Shikuku v Musyoki & another (Civil Appeal 317 of 2019)
[2024] KECA 1460 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1460 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 317 OF 2019

DK MUSINGA, S OLE KANTAI & JM MATIVO, JJA

OCTOBER 25, 2024

BETWEEN

MARTIN SHIKUKU ..... APPELLANT

AND

JOSPHAT MULEI MUSYOKI ..... 1ST RESPONDENT

JOSEPH MATATA KYENZI ..... 2ND RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court at Nairobi (C.W. Githua, J.) delivered on 29th April, 2019 in H.C. Civil Appeal No. 144 of 2014)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Nairobi (Githua, J.) delivered on 29th April, 2019 where the Judge allowed the appeal. The matter had commenced at the Chief Magistrates' Court, Nairobi, where the appellant, Martin Shikuku, had sued the respondents, Josphat Mulei Musyoki and Joseph Matata Kyenzi, as a result of a traffic road accident that had occurred along Kiserian road on 27th March, 2010 where it was alleged that the appellant had been seriously injured. The magistrate found the respondents fully liable for the accident and awarded damages to the appellant.

2. Our mandate in a second appeal like this one is found in *Civil Procedure Act* and in various case law.

3. Section 71A of the said Act provides:

> "(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court from a decree passed by a subordinate court of the first class on an appeal from a subordinate court of the third class, on a question of law only.

2. An appeal under this section shall be final."

Section 72 on second appeal from the High Court provides:

(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely-

a. the decision being contrary to law or to some usage having the force of law;

b. the decision having failed to determine some material issue of law or usage having the force of law;

c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed ex parte."

4. This Court, considering a second appeal from the High Court in Charles Kipkoech Leting vs. Express (K) Ltd & Another 2018] eKLR stated:

5. This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo,

6. Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia 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. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

7. The appellant averred in the plaint that on 27th March, 2010 he was lawfully walking along the verge of and off the Kiserian road near Total Petrol station when the 2nd respondent, as a driver and agent of the 1st respondent, so negligently drove, managed or controlled the motor vehicle registration mark KBG 780 V that he caused the same to collide with him. Various particulars of negligence were set out, including that the 2nd respondent drove the said motor vehicle at a speed that was excessive, and failure to exercise or maintain sufficient control of the said motor vehicle that he caused the accident. Particulars of injuries were also set out in the plaint, and it was alleged that the appellant, a carpenter, used to earn Ksh.500 daily, which sum he lost and could no longer earn due to the injuries he had suffered. It was prayed that he be awarded special and general damages.

8. In a witness statement attached to the plaint the appellant restated how the accident had occurred; a report was made at Ngong Police Station where he was issued with a P3 Form and a Police Abstract Report; he was later seen by two doctors who had certified the injuries he had suffered.

9. The respondent filed a defence where the circumstances of the accident as given by the appellant in his plaint were denied. It was alleged, without prejudice, that the appellant was wholly or substantially to blame for the accident due to the negligent manner he had conducted himself, and various particulars of negligence were set out.

10. A reply to the defence reiterated the contents of the plaint.

11. Amongst the documents produced and agreed upon by both sides were 3 medical reports, treatment notes from Kenyatta National Hospital and 2 Police Abstract Reports and several receipts

12. Evidence was taken by the magistrate from Dr. Wokabi (PW1), who testified on injuries suffered by the appellant in the accident.

13. The appellant (PW2) adopted his witness statement. On how the accident occurred, he stated that he was walking on the pavement when a motor vehicle hit him from behind; that he was walking off the tarmac road; that the vehicle hit him and flung him to a stationary lorry which was parked off the road ahead of him. He further testified that he had been a carpenter but could no longer engage in that trade; he earned Kshs.500 per day from that occupation.

14. Challenged in cross examination he said:

> "I was walking on the left side of the road heading home from making an inquiry at a hardware shop.
>
> A vehicle hit me from behind. I never had a chance to look behind before it hit me. At Kiserian there are no pavements but besides the road there is a place for pedestrian ..."

And later:

> Where the vehicle hit me from was outside the tarmac road for vehicles."

15. The appellant's case was then closed and the respondents told the court that they were not calling any witness.

16. The magistrate in the judgment dated 28th March, 2014 found the respondents 100% liable for the accident and awarded the appellant Ksh.1,200,000 general damages for pain and suffering, Ksh.449,280 for loss of earning capacity, Ksh.37,154 for special damages, and Ksh.84,000 for loss of earnings plus costs and interest.

17. That judgment was set aside by the Judge on first appeal, and that is what provoked this second appeal.

18. The appellant in his Memorandum of Appeal drawn by M/s Obaga & Company Advocates where 11 grounds of appeal are set out states that the decision by the High Court is "perverse"; that the Judge failed to appreciate that the doctrine of res ipsa loquitur applied in the case; that the Judge erred in failing to appreciate the standard of proof required in civil cases; that the Judge did not adequately evaluate the evidence tendered before the magistrate; that the Judge erred in law in failing to appreciate that the 2 Police Abstract Reports corroborated each other and corroborated the appellant's evidence on the negligence of the 2nd respondent and the contents of the said reports was not challenged; that the Judge did not carry out her mandate as required in a first appeal and, finally; that the Judge failed

to appreciate the overriding objective of the courts. We were asked to set aside the said judgment and reinstate the judgment of the trial court.

19. When the appeal came up for hearing before us on 18th July, 2024, learned counsel Miss Obaga appeared for the appellant while learned counsel Miss Ndirangu appeared for the respondents. Both sides had filed written submission, and in a highlight, counsel for the appellant submitted that the appellant was at the scene of accident and testified on its occurrence; that from the impact the motor vehicle must have been driven at an excessive speed; and that the evidence was not challenged. Further, that the police officer who visited the scene blamed the 2nd respondent for the occurrence of the accident, as recorded in the Police Abstract Report. According to counsel, motor vehicles do not ordinarily veer off the road to hit pedestrians; that per se was evidence of negligence.

20. In their written submission, the respondents state that the doctrine res ipso loquitur is not a principle of law; that the High Court correctly found that the appellant's evidence before the trial court was insufficient to prove causation. They refer to section 109 *Evidence Act* to support the submission that he who alleges has the duty to prove. They cite Peter Kanithi Kamunya vs. Aden Guyo Haro [2014] eKLR for the proposition that a Police Abstract Report is not proof of occurrence of an accident but of the fact that following occurrence thereof the accident was reported at a police station.

21. We have considered the whole record, the submissions made and the law, and this is how we determine this appeal.

22. The case for the appellant was that he was walking beside the main Kiserian tarmac road when the respondents' motor vehicle veered off the road and hit him from behind. He suffered such serious injuries that he had to be admitted at Kenyatta Hospital for about 1 month. Those injuries as detailed in 3 medical reports of Dr. Wokabi, Dr. Wangata and Dr. Wambugu comprised fractures of the left tibia and fibula, fractures of right fibula, degloving injury of left thigh, amongst other injuries.

23. The trial magistrate found on causation and on the issue of negligence as follows:

> "He [the appellant] said he was knocked from behind while walking on the pavement besides the Kiserian road on his way home on the material date. He said the 2nd Defendant never hooted and that from the impact he felt on his body when hit, the vehicle must have been coming so fast from behind him because he ended up with fracture(s) on both legs."

24. The magistrate believed the appellant's testimony that the motor vehicle left its correct path and veered off the road when it was still day time and hit the appellant from behind.

25. The Judge on first appeal, without any contrary evidence, found that the appellant did not prove that the 2nd respondent negligently caused the accident by carelessly driving the 1st respondent's motor vehicle. She found that negligence as pleaded in the plaint must be proved by cogent and credible evidence to the standard required by law. The Judge found that the appellant had not proved liability. With due respect to the Judge, we disagree.

26. The appellant testified how the accident occurred when the respondents' motor vehicle veered off the road and hit him. The respondents did not place any evidence before the trial court as to how the accident occurred. The evidence by the appellant that the motor vehicle left its path and hit him off the road on the pedestrian walk-way was unchallenged. Although it is true that he who alleges must prove, that standard in civil cases is on a balance of probabilities. That standard of probabilities was reached in the instant case where there was unchallenged evidence that the motor vehicle veered off the road, and that the appellant who was walking on the pedestrian path was seriously injured in the accident. Requiring the appellant to adduce further or corroborative evidence was to place the standard too high,

higher than he was required to do. We agree with the appellant's submission that motor vehicles do not in ordinary circumstances veer off the road to injure a pedestrian walking on a road pavement. It is only through negligence that the driver of such a motor vehicle would have done so, and therefore he must meet the consequences of such action.

27. The trial magistrate was right to find that the 2nd respondent drove and managed the motor vehicle so negligently that it left the road, hit the appellant and injured him seriously. We think, in the circumstances, that the Judge considered matters she should not have considered or ignored matters she should have considered.

28. This appeal has merit and we allow it. We hereby set aside the judgment of the High Court in Civil Appeal No. 144 of 2014 and substitute it by reinstating the judgment of the Chief Magistrates' Court Civil Case No. 6813 of 2010 (Milimani). The appellant will have costs of this appeal as well as costs of the proceedings in the courts below.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

D. K. MUSINGA, (P.)

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR