Godo v Agwanda (Civil Appeal E105 of 2023)
[2024] KEHC 3673 (KLR) (28 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3673 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E105 OF 2023

RE ABURILI, J

MARCH 28, 2024

BETWEEN

MICHAEL OTIENO GODO ..... APPELLANT

AND

ERICK OTIENO AGWANDA ..... RESPONDENT

(An appeal arising out of the Judgement of the Honourable G.C. Serem in the Small Claims Court at Kisumu delivered on the 9{{^th}} June 2023 in Kisumu Small Claims No. E081 of 2022)

JUDGMENT

Introduction

1. The respondent herein Erick Otieno Agwanda sued the appellant Michael Otieno Godo before the Small Claims Court seeking judgment in the sum of Kshs. 980,000 being compensation for personal injury sustained in an accident which occurred on the 10.11.2022. The appellant filed a defence on the 27.1.2023 denying the occurrence of the accident and stated that in the event the same occurred, it was due to the negligence of the claimant/respondent herein.

2. The Adjudicator found the appellant 100% liable and awarded the respondent general damages in the sum of Kshs. 500,000.

3. Aggrieved by the said judgment and decree, the appellant filed this appeal vide a memorandum of appeal dated 21st June 2023 raising the following grounds of appeal:

    a. That the learned trial magistrate erred in fact and in law in failing to dismiss the suit by apportioning 100% liability to the appellant (respondent) without considering the circumstances of the case.

b. That the learned trial magistrate erred in law and in fact in finding in favour of the respondent (claimant) against the appellant (respondent) when there was totally no credible evidence or proof of negligence on the part of the appellant.

c. That the learned trial magistrate erred in fact and in law in failing to consider the appellant's submissions on liability by completely disregarding the submissions and authorities of the appellant and as a result arrived at an unjustified decision on liability.

4. The partied filed written submissions to canvass the appeal.

The Appellant's Submissions

5. The appellant reproduced the evidence adduced and submitted that the magistrate erred in law and fact when she held that all the evidence before court pointed towards the respondent's negligence whereas the respondent failed to establish on negligence on a balance of probabilities. Further, that the respondent admitted to alighting at Lexo Petrol Station prompted by a phone call hence he was not keen and or patient and did not allow the vehicle to stop before alighting.

The Respondent's Submissions

6. The respondent submitted, in essence, maintaining that based on the evidence adduced before the court, the appellant was liable for the accident and as such this court ought to uphold the trial court's decision.

Analysis and Determination

7. 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 in mind that the trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

8. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

9. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions, it appears to this court that the only issue for determination was Whether or not the apportionment of liability was fair and reasonable in the circumstances of this case.

10. In *Khambi and Another v Mahithi and Another* [1968] EA 70, it was held that:

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

11. That was the same position taken in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mahendra M Malde v George M Angira* Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

12. The law is clear that he who alleges must proof. The term burden of proof draws from the Latin Phrase *Onus Probandi* and when we talk of burden we sometimes talk of onus.

13. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to *Phipson on the Law of Evidence*, the term 'burden of proof' has two distinct meanings:

    1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

    2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

14. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.

15. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

16. The question therefore is whether the respondent herein discharged the burden of proof that the appellant was liable in negligence for the occurrence of the accident leading to the deceased's passing.

17. On whether the respondent proved negligence on the part of the appellant, the respondent testified as CW2 adopting his witness statement dated 15.12.2022 and stated that he blamed the driver of the matatu for the accident because as he was alighting from the matatu, the driver took off.

18. In cross-examination, the respondent stated that he sat behind the driver next to the door and was headed towards town when he received a call and decided to alight. He testified that he informed the driver and conductor but that the driver took off as he was alighting.

19. In re-examination, the respondent testified that a call prompted him to alight but that he was not on his phone when he alighted as he had already finished talking on the phone.

20. CW1 No. 65670, PC Kithongo Kiiru produced an OB extract 59/10/11/2022 for the accident which was reported at 1540hrs by the driver of the appellant's matatu who stated that while driving motor vehicle registration no. KDC 633X Toyota Hiace from Bondo to Kisumu, he slowed down then saw a passenger, the respondent jumped and he was hurt.

21. In cross-examination, PC Kithongo testified that he was the investigating officer in the traffic case and that he did not get any contrary information to that given by the driver of the appellant's vehicle. He stated that the person who was injured was a passenger of the vehicle and that the driver did not wait for the passenger to alight.

22. In re-examination, PC Kithongo testified that he got the testimonies of both the driver and the passenger and that the driver said that the passenger did not wait for the car to stop while the passenger stated that the driver did not stop.

23. In response, the appellant called one witness, the driver of the suit motor vehicle who testified that he was coming from Bondo to Kisumu and on reaching near Lake, the conductor informed him that a passenger wanted to alight but that the passenger alighted before the vehicle stopped. He stated that the passenger jumped out and fell. He testified that he blamed the passenger as he jumped before the vehicle stopped.

24. In cross-examination, the driver reiterated his testimony and further testified that the door of the vehicle was not open but that when the conductor knocked, he slowed down and the door of the vehicle was opened. In re-examination, the driver reiterated that the passenger jumped and fell off and further that the vehicle was almost stopping.

25. It was the trial court's holding that the driver in the present case failed to come to a complete stop to allow passengers to alight but rather hastily and negligently drove off from the stage without checking hence the appellant bore liability at 100% for the negligence of his driver.

26. The parties have given quite varied accounts as to how the accident occurred. How should the court resolve such tension between the accounts rendered by the Appellant and Respondent on liability?

27. The established judicial method, which rests on the singular dependability of the fact-base, and which vindicates the principles of fairness, objectivity and legitimacy – is to entertain the account from the other side; and thereafter, to weigh, check and balance the two streams of evidence, thereby arriving at a valid and just result.

28. The evidence in support of each of the opposing accounts herein is barely sufficient. Judicial pronouncements have settled that where the court is unable to determine who is to blame for the accident, liability is apportioned equally. In the case of *Platinum Car Hire Limited v Samuel Arasa Nyamesi and Another*, Majanja J, H.C Kisii C.A 29/2016 quoted with approval the Court of Appeal decision in the case of *Berkly Steward Limited v Waiyaki* [1982-1988] KAR where it is cited with

approval the decision in *Baker v Market Harborough Industrial Co-operative Society Ltd* (1953) 1 KLR 1472, 1476 where Lord Denning LJ observed inter-alia that-

> " Every day proof of collision is held to be sufficient to call on the dependants for an answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to drawn any distinction between them."

29. The court further stated that where the court is unable to determine who is to blame, it has to apportion liability equally as illustrated by the Court of Appeal in *Hussein Omar Farar v Lento Agencies* C.A Nairobi, Civil Appeal No.34/2005 [2006] eKLR where it observed that –

> " In our view it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

30. In the end he held that –

> " I too come to the conclusion that following the collision, the appellant and the second respondent must share culpability in the absence of any other evidence exonerating one or either party."

31. In the instant case, it is clear that an accident occurred on the 10.11.2022 but the parties herein do not agree on how the accident occurred as they both give different versions of the accident. The appellant claims that the respondent jumped out of the vehicle before the appellant's driver stopped to allow the respondent to alight and submitted that the respondent was distracted by the phone which he had received hence he did not wait until the driver had stopped before getting out of the motor vehicle. The Respondent claimed that the appellant's driver took off as he was alighting, having notified the conductor to alert the driver that he, the respondent wanted to alight.

32. It is a well settled principle that an appellate court will not interfere with findings of fact by the trial court unless it is proved that there was an error in principle or the finding is out rightly wrong.

33. In the instant case, it is my view that the Adjudicator did not properly address her mind to the law as established above, in determining the issue of liability. The circumstances of, and evidence presented in this case warrant a 50:50 contributory negligence between the appellant and the respondent because there was no full proof testimony that the appellant's driver drove off when the respondent was alighting, or that the respondent jumped off the vehicle before it had completely stopped to allow him to alight. I thus find that the Adjudicator erred in finding the appellant's driver wholly to blame for the occurrence of the accident.

34. Accordingly, I find this appeal partially merited. I set aside the apportionment of liability at 100% against the appellant and substitute the same with a finding that the appellant and the respondent were equally to blame for the accident in the ratio of 50:50.

35. As the appeal is only partially successful, I order that each party shall bear their own costs of this appeal.

36. This file is now closed, to be returned to the lower court with a copy of this judgment.

37. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF MARCH, 2024

R.E. ABURILI

JUDGE