's motor bike.

28. It is noted that the Plaintiff had testified that the Defendant was charged with the offence of careless driving. However, the Plaintiff was not aware of the status of the traffic case.

29. But PW2 testified that the Defendant was fined, in the said traffic case.

30. PW3, George Mwita, was a clinical officer. He examined the Plaintiff, and produced evidence to prove the injuries sustained by the said Plaintiff.

31. His evidence has no bearing on liability.

32. PW4, Dr. George Onyango, is a surgeon. His evidence has no relevance to the question of liability.

33. PW5, PC Geoffrey Ndiema, testified that the case against the Defendant, for careless driving, was still pending in Court.

34. However, during cross-examination, PW5 made it clear that the decision on liability did not need to wait for a determination of the traffic case.

35. Having re-evaluated the evidence on record, I find that the accident was caused by the negligent manner in which the Defendant's vehicle was being driven. He was driving at a high speed; and he hit the Plaintiff's motor bike, which was literally off the road, on the Plaintiff's side.

36. The trial Court held that the Plaintiff was 50% liable for the accident because;

“..... the plaintiff was not supposed to be riding as he did not have a valid licence.”

37. With utmost due respect to the learned trial magistrate, there is no basis for the conclusion that the failure to have a valid driver's licence caused the accident.

38. In the case of **ELIZABETH GATHONI THUKU Vs PETER KAMAU MAINA & ANOTHER H.C.C.A. NO. 92 OF 2017 C.** Kariuki J. held thus;

“The unlicensed motorcyclist is not automatically liable simply by virtue of being without a licence, rather it lies on who acted carelessly in some way, causing the collision.”

39. As the learned Judge held, liability in a civil claim is an issue to be determined on evidence which shows the person whose actions or omissions caused the accident.

40. Therefore, whereas it amounts to a traffic offence to ride a motor cycle without a valid driver's licence, it is possible that the person who had no valid licence could have been driving so carefully that he cannot possibly be at fault for the accident.

41. The converse is also possible; that a driver who holds a valid driver's licence could be so negligent that the accident is wholly attributable to his said negligence.

42. In this case I find that the Respondent was wholly liable for the accident. There was absolutely no factual evidence that the Appellant was to blame in any way, for the accident.

43. Accordingly, there is merit in the appeal. I therefore set aside the trial Court's apportionment of liability at 50:50; and I substitute it with a finding that the Respondent was 100% liable.

44. Finally, the costs of the appeal are awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 2ND DAY OF DECEMBER 2021

FRED A. OCHIENG

JUDGE