Ogola v Owino (Civil Appeal E038 of 2024)
[2025] KEHC 5052 (KLR) (28 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5052 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL E038 OF 2024

WM MUSYOKA, J

APRIL 28, 2025

BETWEEN

GEORGE OKELLO OGOLA ..... APPELLANT

AND

EDWARD OKOTH OWINO ..... RESPONDENT

(An appeal arising from the judgment of Hon. T Madowo, Senior Resident Magistrate, SRM, delivered on 18th July 2024, in Busia CMCCC No. E071 of 2022)

JUDGMENT

1. The suit, at the primary court, was initiated by the appellant, against the respondent, for compensation, arising from a motor vehicle accident, which allegedly happened on 2nd July 2022, along the road from Bumala to Ejinja, at the Tingolo area, involving the appellant and motor vehicle registration mark and number KCT 918X, which was allegedly owned or controlled by the respondent at the material time. The appellant was a motorcyclist, cruising along the said road, when motor vehicle KCT 918X was allegedly so negligently driven, that it caused an accident, wherein the appellant sustained injury.

2. The respondent filed a defence, in which he denied everything pleaded in the plaint. In the alternative, he attributed negligence on the appellant. He also raised a preliminary issue around the plaint and verifying affidavit being defective.

3. Only the appellant and his 2 witnesses testified. Judgement was delivered on 18th July 2024. The suit was dismissed, with costs, for failure by the appellant to prove his case on a balance of probability.

4. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 28th August 2024, are around the suit being dismissed against the weight of the evidence, the judgement being based on irrelevant and unpleaded matters, and the award of general damages being too low in the circumstances.

5. Directions, on the disposal of the appeal, were given on 10th February 2025, for canvassing of the appeal by way of written submissions. Both sides have filed written submissions.

6. The appellant has argued that there was prima facie evidence, from his witness statement, and oral evidence, that the respondent negligently turned without indicating, which caused the accident. He submits that the failure by the respondent to testify meant that his case was uncontroverted. The decisions, in Samwel Thara Mugacha vs. Jackline Wani Kyenza [2024] KEHC 10651 (KLR) (Rutto, J), Ngugi vs. Karanja & another [2023] KEHC 2368 (Chigiti, J) and Jitan Nagra vs. Abidnego Nyandusi Oigo [2018] eKLR (Majanja, J), are cited in support. On quantum, Nyamira Luxury vs. Daniel Hangai Gegoyo [2021] eKLR (Maina, J) and Francis Ndung'u Wambui & another vs. Benson Maina Gatia [2019] eKLR (Muchemi, J) are cited, for the submission that an award of Kshs. 400,000.00 would have been more reasonable, instead of the Kshs. 150,000.00 proposed by the trial court.

7. The respondent supports the decision by the trial court, and cites Sammy Traders Ltd vs. Odhiambo & 2 others [2023] KEHC 1881 (Odera, J), Eastern Produce (K) Limited vs. Christopher Asiado Osiro [2006] eKLR (Gacheche, J), Evans Otieno Nyakwana vs. Cleophas Bwana Ongaro [2015] eKLR (Majanja, J), Kiema Mutuku vs. Kenya Cargo Hauling Services Ltd [1991] 1 KAR 258, Milka Akinyi Ouma vs. Kenya Power and Lighting Co. Ltd & another [2020] eKLR (Mrima, J).

8. The appeal turns on liability and assessment of general damages.

9. Let me start with liability. The allegation in the plaint was that the respondent negligently controlled his vehicle, causing the accident. That was denied in the defence. At the oral hearing, the appellant testified as PW3, adopted his witness statement, and said that it was him who rammed into the vehicle of the respondent, which was turning abruptly, without indicating. The police officer, who investigated the matter, testified that the vehicle of the appellant was turning, to join a feeder road, when the motorcycle, the appellant was riding, rammed into it. The respondent did not testify.

10. What do I make of this? The appellant testified and called a witness at the trial, but the respondent did not testify. The appellant and his witness were clear, that the accident happened as the respondent was turning into a feeder road, and that the appellant rammed into his vehicle. It could be that either one or both drivers were to blame for the collision. The respondent was turning suddenly, without indicating; while the appellant was not maintaining a proper lookout for the vehicles ahead of him, not keeping a safe distance and not taking evasive action.

11. The appellant attended court and gave his version of what transpired. The respondent did not. The question would be whether the appellant did enough. The burden was on him to establish negligence on the part of the respondent. He was the one who rammed into the vehicle ahead of him. He needed to establish that he was maintaining a safe distance from the vehicle ahead, to enable him to control his vehicle, in the event of any eventuality, and that he took evasive or other action to avoid running into the vehicle ahead, were it to stop abruptly. He also needed to establish that he braked to prevent the collision. He did not mention what he did with his vehicle, when he realised that the respondent was turning. I am not persuaded that he did enough to establish negligence on the part of the respondent.

12. I am alive to the fact that the trial court saw and heard the appellant testify, and was best situated to evaluate on his demeanour, and believability.

13. It is trite that the driver who rams his vehicle on another, from behind, would be liable, in negligence, for the accident. That principle applied here, and the appellant bore the higher degree of liability, as against the driver of the vehicle ahead of him. The trial court thought and held that his degree of liability was higher, hence he was unable to prove his case against the respondent.

14. In Multiple Hauliers (EA) Ltd vs. Justus Mutua Malundu & 2 others [2017] eKLR (PJ Otieno, J), the court stated that there is a general "presumption that he who hits another from behind is ipso facto negligent." The court stated that the issues of due attention and look out come into play, even if the driver ahead suddenly applied brakes. On the facts of that case, the driver of the vehicle, that hit the other vehicle from the rear, was held fully liable.

15. In Stanley Ogutu Attai vs. Peter Chege Mbugua [2019] eKLR (Ng'etich, J), where a pedestrian was hit from behind by a vehicle, it was said that the driver of a vehicle, driving behind another vehicle or a pedestrian, had a duty of care for other road users, especially those ahead of him, and, that, from behind, such a driver would have a better view of what is ahead of him. It was noted, in that case, that there was no evidence of any evasive action taken by the driver, in terms of either braking or swerving, to avoid the collision.

16. In Samuel Stephen Were vs. Sukari Industries Ltd [2018] eKLR (Majanja, J), where a motorcycle was hit from the rear, by a speeding tractor, it was held that, since the motorcycle was hit from behind, it would have been very difficult, if not impossible, for the rider to avoid the accident. See also Christine Mwigina Akonya vs. Samuel Kairu Chege [2017] eKLR (J. Ngugi, J).

17. Under normal circumstances, such a hit, by dint of Multiple Hauliers (EA) Ltd vs. Justus Mutua Malundu & 2 others [2017] eKLR (PJ Otieno, J), would point to negligence on the part of the driver of the vehicle hitting the other, on the basis that there is a general "presumption that he who hits another from behind is ipso facto negligent." The question then to ask is whether the facts of the instant case pointed to negligence on the part of the respondent.

18. The position stated in Multiple Hauliers (EA) Ltd vs. Justus Mutua Malundu & 2 others [2017] eKLR (PJ Otieno, J), is a rebuttable presumption, which can be displaced by evidence to the contrary. According to the appellant, the accident happened when the respondent suddenly swerved his motor vehicle in front of the appellant's moving motorcycle, without indicating that he intended to do so, causing the appellant to crash into the motor vehicle. His case is that, although his motorcycle hit the respondent's motor vehicle from the rear, he was not to blame for the collision, for the respondent caused the accident by suddenly swerving his motor vehicle in front of the moving motorcycle, while turning into a feeder road.

19. The respondent merely denied the accident, and, alternatively, attributed negligence on the appellant, but did not testify. The appellant called a police witness, who had investigated the accident. He produced a police abstract report of the accident. His evidence mirrored that of the appellant, that the appellant rammed into the other vehicle, as that other vehicle was making a turn to a feeder road. He did not mention that the turn was being made without an indication of that intention.

20. The burden of proof was on the appellant to establish negligence on the part of the respondent. The accident is not contested. It is not contested that it was the appellant who rammed into the vehicle of the respondent, but his case is that that happened after the respondent suddenly swerved into a feeder road without warning. The respondent did not testify, and that portion of the testimony of the appellant was not contested. A presumption had arisen, going by Multiple Hauliers (EA) Ltd vs. Justus Mutua Malundu & 2 others [2017] eKLR (PJ Otieno, J), that the appellant was ipso facto to blame for the collision.

21. However, that presumption could not mean that he was wholly to blame, for there was testimony, which was not contested, that the respondent was turning, when the accident happened, and he had not warned the vehicles behind him. That meant that, although the appellant was largely to blame for the accident, the respondent had also contributed, and some apportionment should have been made

against him, which, from the facts, should be around 5% to 15%. The trial court would appear to have been influenced by the fact that the appellant did not have protective gear, and his motorcycle was not insured. However, such infractions did not contribute to the occurrence of the accident. They could not absolve the respondent of contributory negligence.

22. On quantum of damages, the appellant had called a doctor, who produced a medical report. According to his report, the injuries sustained by the appellant, from that accident, included a head injury with loss of consciousness; bruises on the face, the scalp, left hand and left knee; blunt injuries to the chest, left hand and right knee. He described them as moderately severe soft tissue injuries, from which he recovered. The trial court opined that it would have awarded Kshs. 150,000.00 general damages, but cited no authority. The appellant argues that he was entitled to Kshs. 400,000.00 general damages, and cites Nyamira Luxury vs. Daniel Hangai Gegoyo [2021] eKLR (Maina, J) and Francis Ndung'u Wambui & another vs. Benson Maina Gatia [2019] eKLR (Muchemi, J), which he had also cited at trial.

23. I have had occasion to read through Nyamira Luxury vs. Daniel Hangai Gegoyo [2021] eKLR (Maina, J) and Francis Ndung'u Wambui & another vs. Benson Maina Gatia [2019] eKLR (Muchemi, J). The injuries in Nyamira Luxury vs. Daniel Hangai Gegoyo [2021] eKLR (Maina, J) came closer to those sustained by the appellant, but they were a lot more serious, for they involved subluxation of the left shoulder and deep lacerations to the left hand and right leg. An award of Kshs. 500,000.00 was made in that case. The injuries in Francis Ndung'u Wambui & another vs. Benson Maina Gatia [2019] eKLR (Muchemi, J) were more serious, for they involved a severe head injury with extra-cranial haematoma, and the award was Kshs. 300,000.00.

24. I have done a survey of recent decisions, where claimants had sustained comparable injuries. The awards fall in the range of Kshs. 150,000.00 to Kshs. 300,000.00. On the lower end, would be a mild head injury with loss of consciousness, accompanied by soft tissue injuries; and on the higher side the head injury would be a little severe, accompanied by more serious soft tissue injuries.

25. In Kyoga Hauliers vs. Okoddi [2023] KEHC 27107 (KLR) (Chirchir, J), the claimant had sustained multiple cut wounds on the scalp, head injury with loss of consciousness and blunt injury to the chest, and the court awarded Kshs. 150,000.00. In Flashmark (K) Limited vs. Musyoka [2023] KEHC 18281 (KLR) (JN Mulwa, J), the injury was a mild head injury with loss of consciousness, lacerations on left and right knees and a blunt chest injury, and an award of Kshs. 230,000.00 was made. In Manasseh Distributors & Wholesalers Ltd vs. Oburu [2024] KEHC 14091 (KLR) (Mrima, J), the injuries were head injury with loss of consciousness, blunt injury to the neck, deep cut wound on the left parietal scalp, blunt injury to the back, lacerations on the left hip joint area and a blunt injury to the left knee, and the award was Kshs. 300,000.00.

26. I find guidance in Flashmark (K) Limited vs. Musyoka [2023] KEHC 18281 (KLR) (JN Mulwa, J), where the injuries sustained were comparable with what the appellant sustained. In the other cases, the injuries were less severe, in one; and too severe, in the other. The appellant was treated as an out-patient. I am persuaded an award of Kshs. 250,000.00 would suffice, for pain and suffering.

27. I find merit in the appeal herein, for reasons that should emerge from the above discussion. I accordingly allow it. The finding and holding of the trial court, on liability is set aside, and substituted with a finding and holding that the respondent bore liability at 10%, with the appellant bearing blameworthiness to the extent of 90%. An award on general damages is made of Kshs 250,000.00 . The order, of the trial court, on special damages stays. The amount of damages shall be subject to contribution, save for the specials. The appeal herein is disposed of in those terms. The appellant shall have costs of the appeal, and at the court below. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 28TH DAY OF APRIL 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

ADVOCATES

Mr. Omondi, instructed by Omondi & Company, Advocates for the appellant.

Ms. Pandit, instructed by Nishi Pandit & Company, Advocates for the respondent.