Ngosia v Pan Africa Chemicals (Civil Appeal 46 of 2017)
[2025] KEHC 7480 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7480 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 46 OF 2017

PJO OTIENO, J

MAY 29, 2025

BETWEEN

ANNE NANJALA NGOSIA ..... APPELLANT

AND

PAN AFRICA CHEMICALS ..... RESPONDENT

(Being an appeal from the judgment & Decree of Hon. F.Makoyo PM in Butere MCCC NO. 133,134 & 135 OF 2014)

JUDGMENT

Background of the Appeal

1. The appellant by way of plaints dated 1st September, 2014 sued the respondent, at the Senior Principal Magistrates Court at Butere, claiming general damages, special damages, cost of the suit and interest thereon. The claim was that the appellant and her two daughters suffered bodily while aboard, as pillion passengers, Motor Cycle Registration Number KMCN 421Y which collided with Motor Vehicle Registration Number KBJ 012H registered in the name of the respondent.

2. In the plaint the appellant particularized what she deemed negligence of the respondent as well as the particulars of injuries and special damages, then prayed for an award for general damages, special damages, costs and interests.

3. The respondent filed a defence in which it denied being responsible for the accident, denied being the owner of the motor vehicle or that an accident ever occurred on the date, place pleaded and the manner pleaded. It equally denied all the particulars of negligence and injuries and put the appellant to very strict proof thereof.

4. In the alternative and without prejudice, the respondent averred that if at all the accident ever occurred, then it was solely caused by or substantially contributed to by the appellant and the motor cycle rider.

The particulars of both the rider and the appellant were set out. It was then pleaded that the accident having occurred in Webuye town, the court sitting in Butere lacked the requisite territorial jurisdiction to hear and determine the matter.

5. It is of note that if not for the names and injuries allegedly suffered by the of the appellants, the plaints on each of the three suits were word for word similar hence even the statements of defenses file were thus just one in three copies.

6. Three suits, 133, 134 and 135 all of 2014 were filed before the trial court. On the 16.07.2015, one of the suits, SRMCC135 of 2014 was selected as the test suit for purpose of determining liability. This appeal is a composite appeal against the three decisions because proceedings were only taken in the test suit but the trial court delivered three distinct judgments. The court takes the view that this was an apt case to consolidate the suits rather than taking a test suit.

7. In the test suit the appellant gave evidence on her own behalf and on behalf of the two minors, then called a doctor PW2 and a police officer as Pw3 to support her case. On his side, the respondent called one witness, the driver of the motor vehicle on the material day.

8. The summary of the appellants case was that, on the material date, she was riding as a pillion passenger with the two minors, when a motor vehicle belonging to the defendant suddenly made a U-turn on the road and there occurred a collision. The vehicle had slowed down to permit being overtaken only for it to turn without any signal to that effect. She then gave the injuries suffered by her and the minors and marked for identification treatment chits from the hospital, p3 form, police abstract then produced a certificate of search showing the motor vehicle belonged to the respondent. She blamed the respondent for negligence leading to the accident.

9. On being cross examined by the respondent's counsel, the appellant told the court that the accident occurred on the right lane of the road and that the motor vehicle was hit on its right side on the driver side and that the police abstract showed that it was the outrider who was charged with the offence of riding uninsured motorcycle. On whether the cyclist indicated his intention to overtake, the witness told the court that the indicators are at the back of the motor cycle and she was unable to see.

10. The evidence by Pw2 was essentially on the injuries observed on the three appellants when he examined them. He produced his medical reports, said that he charged 3,500 for each but did not issue nor produce any receipt to that effect. When cross examined, the doctor told the court that the injuries were of soft tissues which would have healed by the time he gave evidence.

11. The third and last witness was a police corporal, Beatrice Adenyo whose evidence was that an accident indeed occurred in which the three appellants were involved and that it involved a collision between the respondent's motor vehicle and a motor cycle on which the three appellants were travelling. She said the passenger were not to blame for the accident.

12. When cross examined by the respondent's counsel, the witness told the court that she was not the investigating officer but had just been given the abstract to produce in court. She added that the rider was charged for driving an uninsured motorcycle and without a driving license hence was never expected to be on the road at all. She added that every motor vehicle involved in a road accident ought to be inspected and that she could not say if the respondents motor vehicle was ever inspected.

13. For the respondent, the evidence by the driver at the material time was that he had slowed down to park but lacked space and thus decided to cross and park on the right side of the road when his righthand side door was hit and he saw the appellant and her children fall on the road. He said that he had checked to ensure that the road was clear for crossing and only saw the motorcycle after the accident.

14. In a reserved judgment delivered by the trial court on 23rd March, 2017, the trial court dismissed the appellant's suit for the reason that the plaintiff had admitted that the accident was caused by the respondent's reckless driver and not the respondent hence negligence had not been proved against the respondent. The second reason given was that the investigating officer stated that that the rider of the motor cycle was to blame for the accident. The suit was thus dismissed with costs.

15. Aggrieved with the decision of the trial court, the appellant lodged an amended memorandum of appeal dated 11th May, 2022 and set her grounds of appeal to be that;

    a. That the learned trial magistrate erred in law and in fact in dismissing the plaintiff's suit with costs.

    b. That the decision of the trial magistrate was based on wrong premises and gross on the evidence presented before court.

    c. That the learned trial magistrate misdirected himself by considering the evidence and submissions on liability before him superficially and consequently erred in dismissing the appellant's case.

    d. That the learned trial magistrate erred in law and in fact by holding that the appellant had failed to prove her case as against the defendant as the police officer stated that the driver of the said motor vehicle was not liable.

    e. That the learned trial magistrate erred in law and in fact in holding that the police officer before court was not the investigating officer.

    f. That the learned trial magistrate erred in law and in fact in ignoring the applicable principle and relevant authorities in the written submissions presented and filed by the appellant.

    g. That the learned trial magistrate's decision, albeit a discretionary one, was plainly wrong.

16. The appellant thus prays that the appeal be allowed and that this court adopts the damages awarded in the alternative by the lower court. Even when split into seven grounds, the court reads the ground of appeal to fault the trial court's decision to be contrary to the evidence recorded. That must be the only issue because the ownership of the motor vehicle even though contested in the defense was admitted in evidence just like the occurrence of the accident and injury to the appellants.

17. The appeal was directed to be canvassed by way of written submissions which the court has perused and now summarised as below.

Submissions

18. The appellant identifies two issues for determination to be; who should be blamed for the accident and who should bear the costs of the appeal. On causation, the appellant submits that the driver of the motor vehicle was to blame since he admitted in evidence that he had to park on the left side of the road then decided to cross and park on the righthand side thus colliding with the motorcycle. That statement, she asserts, corroborated the evidence of the appellant that the cyclist hit the motor vehicle on the driver's door. She further faults the trial court's reliance on the evidence of the investigating officer that the respondent's driver was not to blame yet she was not the investigating officer but only produced the abstract.

19. The appellant cites to court the decisions in LWK vs kirigu staley (2019) eKLR on the expectation on a driver on public road, William Kabogo vs George Thuo (2010)1 klr 526, on what evidence suffices for proof on preponderance and Hussein Omar Farah vs lento Agencies (2006) eKLR for the principle

of law that where there lacks concrete evidence to determine, who between two driver, is to blame for the causation of a collision, both should be held equally to blame.

20. Based on such submissions, and I divergence from the ratio in the last cited case, the appellant prays that the appeal be allowed, the decision of the trial court set aside and substituted with a judgment allowing the suits and assessing general damages in a uniform sum of Kshs 200,000/- for each of the appellants. It is also submitted that each of the appellants should be awarded special damages in the sum of Kshs 10,520/-.

21. It is the submission by the respondent that the court is bound, being a first appellate court, on the authority of Selle vs Associated Motor boat Ltd (1968)EA 123, to fully reappraise the evidence taken at trial appellant, and carry out own evaluation with a view to making on conclusions, but in doing so, reminds itself that it did not take evidence and see the witnesses testify so as to deduce the demeanor of such witnesses.

22. In executing that mandate by way of rehearing, the respondent agree with the appellant that the issues for determination are just two.

23. In appraising the evidence on record, the respondent blames the appellant in negligence for overloading the motor cycle when four (sic) pillion passengers took the ride, for allowing to be ridden by a motor cyclist without a driving license and because of the failure of the motor cyclist to slow down when the driver of the motor vehicle gave an indicator that he wanted to make a right turn. It is then reiterated that the burden of proof is ordained in law to remain with the plaintiff throughout and cites the provisions of section 107 of the *Evidence act* and the decisions in Karugi vs Kabiya (1987) eKLR, Evans Nyakwara vs Clephas Bwana (2015) eKLR, and statpack Industries vs James Mbithi (2005) eKLR.

24. On the quantum of damages, it is submitted that the appellant having failed to prove that the injuries suffered were as a result of the respondent's negligence, then the appellant is not entitled to any relief against the defendant. The court is thus urged to uphold the decision of the trial court and to dismiss the appeal with costs, because the law demands that costa follow the event.

Issues, Analysis and Determination

25. The court has on its duty on first appeal reexamined the record at trial in line with the grounds of appeal preferred and concurs with the parties that the sole issue is whether the case was proved contrary to the finding by the trial court. Put the other way; whose negligence occasioned the accident and to what extent. The consequential issue is what orders should be made as to costs.

26. It is trite law that the legal burden of proof lies upon the party who invokes the aid of the law. The court in Nickson Muthoka Mutavi v Kenya Agricultural Research Institute (2016) eKLR had this to say on the burden of proof in an action for damages for negligence;

> " The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the prove of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of a causal connection must be established."

27. It was the evidence of the appellant who testified as PW1 that she had come from the hospital and boarded a motorcycle from Webuye Hospital with her two children and when they got to the police line, the respondent's motor vehicle which was in front of them slowed down and suddenly made a

U-turn towards on the path of the motor cycle thus causing a collision and resulting on her and the children sustaining bodily injuries.

28. That position was refuted by the driver of the motor vehicle who testified as DW1and stated that he was in deed on the and intended to park the motor vehicle on the left side of the road so as to let passenger disembark and for him to purchase airtime. He was unable to park there because of matatus and that fact that the side of the road was made uneven by acts of erosion. He thus decided to park on the right side of the road, checked on both sides of the road, front and back. He testified that before setting on the turn, gave an indication of turning right and looked at the front and at the back and was satisfied that the road was clear, but, just as he was about to get on the right lane of the road he heard a loud bang, stopped immediately and saw the motorcycle in the air while the woman and her two children had fallen on the right lane. He concluded that the motorcyclist was careless, failed to exercise proper lookout and was at a high speed and was thus to blame for the collision.

29. The court's appreciation of the evidence led by both sides is that the collision occurred as the cyclist was trying to overtake while the motorist was trying to cross the road. The cyclist was on his path while the motorist was trying to change/cross lanes. The motorist had a duty of care to other road users not to obstruct their path. He was well aware of that duty and obligation that is why he says he signaled the intension and checked both sides of the road before hand but did not see the cyclist. The question is where did the cyclist emerge from if not on the road as the motorist was embarking on crossing the road.

30. The court has been on that section of the road and takes judicial notice that the road is fairly straight with no obstruction. It is said that the incident was about 6pm and it was not dark. In such circumstances, if in deed the motorist did employ proper lookout he would have seen the cyclist and given him the right of way having been on the road and his lane. In failing to notice the presence of the cyclist on the road the motorist failed on its duty to be on proper look out and was thus negligent.

31. The court thus finds that there was sufficient evidence to show that the motorist acted below the standard expected of a reasonable and discerning driver on a public road. It was thus erroneous upon the trial court to fully absolve the motorist from all the blame.

32. However, even the motor was also expected to be on the lookout and take precaution to avoid collision even if another road user was to act in the most unreasonable and unexpected manner. The scene is a built- up area and all motorised vehicles are expected to drive at no more than 50km per hour. That speed limit is in place so that, owing to the expected increased human and other traffic, one is able to manoeuvre even in the event of sudden and abrupt and unexpected action by another road user. In the circumstances revealed in the evidence on record, had the cyclist been on proper lookout and been observing the other users of the road, he would have been able to take an avoidance action to obviate the collision. His failure to take an appropriate step t avoid collision also contributed to the collision.

33. The court thus finds that the both cyclist and the motorist contributed to the collision but the court lacks the exactitude on contribution by each. This is therefore a case where the court determines both to have been equally blameworthy and assigns to the respondent liability at 50%. In apportioning liability as such, the court is satisfied that the appellant was never in the control of the motor cycle hence cannot be blamed for the causation. That the cyclist was not licensed cannot be the basis to attribute negligence on the appellant. The court is least persuaded that having two young children with her on the motor cycle could have contributed to the causation. No liability attaches on the appellant

34. To the court there having been a collision between the motor vehicle and the motor cycle, both owners ought to have been joined in the suit but both counsel never pursued that line. That failure has made the cyclist escape with a possible obligation he ought to have shouldered.

35. The other reason the trial court judgment ought to be set aside is the finding that the evidence of PW3 absolved the respondent from blame.

36. PW3 was not a witness but was merely called to produce a document, the police abstract. She did not witness the incident of the accident and therefore what he told the court could not have been evidence beyond the production of the police abstract. She was in fact protected by section 147 of the *evidence Act* even from cross examination. That the trial court allowed her to be cross examined was bad enough but should not have been the basis to dismiss the suit. The court thus finds that the dismissal of the suit on the strength of the evidence of PW3 was in error.

37. On the assessment of damages by the trial court, it remains at the realm of judicial discretion and it takes a very strong case for this court to substitute its opinion for that of the trier of fact. The court finds no basis to interfere with the award of damages and upholds same.

38. In conclusion, the appeal succeeds to the extent that the order dismissing the suit is set aside and, in its place, substituted a judgment allowing the suit and holding the respondent liable up to 50% only. The sums awarded to the appellants in general damages is upheld. The costs of the appeal is awarded to the appellants being the successful parties.

39. It is so ordered.

DATED AND SIGNED THIS 29TH DAY OF MAY, 2025.

PATRICK J O OTIENO

JUDGE

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 29TH DAY OF MAY, 2025.

S. MBUGI

JUDGE

In the presence of:

No appearance for the parties

C/A: Agong'a