IN THE COURT OF APPEAL AT NAIROBI

(CORAM: W. KARANJA, KORIR & ODUNGA, JJ.A.)

CIVIL APPEAL NO. 358 OF 2019

BETWEEN

DAVID KARANJA NDUNGU……APPELLANT

AND

JOSEPH KURIA NJUGUNA……1ST RESPONDENT
CHARLES NJIMU……2ND RESPONDENT
ANTHONY KARIUKI……3RD RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi ***(A. Mbogholi Msagha, J.)*** *delivered on 4th April 2019*
in
HCCC No. 454 of 2019)
****

JUDGMENT OF THE COURT

1. This is a second appeal arising from a judgment delivered by the High Court at Nairobi (A. Mbogholi Msagha, J. as he then was) on 4th April 2019 in Nairobi **H.C. Civil Appeal No. 454 of 2017** in which the learned Judge dismissed the appeal with costs to the appellant save for the finding that the 2nd and 3rd respondents were to blame for the accident to the extent of 20%. The learned Judge held that the appellant would get 80% of the total award from the 1st respondent and was at liberty to pursue the 2nd and 3rd respondents for the balance.

2. By way of background, David Karanja Ndungu, the appellant through a plaint dated 18th September 2013 instituted **Civil Case No. 7567 of 2013** against the respondents at the Chief Magistrates' Court sitting at Nairobi. In the Plaint, the appellant claimed that on 2nd April 2012 he was on-board a motor vehicle **KAU 027W** which had stopped at a bus-stage alongside Kangundo Road for passengers to alight. While there, motor vehicle registration **No. KAZ 416R** rammed into KAU 027W that was stationary. The appellant averred that as a result of the said accident he sustained severe bodily injuries and suffered loss and damage.

3. Particulars of the injuries to appellant were a fracture of the left femur, compound fracture of the left tibia and fracture of the left fibula. The appellant pleaded particulars of special damages as follows:

    a) Copy of records Kshs 1,000.00

    b) Medical report Kshs. 2,000.00

    c) Medical costs Kshs.

    633,488.00 Total Kshs.

    635,988.00

4. The appellant prayed that judgment be entered against the respondents jointly and severally for:

    a) General damages for pain suffering and loss

of amenities of life, Future medical costs, Future loss of

earnings and past loss of earnings up to September 2013 of Kshs.180,000.00

b) Special damages of Kshs.635,988.00

c) Costs of the suit and interest.

5. The 1st and 3rd respondents filed their defences denying all the particulars of negligence and the occurrence of the accident. Default judgement was entered against the 2nd respondent on 28th November 2014. The case against the 3rd respondent was withdrawn on 23rd November 2015 leaving only the claim against the 1st respondent.

6. Upon hearing the parties, the learned magistrate (L. Kassan, SPM.) entered judgment for the appellant on 24th June 2016. He entered liability at 100% in favour of the appellant as his evidence was unchallenged, general damages in the sum of Kshs.1,500,000.00, special damages in the sum of Kshs 635,988.00, future medical cost in the sum of Kshs.250,000.00, future loss of earnings in the sum of Kshs.960,000.00, and past loss of earning in the sum of Kshs.150,000.00.

7. Aggrieved by that decision, the 1st respondent filed an appeal before the High Court. The memorandum of appeal dated 24th August 2017 listed 7 grounds. Upon hearing the parties, the learned Judge

dismissed the appeal with costs to the appellant, save for the finding that the 2nd and 3rd respondents were both to blame for the accident to the extent of 20%. The learned Judge held that the appellant would get 80% of the total award from the 1st respondent and was at liberty to pursue the 2nd and 3rd respondents for the balance.

8. The decision of the High Court dated 4th April 2019 aggrieved the appellant leading to this appeal. In the memorandum of appeal dated 29th July 2019 the appellant raised 3 grounds of appeal assailing the learned Judge for holding that the appellant was only entitled to recover 80% of his award and costs from the 1st respondent; failing to appreciate the law on joint and several liability and or enforcement of judgment against concurrent/several tortfeasors and by considering an issue not raised by the parties.

9. The appellant thus prays, *inter alia,* that the impugned judgment be set aside and be substituted with a judgement in favour of the appellant against the respondents jointly and severally, regardless of their share of blame for the suit accident, and that he be awarded costs of the appeal.

10. We heard this appeal virtually on 11th December 2024. Learned counsel **Mr. Kaburu** appeared for the appellant while learned counsel **Ms. Mwangangi Nzisa** appeared for the 1st respondent. Both counsel relied on their written submissions, which they highlighted orally. The submissions by the parties are dated 28th April 2020 and 9th December 2024 respectively.

11. The appellant submitted that the appeal was against part of the decision in particular where the appellate Judge held that:

> ***"The end result is that this appeal is dismissed with costs to the 1st respondent. However, I have found that the 2nd and 3rd respondents were to blame to the extent of 20%. The 1st respondent will get 80% of the total award from the appellant and is at liberty to pursue 2nd and 3rd respondents for the balance. For avoidance of doubt the appellant shall be liable to pay 80% of the costs both in the lower court and in this appeal."***

12. Learned counsel for the appellant reiterated that the learned Judge failed to appreciate the law on joint and several liability or enforcement of judgements against joint/several/concurrent tortfeasors, and that the issue had not been raised by the parties in the appeal. It was submitted that both defendants were joint and concurrent tortfeasors who as such were each liable fully for the entire loss. Furthermore, if one defendant pays fully, he may recover from the co-defendant a proportionate share of the co- defendants' share of

blame/liability. Counsel intimated that it was

erroneous for the learned Judge to prohibit the appellant from recovering fully from either defendant and also to fail to enter a joint and several judgement. Reliance was placed on ***Zarina A. Shariff -vs- Noshir P. Sethna [1963] EA.***

13. We were urged to allow the appeal with costs to the appellant.

14. In opposing the appeal, the 1st respondent submitted that a co-defendant's notice was issued by the 1st respondent. It was contended that the appellant filed a suit against the registered owners of KAU 207W and KAZ 416R and that the plaint filed disclosed separate causes of action against both defendants in respect of torts allegedly committed by the defendants in joint capacity. It was submitted that under the particulars of negligence the appellant blamed the drivers of both motor vehicles and enumerated the particulars of negligence.

15. According to the respondent, the appeal is centred on liability of joint and several tortfeasors and that judgement can only be entered either jointly and severally against the defendants where the court finds them liable. It was contended that the trial court held 100% in favour of the appellant. Further it was submitted that the trial court was silent on the issue of apportionment of liability

against the respondents as the trial court did not state whether the finding on liability was joint and/or several.

16. Learned counsel went on to state that the learned Judge entered judgment on liability in the ratio of 20:80% as against the 2nd respondent and 3rd respondents and the 1st respondent respectively and that the Judge was very clear and specific in the apportionment of liability and that he did not enter judgement as joint and several. Reliance was placed in ***Africa Planning & Design Consultants - vs-Sololo Outlets Ltd (in receivership) & Another [2018] eKLR.***

17. It was submitted that the appellant's case should be considered as against each respondent sued and that if the appellant's case is proved against one and not the other respondent, the court will so hold and then decide which respondent the appellant has succeeded against and give judgement accordingly. Counsel emphasised that the wording of **Order 1 rule 24** of the **Civil Procedure Rules** does not make it mandatory for a court to enter judgement that is joint and/or several and that whether the court grants such a judgement depends on the circumstances of the case and the evidence presented.

18. Counsel maintained that the High Court was correct in its finding and apportionment of liability and that it was not bound

to make a

finding that was joint and/or several and in the circumstances, we are urged to dismiss the appeal with costs to the 1st respondent.

19. Before we delve into the determination of the appeal, we must remind ourselves of our mandate in a second appeal which has been enunciated in a long line of cases by this Court. See for instance ***Maina -vs- Mugiria [1983] KLR 78,*** and ***Stanley N. Muriithi & Another Vs. Bernard Munene Ithiga [2016] eKLR***,

for the holdings that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

20. We have perused the entire record of appeal, considered the rival submissions by counsel for both parties, the authorities cited and the law. We discern only one issue of law that calls for our determination in this appeal; Whether the High Court erred in apportioning liability between the 1st respondent and the 2nd and 3rd respondents in the ratio of 80:20%.

21. On the issue of liability in road traffic accidents, it has been stated time without number that the determination thereof is not a

scientific affair. Lord Reid put it more graphically in ***Stapley -vs-***

Gypsum Mines Limited ***(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."***

22. It was thus upon the appellant to discharge the burden of proof of

negligence aforesaid against the respondents. This Court in ***East***

Produce Kenya Limited -vs- Christopher Astiado Osiro [2006]

eKLR, reiterated that he who alleges negligence bears the burden

of proof. The court further quoted with approval the case of ***Kiema***

Mutuku -vs- Kenya Cargo Hauling Services Ltd [1991]

2 KAR 258 on the holding that:

> ***"There is yet no liability without fault in the legal system in Kenya and the plaintiff must prove some negligence against the defendant where the claim is based on negligence."***

23. To start with, we note from the record that the case against the 3rd respondent had been withdrawn before the trial court. The same did not, therefore get to the trial stage and there was no way the learned Judge could have purported to find liability on a person who was not a party before the trial court. The learned Judge does not appear to have noticed the said withdrawal. From the record of appeal, it is clear that the appellant's evidence was the only material available to the trial court in determining the issue of liability in respect of the accident and as rightly noted by the trial court the defence did not call any witnesses. The trial court, however, noted that default judgement was entered against the 1st and 2nd respondents.

24. We have reviewed the appellant's evidence before the trial court and we are satisfied that on a balance of probabilities the appellant established negligence against the 1st and 2nd respondents. Additionally, we are of the view that there was no legal or evidential basis to justify the High Court's apportionment of liability against the 2nd respondent and 3rd respondent's as the trial court had initially entered default judgement against the 2nd respondent on 28th November 2014. There was no case against the 3rd respondent as the appellant had withdrawn the case against him on 23rd November 2015. With respect the learned Judge thus erred in

holding that the 2nd and 3rd respondents were liable for the accident at 20% while the 1st respondent was liable for the accident at 80%.

25. In our view the judgement of the trial court was very clear that both the 1st and 2nd respondents were 100% liable for the accident. In this case there were specific acts of negligence pleaded by both the appellant and 1st respondent in their pleading and the onus was on them to prove those allegations on a balance of probabilities. Taking into account the foregoing, we concur with the following findings by the trial court: -

> ***"The defence did not call any witness. The court will take the evidence of the plaintiff. He produced all documents to support the accident including police abstract. Witness documents were not opposed by the defence. The defence did not call any witness to deny that the accident occurred. On liability I find that the plaintiff's testimony is unchallenged. I hold liability at 100% in favour of the plaintiff. Default judgement was entered against 2 defendants."***

26. The 1st respondent submitted that the trial court erred as it failed to indicate whether liability was joint and/or several and applauded the High Court for apportioning liability in the ratio of 80:20 % against the 1st respondent and 2nd and 3rd respondents.

27. We agree that in the judgment the trial court did not indicate if the judgment was jointly and severally against the respondents.

We have noted, however, that in the decree extracted from the

judgment dated 14th June 2016, the court clearly indicated that the judgment was "joint and several". The decree, therefore, cured the oversight in the main judgment.

28. We note that the appeal did not challenge the apportionment of liability as between the defendants themselves, but against the appellant on the one hand and the 1st and 2nd respondents before the High Court on the other. We observe that the learned Judge fell into error when he assigned liability to the 3rd respondent, who was neither a party before the trial court, nor before the High Court. The learned Judge, therefore, granted orders that had not been sought in the appeal before him.

29. The question of joint and several liability has been discussed by superior courts in many decisions. In ***Zarina Akbarali Shariff and Another -vs- Noshir Pirosesha Sethna and Others [1963] EA 239,*** the predecessor to this Court (Per *Sir Ronald Sinclair, P.*) citing ***Halsbury's Laws of England 3rd Edn. Vol. 37 P136 Para 245; Glanville Williams on Joint Torts and Contributory Negligence 1st Edn. P3 Para 1; Dingle -vs- Associated Newspapers Ltd [1961] 1 All ER 897; Drinkwater -vs- Kimber [1952] 1 All ER 701 at 705; James Ngaya -vs- Beers [1961] EA***

390 addressed the question of joint and several liability in the following terms:

The findings of a trial Judge as to degrees of blame to be attributed to two or more tortfeasors involves an individual choice or discretion and will not be interfered with on appeal save in exceptional circumstances…If each of the several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the whole damage. If each of several persons commits an independent tort consecutively against the same person, each is liable for the damage caused by his tortuous act, assuming the damage proximately caused by each tort is distinct. Concurrent tortfeasors are, unlike other tortfeasors, liable in full for the damage done by all, and it does not matter whether the concurrence is joint or merely several. Several concurrent tortfeasors are independent tortfeasors whose acts concur to produce a single damage. The damnum is single, but each commits a separate injuria."

30. The position is for the reason that injuries suffered by the appellant

were in a collision involving two vehicles arising from the

concurrent negligence of each of the drivers, and for which the two

drivers will be jointly and severally liable. In the circumstances, the

1st and 2nd respondents were joint tortfeasors and were jointly and

severally liable and the appellant is at liberty to recover the

damages awarded from all of them or only one of them.

31. In the circumstances, we find this appeal with merit and we

allow it to the extent that the judgment dated 4th April, 2019 is

set aside in its entirety. The decree issued by the trial court dated 14th June 2016 be executed jointly and or severally as ordered by the trial

court. We note that the learned Judge dismissed the appeal against quantum and so the appeal succeeded only in part. Accordingly, the order that commends itself to us on the question of costs is that each party bears its own costs of this appeal and before the High Court.

Dated and delivered at Nairobi this 3rd day of October 2025.

W. KARANJA

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.