Cherotich v Cosmos Car Ltd & another (Civil Appeal E49 of 2022)
[2025] KEHC 1371 (KLR) (26 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1371 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CIVIL APPEAL E49 OF 2022

JR KARANJA, J

FEBRUARY 26, 2025

BETWEEN

YVONNE CHEROTICH ..... APPLICANT

AND

COSMOS CAR LTD ..... 1ST RESPONDENT

AMOS KOECH ..... 2ND RESPONDENT

JUDGMENT

1. This appeal is against the judgement of the Senior Resident Magistrate at Kericho in CMCC No. 14 of 2020 delivered on 26th July, 2022. The Appellant, Yvonne Cherotich was the Plaintiff in the case while Cosmos Cars Ltd and Amos Koech were the Defendants respectively.

   The Memorandum of Appeal dated 17th August, 2022 contains the two grounds of appeal viz

   (1) That, the Honourable Learned Magistrate erred in law and fact in holding that the Respondents were 90% liable and the Appellant 10% liable in total disregard of the evidence.

   (2) That, the honorable court erred in law and in fact in failing to consider the evidence adduced by the Appellant on liability

2. These grounds clearly suggest that the appeal is essentially on the question of liability. Therefore, the Appellant prays for the judgement of the Trial Court in that regard be set aside with costs being borne by the Respondents. In his statement of claim dated 11th September, 2020, the Appellant pleaded that on the 10th June, 2020, she was travelling in motor vehicle registration number KCV 701Y belonging to the first Defendant as the legal owner and driven at the time by the second Defendant/ Respondent when along the Kericho-Kisumu road at Kailui area the vehicle was so negligently driven, controlled and/or managed that it rolled severally thereby causing the Plaintiff to suffer very serious bodily injuries.

3. The Appellant blamed the Respondents for the accident and prayed for general damages and special damages in the sum of Ksh. 10,800/= together with costs and interest.

   At the trial, the Appellant (PW4) testified and called three witnesses including a medical doctor, DR. Obed Omuyoma (PW1), a police officer, PC Ismael Bashir (PW2) and a health record and information officer Moraa Dorothy (PW3).

4. The Respondents denied the claim and indicated as much in their statement of defence dated 24th November, 2020, in which they contended that if the accident occurred, that it was solely and/or substantially contributed to by the negligence of the Plaintiff as duly particularized.

   The Respondents therefore prayed for the dismissal of the suit with costs. They however, did not lead any evidence in support or proof of their pleadings.

5. The Trial Court considered the evidence availed by the Plaintiff/Appellant and concluded on the issue of liability that the same be shared between the Appellant/Plaintiff and the Respondents/Defendant at the ratio of 10%:90% respectively. In so concluding, the Trial court rendered itself thus: -

   > "It is not disputed that a self-involving accident involving the motor vehicle registration number KCV 701Y occurred on 10th June, 2020 along Kericho Kisumu road at Kailui area. It is also not disputed that the Plaintiff was a passenger in the said motor vehicle and was injured as a result of the said accident. Also the ownership of the motor vehicle as proved by the Plaintiff is not disputed in any way.
   >
   > Considering the testimonies of the plaintiff's witnesses particularly the plaintiff (PW4) in cross- examination and the policeman (PW2) in examination in chief and in cross-examination from my view of evidence on record I find that the Defendants in this case were negligent and should bear the larger liability for this accident. This finding is based on the reasons that the accident was self-involving accident the Plaintiff who was just a passenger had no say in the manner the motor vehicle was contralled, the driver of the motor vehicle failed to appreciate the weather conditions and the skills of the road and failed to exercise the nature of a reasonable and competent driver expected considering the prevailing circumstances".

6. The Trial Court stated further that: -

   > "All in all though PW2 testified that the accident was beyond the control of the driver as the same was occasioned by bad weather considering the circumstances obtaining here, liability is entered in the ratio of 10%:90% in favour of the Plaintiff."

   The award of damages that followed was gauged on the aforementioned ratio of liability which placed the Appellants contributary negligence at 10%. This was the bone of contention in this appeal and being a first appeal, the duty of this court was to revisit the evidence and draw its own conclusions bearing in mind that the Trial Court had the advantage of seeing and hearing the witnesses (see, section 78 of the *Civil Procedure Act* and Selle Vs Associated Motor Boat Co. Ltd (1968) EA 123].

7. As noted hereinabove, this is an appeal with a bias on the issue of liability as such the question of quantum of damages does not come into focus. However, the success of the appeal would invariably alter the award made by the Trial Court in favour of the Plaintiff/Appellant towards an upward, trajectory.

   Having revisited the evidence as presented by the Appellant only, it was notable to this court that the failure by the Defendant/Respondents to lead any evidence rendered the Appellants case undisputed

and/or unproved thereby implying that the Respondents were 100% liable for causing the material accident in which the Appellant was entitled to loss and damages for the injuries suffered.

8. In any event, the occurrence of the accident and the ownership and the ill-fated vehicle were factors which were not even disputed or substantially disputed from the beginning. The basics issue for determination before the Trial Court was actually whether the Defendants/Respondents were responsible, hence liable for the consequences of their negligent acts and/or omissions and to what extent or degree.

9. The answer to the question as laid bare by the uncontroverted evidence of the Appellant/Plaintiff was in the affirmative to the extent of full liability or 100% liability against the Respondent. There was no room for the Appellant to shoulder any responsibility for the accident and if there was any, then it was 0% or nil liability.

10. The impugned judgment in the manner of putting blame on the Appellant for the accident at the ration of 10% was therefore erroneous as it was neither borne of nor supported by any evidence from the Respondents. This was a finding which was completely against the weight of the evidence.

    Ultimately, it is the finding of this court that the Respondents were jointly and severally liable to the Appellant at 100% for the loss and damage suffered by the Appellant as a result of the accident involving their public service vehicle.

11. In sum, this appeal is well merited and is allowed to the extent that the finding of the Trial Court on liability and the accruing judgment in respect thereof is hereby quashed and set aside and substituted for a judgement on liability in favour of the Appellant against the Respondents at 100%.

    The Appellant shall have the costs of the appeal.

12. Ordered accordingly.

J.R. KARANJAH

JUDGE.

DATED AND DELIVERED THIS 26TH DAY OF FEBRUARY, 2025.