Bhandari t/a Chetambe Jaggery v Juma (Civil Appeal 246 of 2019)
[2025] KECA 1441 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KECA 1441 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 246 OF 2019

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

JULY 31, 2025

BETWEEN

KASHORE BHANDARI T/A CHETAMBE JAGGERY ..... APPELLANT

AND

SAMSON NAMASAKA JUMA ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Kakamega (W. Musyoka, J.) dated 31st January 2019 in HCCA No. 12 of 2012)

JUDGMENT

1. This is a second appeal arising from the judgment and decree of the High Court, (W. Musyoka, J,) dated the 31st January, 2019, dismissing the appellants' appeal against the judgment and decree of the trial court in favour of the respondent in Butali SRMCC No. 116 of 2009, dated 19th December, 2011.

2. The brief background to the appeal is that an accident involving the appellants' lorry and Samson Namasaka (the respondent) occurred on 19th December 2012. The respondent was cycling along the Kakamega-Webuye road when the appellant's motor vehicle Registration No. KYE 309, knocked him, resulting in injuries, for which he blamed it on the negligence of the appellant. The respondent thus sued the appellant as the owner of the said motor vehicle, claiming general and special damages

3. The appellant filed a defence, denying the occurrence of the said accident; and alleging that if the accident occurred, then it was not caused by any negligence on its part, his servants, or agents. Instead, the appellant contended that he only became aware of the alleged accident after the police informed him about its occurrence, and required his driver to record a statement. On cross-examination, the driver confirmed that the said motor vehicle was not inspected and that he had never been charged with a traffic offence with regard to the alleged accident.

4. The suit proceeded for hearing, resulting in the judgment of the trial court dated 19th December, 2011, assessing liability at 100% in favour of the respondent, general damages at Kshs.400,000/- and special damages of Kshs.5,250/- were also awarded.

5. Aggrieved by that judgment on liability, the appellants filed an appeal being Kakamega HCCA No. 12 of 2012 against the judgment and decree of the trial court, raising four (4) grounds thereof, to wit that; there was no evidence to warrant a finding that the appellant was to blame for the accident; the evidence on record absolved the appellant from liability; the case was not proved to the required standards; and, that his submissions on causation was not considered.

6. The High Court upon re-assessing and re-analyzing the record upheld the trial court's judgment and dismissed the appeal with costs to the respondent.

7. Undeterred, the appellant filed this appeal relying on the grounds that:

    i. The learned judge erred in law and fact in assessing evidence, applying the law and considering the appellant's submissions in his judgment hence delivering a judgment against the weight of Evidence and the appellant's submissions.

    ii. That the learned judge erred in law in shifting the burden of proof for the causation of the accident in issue to the appellant.

    iii. That the learned judge erred on law in holding that the respondent had proved his case on a balance of probability when there was no sufficient evidence; and contradictory evidence on how the accident in issue occurred, hence falling into error.

    iv. The learned trial judge erred in law in upholding the judgment of the lower court on causation of the accident in issue when in fact there was no independent and corroborative evidence that it is indeed the appellant's motor vehicle which caused the accident in issue.

    v. The learned judge erred in law in considering hearsay evidence of the respondent witness in holding the appellant liable for the accident in issue.

8. In support of the appeal, the appellant contends that in his pleadings, the respondent never raised the issue of vicarious liability as alleged. That in the absence of such pleadings, it will be incompetent to hold the appellant liable.

9. Regarding liability, the appellant submits that in his evidence, the respondent told the court that while he was cycling from Kakamega to Webuye, he was hit from behind by a lorry. He stated that he did not see the registration number of the lorry that hit him, but a witness named Michael Wasike provided him with the lorry's registration details. The respondent blamed the driver of the appellant's lorry but failed to specify any particulars of the negligence alleged in the plaint.

10. PC Mudasika, a traffic officer from Kabras Police Station who testified for the respondent stated that they received a phone call from a good Samaritan informing them of the alleged accident. He compiled a case file and issued the victim with a P3 form and a police abstract. The accident was investigated by PC Maningo and the case file was still pending under investigation as at the time of his testimony. On being cross-examined, he admitted that the name of the informer did not appear on the abstract nor was he a witness; and that he did not have the police file but only came to court to produce the abstract.

11. It is further submitted that in their evidence, the appellant called Nelson Zakayo, the driver of the lorry who stated that on the said date, he passed the accident scene twice carrying cane; finished work at 4:06 pm and went home. He only learnt about the alleged accident a month later when his colleagues

informed him that he was required by the police from Malava Police Station. Nelson volunteered and went to the station and recorded his statement. He further stated that he was never charged with any traffic offence and that the lorry was neither impounded for inspection nor was any action taken.

12. The appellant submits that despite alleging that there were eye witnesses to the accident, none of them was called to give evidence on what transpired and the identity of the accident vehicle. In this regard we are invited to consider the case of Mumbi M'Nabea vs. David M Wachira [2016] eKLR where the court stated that in civil liability claims the standard of proof is that of the balance of probabilities, hence the court will assess both oral, documentary and real evidence advanced by each party; and decide which case is more probable.

13. Referring to the case of Eastern Produce [K] Ltd vs. Christopher Atialo Osir [2005] eKLR which held that the standard of proof lies with the person alleging negligence and some form of negligence must be proved against the defendant, the appellant maintains that all that his servant was required to show; and which he did was that he was not at the scene of the accident at 6:00 pm, therefore he could not have caused the accident in issue. Regarding the doctrine of res ipsa loquitur, it is submitted that although, the doctrine was pleaded, it was not substantiated in evidence.

14. In rebuttal, the respondent submitted that in his evidence, Nelson Sakaya, DW1, admitted being an employee of the appellant and that on the material day, he was carrying cane to his employer's factory. Nelson further admitted that the accident vehicle registration number KYE 309 belonged to the appellant, which admission formed the basis of the fact that the appellant's vehicle was at fault for causing the accident. Having so admitted, the trial court found the appellant vicariously liable for the acts of his employee in causing the accident in question.

15. It is submitted that the facts of the accident were confirmed by an eyewitness Michael Wekesa Juma, who saw the appellant's lorry hit the respondent from behind; that this information was reported at Kabras Traffic Station and a police abstract confirming the occurrence of the accident was produced as evidence.

16. Relying on the case of Peter Njuguna vs Francis Njuguna Njoroge [2015] eKLR, the respondent argues that he could not, in any practical way, have seen the appellant's lorry registration number KYE 309 hit him from behind while cycling. It was only an eye witness who could have seen the accident happening, as such it was incumbent upon the appellant to rebutt the evidence rather than the mere denials.

17. Being a second appeal, this Court's duty is confined to consideration of matters of law only. However, the Court may consider matters of fact where it is shown that the two courts below considered matters, they should not have considered or failed to consider matters they should have considered, or that looking at the entire decision, it is perverse. For this proposition, see Kenya Breweries Limited vs. Godfrey Odoyo [2010] eKLR.

18. Having carefully considered the record in the light of the rival submissions set out above and the principles of law relied upon by the respective parties, in this appeal, it is clear that the determination of the appeal revolves around the question of liability.

19. Black's Law Dictionary, 8th Edition, defines liability as the quality or state of being legally obligated or accountable, or the legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.

20. Did the respondent prove that the appellant was liable for the accident? 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.

21. This refers to the legal burden of proof. The evidential burden of proof which is captured in Sections 109 and 112 of the *Evidence Act* provides as follows:

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
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> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

22. The two provisions were dealt with in the decision of Anne Wambui Ndiritu (Suing as *Administrator of the Estate of George Ndiritu Kariamburi -Deceased) vs. Joseph Kiprono Ropkoi & Four by Four Safaris Company Ltd (Civil Appeal 345 of 2000*) [2004] KECA 65 (KLR) (10 December 2004) (Judgment), in which this Court held as follows:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however, the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

23. It follows that the general rule is that the initial burden of proof lies on the plaintiff, being the respondents in this appeal, but the same may shift to the appellant depending on the circumstances of the case. In the instant appeal, the respondent told the court that he was hit from behind while cycling along the Kakamega- Webuye road; he lost consciousness after the accident and was taken to the hospital. The respondent maintained that he had seen the lorry while cycling, but admitted that he did not see the number plate of the lorry before the accident; rather, it was an eyewitness who identified it. In his determination, the learned judge stated as follows;

> " The respondent herein did not adduce any evidence to impute negligence on the part of the appellant. However, it should be noted that the respondent stated that he was hit from behind. It is on this basis that the trial court held the appellant wholly liable for the accident. The appellant's witness did not in his testimony give any account of how the accident occurred. He denied that the same occurred, that he had no knowledge that he had run over the respondent.
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> ...
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> The courts (sic) seem to hold the view that in the circumstances it would have been difficult for a party that has been knocked down from behind to see the circumstances that led to the accident and the failure to do so is not fatal to his case. From the foregoing it is my finding that the fact that the appellants' motor vehicle hit the respondent from behind was sufficient proof of his negligence. Further, his claim that he did not see him implies negligence on his part."

24. Despite the learned judge's finding, it is evident from the record that the respondent did not identify the vehicle that knocked him from behind. The informer who allegedly witnessed the accident and gave out the appellant's lorry as the one which hit the respondent was not called as a witness, the police confirmed that the matter was pending investigation, and further that no police file was produced in evidence.

25. In Michael Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR the Court stated that

> "The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows;
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> '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...'"

26. The burden was upon the respondent to prove that the accident was caused by the negligence of the appellant's driver. However, it is evident that none of the three witnesses who testified saw how the accident occurred. The respondent attributed blame to the driver of the subject vehicle who, it was claimed veered off the road and hit the respondent. The respondent relied on the evidence of PC Mudasika. Apart from the fact that PC Mudasika who was not an eye witness, he did not have a police file and admitted that the traffic case was still pending under investigation.

27. In Mary Wambui Kabugu vs. Kenya Bus Services Limited 1997) KECA 402 (KLR) Bosire, JA, stated as follows:

> "The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she looked for her husband who had not been seen for three days and found him admitted at Kenyatta National Hospital with multiple injuries and in critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the appellant did not on a balance of probabilities prove her case. On that ground alone, I would dismiss the appeal."

28. The appellant in his pleadings had given particulars of the negligence of the respondent and or his agents as follows:

> Driving at a speed which was too excessive in the circumstances; driving without due care and/or attention at all and hitting the plaintiff; failing to slow down, brake, stop, swerve in any other manner control the vehicle to avoid the accident; driving and/or allowing a defective motor vehicle on the road, failing to heed the presence of the plaintiff at all and failing to apply brakes at all or hoot; hitting the plaintiff on the pedestrian path and failing to properly and securely steer the vehicle; res ipsa loquitur as defendant's negligence and failing to abide by the Highway Code and Traffic Rules.

29. The respondent did not adduce any evidence in support of any of the particulars of negligence pleaded against the appellant. To the contrary, there was no evidence that the subject vehicle was defective and was being driven at an excessive speed or that it was being driven by an incompetent driver. The burden of proof lay and remained throughout with the respondent to prove negligence on the part of the appellant, as it was the respondent asserting that fact and therefore having the duty to prove the appellant's liability.

30. At the risk of sounding too repetitive, the evidence on record is that the accident happened when the subject vehicle hit the respondent from behind; and that the respondent did not identify the lorry. Further, no eye witness to the accident was called, while the police officer admitted that the case was still pending under investigation. In light of the above, the respondent failed to discharge the burden of establishing the causation of the accident and the negligence he alleged against the appellant. In the circumstances, the trial court and the learned Judge erred in fact and law in finding the appellant liable. The two courts below, unfairly shifted the burden of proof on to the appellant (who was the respondent at the trial), yet the respondent had not established on a balance of probability, that it as the appellant's motor vehicle that hit him.

31. Consequently, we allow the appeal and set aside the judgment and decree of the High Court in its entirety. We award costs of the appeal to the appellant.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JULY, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR