



**JNJ (Suing as the Next Friend and Father of TNJ - Minor) v Mumias Sugar Co. Limited
(Civil Appeal 45 of 2017) [2024] KEHC 6407 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6407 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 45 OF 2017
SC CHIRCHIR, J
MAY 30, 2024**

BETWEEN

**JNJ (SUING AS THE NEXT FRIEND AND FATHER OF TNJ -
MINOR) APPELLANT**

AND

MUMIAS SUGAR CO. LIMITED RESPONDENT

*(Being an appeal against the judgment of Hon. Cheruto C. KipKorir
(PM) delivered on 22/03/2017 in Mumias MCC No. 422 of 2013)*

JUDGMENT

1. The appellant filed suit at the chief Magistrates’ court seeking for damages for personal injuries sustained as a result of Traffic road Accident which occurred on 23rd July 2013 along Mumias-Busia road. The accident involved motor vehicle registration number KBP xxxQ and Motor cycle Registration no. KMCT xxxT, on which the plaintiff was a pillion passenger.
2. At the conclusion of the hearing, the trial court dismiss the suit for want of proof , prompting this Appeal.

Memorandum of Appeal

3. The Appellant has set out the following grounds
 - a. That the decision of the learned trial magistrate was based on the wrong premises and a gross misconduct (sic) of the evidence placed before her.
 - b. That the learned trial magistrate misdirected herself in considering the evidence and submission of liability before her superficially and consequently erred in dismissing the appellant’s case.



- c. That the learned trial magistrate erred in law and in fact in finding that the appellant had failed to prove her case on a balance of probability that the rider abruptly made a right turn without any indications therefore occasioning the said accident.
 - d. That the learned trial magistrate erred in law and in fact in holding that the appellant failed to show how the said accident happened.
 - e. That the learned trial magistrate erred in law and in fact in holding that the appellant had failed to prove negligence on the part of the respondent in the face of the evidence presented before her by the appellant.
 - f. That the learned trial magistrate erred in law and in fact in disregarding relevant evidence on record hence resulting in a wrong decision.
 - g. That the honourable court's decision was based on unjust grounds and against the weight of the evidence on record and constitute an abuse of the due process of the law and procedure and a miscarriage of justice.
 - h. The appellant prays that the appeal be allowed and that this court sets aside the lower court judgment and allow the judgment from the lower court.
4. The appeal was canvassed by way of written submissions.

Appellant's Submissions

5. It is the Appellant's submission that by the driver's own admission he was driving at a speed of between 70- 80 km/ per hour in a an area where the designated speed limit was 50km per hour; that despite this admission, the court ignored this evidence; that considering that the both the motor cycle and the vehicle were heading in the same direction, then the right turn made by the rider ought not to have occasioned an Accident.
6. While relying on the case of *LWK (A minor suing through father and next friend SKD) v Kirigu Stanely & another* (2019) eKLR, the Appellant submits that the respondent driver fail the test of a reasonable man while being in charge of the vehicle.
7. It is the Appellant's final submission that the appellant was a pillion passenger and not the rider, and denying him damages for the medical treatment and injuries would be unfair.
8. He urges the court to find that the respondent was vicariously liable for the accident at 100% or share the liability with the Rider equally.
9. On the second issue on who should bear the cost of the appeal, he urges the court to be guided by section 27 of the *Civil Procedure Act* and the decision in the case of *Orix Oil (Kenya) Limited v Paul Kabuu & 2 others* (2014) eKLR.
10. The respondent did not file submissions

Evidence in Brief

11. PW1 an officer stationed at Mumias police station. He produced the abstract of the accident dated 6/7/2013 which involved motor vehicle reg. no. KBP xxx Q Nissan pick-up and motor cycle KMCT xxx TV star which occurred at Ejinja Centre along Mumias Busia road where the minor TNJ was a pillion passenger on the motor cycle KMCT xxx T. He stated no one had been charged with the offence; that he was not the investigation officer and hence could not tell who was culpable.



12. PW2, was the father and next friend of the plaintiff. He was at home when he was informed that his son had been involved in an accident and when he rushed to the site he found the motor vehicle KBB xxxQ as well as the motorcycle. He was informed that the minor had been rushed to St. Mary's hospital . He stated the plaintiff was admitted there for one week and later taken to kakamega General hospital where he stayed for 2 weeks
13. He produced the treatment notes from Kakamega General Hospital . He paid ksh. 32,000 for treatment at st. Mary's and ksh .17,000 at kakamega county hospital. He produced the receipts.
14. PW3, Dr. Charles Andai testified that he examined the plaintiff on 28/1/2013, following a road accident. He found that he had a right fibula fracture ,cut wounds on the head, blunt injury to the chest and elbows and had plaster on the right leg. He stated that the injuries were moderate soft tissue and bone injuries, and expected him to have healed in one year from the time he examined him. He produced the report as exhibit P7 he said that he relied on the treatment notes from St. Mary's Hospital and Kakamega General.
15. During cross examination by the defendant's counsel, he stated that the tibia fracture was on the lower limb and that the patient was 18years at the time and that the injuries were not incapacitating in nature.
16. At re-examination, he stated that the patient was 17 years according to the medical report.
17. Pw4, the acting executive officer at the court. she produced the court file for Civil Case No. 424/2013, between *Evans Wandera Okello v Mumias Sugar Company* . The case was in respect to the same accident . In that case liability was entered against the defendant on a 100% basis.
18. During cross examination, he stated that the suit was not defended and that it was an interlocutory judgment.
19. The prosecution closed its case.
20. The first witness for the defence was the driver of the motor vehicle. He adopted his written statement dated 22/6/2014 as his evidence- in- chief.
21. During cross examination, he told the court that the motorcycle was by a distance of 7 meters; that the Rider made an abrupt turn to the right ,crossing his path .He admitted that the plaintiff was a pillion passenger in the motorcycle. He further admitted that the accident happened at Ejinja market and that the designated speed limit was 50 km/hr while he was driving at 70km/hr.
22. On re-examination, he stated that the accident was caused by the rider who made a right turn without any prior Notice.
23. DW2 testified that he worked at Mumias Sugar and conversant with the case. He adopted his statement as evidence.
24. At cross examination, he blamed the Rider for making an abrupt right turn; as the two were heading on the same direction and the driver was keeping to his left.

Determination

25. The role of this court as the first Appellate was spelt out in the case of *Selle v Associated Motor Boat Co* [1968] EA 123 where it was held: "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

26. This Appeal is on the finding on liability only, and thus the only issue for determination is whether the trial court's finding on liability was erroneous
27. Section 107 (1) of the *Evidence Act* provides as follows:

"Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.". Thus the onus was on the Appellant to prove negligence on the part of the Respondent's Agent
28. Am in agreement with the observation of the trial court to the effect that the evidence tendered by the plaintiff's witnesses did not establish negligence on the part of the defendant.
29. I have noted that the plaintiff was about 17 years at the time of the accident. He had the capability to explain to the court what transpired . PW2 told the court that the child was in school at the time of the hearing. I don't think school was reason enough not to appear in court. I take note of the fact that the Appellant was represented . His advocate could have requested the court to have the matter heard during school holiday. This was a big let down by the Advocate of his client.
30. However what is not in dispute is that an accident occurred, between motor vehicle registration number KBP xxx Q and the motor cycle KMCT xxxT and that the Appellant was a pillion passenger on the motorcycle. That is according to the evidence of PW1, the police officer and which evidence , to that extent , was not contested. The driver (DW1) also admitted that he took the Respondent to the hospital.
31. DW1, the driver of the motor vehicle admitted that he was driving at speed of between 70-80 km/hr against the maximum limit of 50km/hr allowed in market or town centres. The accident scene was Ejinja market and thus the maximum speed limit of 50km/ hr was applicable. They were both heading in the same direction and the motorbike was ahead by a distance of 7 metres. Driving above the designated speed limit is in itself an act of negligence.
32. I have perused DW1's written statement , in which he sated that that the motor cycle was zigzagging and abruptly made a turn, but he did not indicate to which direction. However in cross- examination he stated that the Rider made a right turn crossing his path. If he was behind the rider by the distance of 7 metres , then the right turn by the Rider need not have resulted in a collision. This can only mean that he driving too close to the motorbike.
33. Thus , whereas it is true that the evidence from the plaintiff did not establish negligence , the testimony of DW1 show that he was negligent. It is the duty of the court to look at the totality of the evidence before arriving at a finding. It is apparent that the trial Magistrate ignored the testimony of the defendant's driver.
34. In an action for negligence ,the legal burden of proof placed on the plaintiff by section 107 of the *Evidence Act* , does not mean the court cannot consider the circumstances surrounding the accident. In this regard I find support in the court of Appeal decision in the case of *Nandwa v Kenya Kazi ltd* (1988) KLR 488, where the court held: "In an action for negligence , the burden is always on the plaintiff 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 inference that the accident was



caused by negligence on the part of the defendant , the issue will be decided in favour of the plaintiff unless the defendant's evidence provides some answer to displace that inference” (Emphasis added)

35. In the present case the driver of the motor admitted that he was driving at a speed of about 70km/hr against the maximum of 50km/hr for that particular section of the road; the explanation that the collision was caused by the Rider turning right is not plausible considering that he was behind the rider by a distance of 7 metres. Thus apart from the excessive speed the explanation given on how the collision occurred , is not plausible and thus not adequate to displace the inference of negligence on his part.
36. The Appellant has submitted that, in the alternative , the driver and the rider should be held equally liable. However the Rider of the motorcycle was neither sued by the plaintiff nor the defendant, and therefore a party who has not been given a chance to be heard can not made to bear the consequences of a matter that he had not participated in.
37. Further , I noticed that the respondent had pleaded contributory negligence against both the Appellant and the rider. The Appellant was a passenger, he played no role in the causation of the accident. On the part of the rider, the onus was on the Respondent to take out 3rd party proceedings against the said Rider. This was the duty of the Respondent pursuant to order 1 Rule 15 of the Civil Procedure Rules. Order 1 rule15 provides as follows:

“ 15

- (1) where a defendant claims against any other person not already a party to the suit(hereinafter called the third party)-
- a). that he is entitled to contribution or indemnity; or
 - b). that he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
 - c) that any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them ,shall apply to the court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect

38. There were no proceedings taken out against the Rider of the Motor cycle and as such no liability can attach to him
39. In the end , from his own testimony as aforesaid the Respondent's driver was negligent , and the Respondent , vicariously . I hold the respondent fully liable for the accident.
40. Consequently I hereby proceed to make the following orders:



- a). The lower court's order dismissing the suit is hereby set aside.
- b). Judgment is hereby entered for the Appellant against the Respondent on a 100% basis
- c). The award of both general and special damages as sated by the trial court is maintained
- d). The award of damages will attract interest at court rates from the date of judgment by the trial court
- e). The Appellant is awarded costs of the suit in the lower court and for this Appeal.

DATED , SIGNED AND DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS, THIS 30TH DAY OF MAY 2024.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin – Court Assistant.

