China Henan International Co-operation v Brian & 2 others (Civil Appeal E099 of 2023) [2025] KEHC 1753 (KLR) (25 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1753 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E099 OF 2023

DKN MAGARE, J

FEBRUARY 25, 2025

BETWEEN

CHINA HENAN INTERNATIONAL CO-OPERATION ..... APPELLANT

AND

OETA NYAMANYA BRIAN ..... 1ST RESPONDENT

DENNIS OBWOCHA AMWATA ..... 2ND RESPONDENT

WILFRED OTUNDO AMWATA ..... 3RD RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. C.A. Ogweno (SRM) dated 1.8.2023 arising from Kisii CMCC No. 13 of 2020.

2. The Plaint dated 9.1.2020 claimed damages for an accident on 29.4.2019 involving the Appellant's motorcycle Registration No. KHMA 670M/XD 133- Drum Roller and the 1st Respondent aboard motor vehicle Registration No. KBZ 142Y along Kisii-Migori road when at PAG area the Appellant's driver or agent had dangerously parked motorcycle Registration No. KHMA 670M/XD 133- Drum Roller without warning causing motor vehicle Registration No. KBZ 142Y to ram into motorcycle Registration No. KHMA 670M/XD 133- Drum Roller hence the accident.

3. The 1st Respondent set forth particulars of negligence for the accident motor cycle and pleaded Ksh. 14,100/= as special damages as well as general damages. The injuries were also pleaded as follows:

    a. Bruises to the anterior chest wall

    b. Chest contusion

    c. Blunt trauma to the back

    d. Lumber disc herniation

e. Chest injury

f. Bruises to the leg

4. The Appellant entered appearance and filed defence denying the particulars of negligence and injuries pleaded in the plaint. The Appellant sought and obtained leave and joined the second and third Respondents as registered owners of motor vehicle Registration No. KBZ 142Y, who were also sued as defendants.

5. The lower court heard the parties and proceeded to render the impugned judgement in which the Court found 90:10 liability against the Appellant and awarded Ksh. 250,000/- in general damages and special damages of Ksh. 5,100/-.

6. Aggrieved by the lower court's finding, the Appellant lodged the Memorandum of Appeal dated 14.8.2023 hence this appeal. The memorandum of appeal is concise, devoid of verbosity, repetition, or empty rhetoric. Increasingly, such precise memoranda of appeal are dwindling and probably growing unpopular despite the expectations of the law. This memorandum of appeal bespeaks only a singular issue of liability.

Evidence

7. During the hearing, PW1 was the 1st Respondent. He relied on his witness statement and documents filed in court. He testified that he was travelling aboard motor vehicle registration No. KBZ 142Y when at KAG area along Kisii – Migori road, they rammed into a stationary motorcycle Registration No. KHMA 670M/XD 133- Drum Roller parked on the road without warning signs. He blamed the Appellant's agent for negligently leaving the drum roller on the road.

8. On cross examination, it was his case that the road was under construction and the accident occurred at around midnight when it was raining. The drum roller was parked in the middle of the road. The driver of KBZ 142Y died as a result of the injuries.

9. On liability, No. 87122 Cpl. Inter Saoke was the police officer. He testified on behalf of PC Munyoki who was transferred to Thika. He produced the police abstract. According to him, the accident occurred at 0055 hrs. It involved the Plaintiff and one Ronald Shem Osingi. The plaintiff sustained injuries and Ronald Shem Osingi died. On cross examination, it was his case that the drum roller had been parked on the road. He could not confirm whether any charges had been preferred.

10. DW1 was Albanus Kioko. He adopted his witness statement dated 30.4.2019 and also produced his two documents filed. It was his testimony that the roller was parked by the road side and not in middle of the road. That there were other vehicles also parked as the road was under construction. They had placed reflectors to alert the road users.

11. On cross examination, it was his case that he was not present and did not know how the accident occurred. He contradicted himself that he had not placed any warning signs on the road. In his witness statement, he stated that he parked the roller on 18.4.2019 on instructions by his supervisor after which he handed over the key to the supervisor.

Submissions

12. The Appellant filed submissions dated 18.12.2024. It was submitted that the driver of KBZ 142Y was the one who rammed into the drum roller and ought to have shelved all or substantial liability. Reliance was placed on the case of Kago v Njenga Civil Appeal No. 1 of 1979 to submit that the Appellant had avoided liability by showing that there was no negligence on their part. Based on this authority, it was

also submitted that the doctrine of res ipsa loquitor did not apply to the circumstances of the accident. He was only called on 30.4.2023 by his foreman to go and record a statement.

13. The Appellant also relied on Isabella Wanjiru Karangu v Washingtion Malele (1983) KLR 142 to submit that the lower court relied on wrong principle and improperly exercised discretion in the finding liability and the same should be interfered with.

14. The Respondent also filed submissions dated 30.12.2024. It was submitted that the 1st Respondent was a passenger in KBZ 142Y and testified that the drum roller was packed in the middle of the road. The Appellant relied on Njuguna Njoroge v Peter Kihiu Mucheru (2019) eKLR to submit that the drum roller was left packed on the road without any warning signs, even leaves or twigs that would have served as precautionary measure.

Analysis

15. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of Peters vs Sunday Post Limited [1958] EA 424 , the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

16. The court must bear in mind that it neither heard nor saw the witnesses. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

17. The Appellant urged me to find that the lower court erred in finding 90% liability against the Appellant. They propose that the judgment of the trial court be set aside. On the other hand, the 1st Respondent's case is that the judgment of the lower court was correct on both quantum and liability and should not be disturbed.

18. The question before me is whether the lower court erred in finding on a balance of probabilities, that the Appellant was 90% liable for the accident. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " 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."

19. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

20. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

21. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

22. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> > " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
> >
> > This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...

are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

23. The Appellant's case is that the driver of KBZ 142Y was negligent for failure to see and avoid the drum roller that was well parked on the side of the road. DW1 testified that he was not with the drum roller at the time of the accident. He was only informed on 30.4.2019 about the accident after he had parked the drum roller on 18.4.2019.

24. The 1st Respondent's on the other hand was that the drum roller was parked in the middle of the road without any warning. The accident occurred at around midnight. This evidence was corroborated by PW3.

25. DW1 was not with the drum roller and was not at the scene of the accident at the time of the accident. There was no evidence that any person, or agent of the Appellant was with the drum roller. The drum roller was left on the road alone. There was also reliable evidence that the drum roller was left without any warning signs. The deceased was driving KBZ 142Y and rammed into the drum roller. It was at around midnight and it must have been dark but as the deceased was driving on the road, no doubt he had lights on. There was no such contrary evidence.

26. The basis for which the lower court apportioned liability was that the deceased could have been driving at a high speed in the circumstances. I find no basis to interfere with the discretion of the lower court. A motor vehicle cannot be parked on the road and left, without any warning signs. There was no record produced of whom the drum roller was assigned to after 18.4.2019, which confirmed the 1st Respondent's case that it was dangerously left on the road without any due care to other road users.

27. Whereas the 1st Respondent had a duty to prove that the Appellant and its agents were to blame, he had no duty to prove that the driver of KBZ 142Y was or was not to blame. There was thus no evidence blaming the driver of KBZ 142Y, deceased. Although the Appellant amended the defence to add the 2nd and 3rd Respondents as parties, no case proceeded against them and no adverse orders could be made in that regard.

28. The Appellant failed to take directions for the alleged apportionment of liability to the owners of KBZ 142Y. To this extent, the court, in finding the Appellant 90% liable was proper. It was the duty of the Appellant to prove contributory negligence which in my view they failed. In the case of MacDrugall App V Central Railroad Co. Rbr 63 Cal 431 the court held that; -

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

29. Therefore, without proper defence of contributory negligence, the court could not determine whether the act or acts of negligence that caused the damage was caused by the negligent acts of different persons to assess the degree of their respective responsibility and blame-worthiness, and apportion liability between or among them accordingly. The Appellant failed in this duty. The lower court was correct in its finding on liability and the same is upheld. In Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, it was held that:

> " Negligence is not actionable per se but is only actionable where it has caused damage and in that regard the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage was caused by the negligent

acts of different persons to assess the degree of their respective responsibility and blame-worthiness, and apportion liability between or among them accordingly... There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasor, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."

30. In Kilet v E-Coach Company Limited & 2 others (Civil Appeal E007 of 2020) [2023] KEHC 17950 (KLR) (18 May 2023) (Judgment), Limo J, posited as doth:

The Position taken by the trial Court was in error for the following reasons.

i. The evidence placed before the trial court including the Police Abstract Prima facie showed that an accident occurred and the appellant testified and squarely blamed the Respondents for over speeding. The Respondent did not call the driver of the subject motor vehicle or any witness to rebut the same,

ii. .Secondly, one does not necessarily need to see a speedometer of a motor vehicle to tell that it is moving fast.

iii. Thirdly, in his pleadings, the Appellant had pleaded the doctrine of res ipsa loquitor. The doctrine of Res ipsa loquitor (latin for the thing explains itself) operated in favour of a party who presents facts from which a Court can draw inference from the surrounding circumstances to conclude that negligence has been proved even if there is no evidence to directly point to the same.

The appellant by establishing that he was a fare-paying passenger and that an accident occurred in a situation where the control of the motor vehicle was in the hands of the driver. Those facts in my view in conjunction with the doctrine was sufficient to establish a prima facie case against the Respondents it required a rebuttal to persuade the trial to make a finding that negligence had not been proved to the required standard in law.

31. In the case of Nadwa v Kenya Kazi Ltd (1988) eKLR, the Court of Appeal posited as follows:

> " In an action for negligence the burden is always on the plaintiffs to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie interference that the accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiffs favour unless the defendant's evidence provides some answer adequate to displace that interference."

32. There was no evidence tendered rebutting cogent evidence by the Respondent. The Appellant was largely to blame for obstructing other road users without marking. The Appellant was under duty to mark the road clearly and place reflecting material even where they are not actively working on the site. Therefore, there is no basis for interfering with the liability at 90:10 against the Appellant. I dismiss the appeal.

33. The next question is costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary

directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

34. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

35. In the circumstances the 1st Respondent shall have costs herein.

Determination

36. In the upshot, I make the following orders: -

a. The appeal is not merited and is dismissed.

b. The 1st Respondent will have costs of the appeal of Ksh.65,000/-.

c. 30 days stay of execution.

d. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 25TH DAY OF FEBRUARY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Mr. Orayo for the 1st Respondent

No appearance for 2nd and 3rd Respondents

Court Assistant – Michael

M. D. KIZITO, J.