Idewa v Wanjema (Civil Appeal E365 of 2023)
[2024] KEHC 5852 (KLR) (Civ) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5852 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E365 OF 2023

WM MUSYOKA, J

MAY 24, 2024

BETWEEN

MAUREEN IJAH IDEWA ..... APPELLANT

AND

CHRISTOPHER SHAYO WANJEMA ..... RESPONDENT

(An appeal arising from the judgment of Hon. AN Ogonda, Senior Resident Magistrate, SRM, delivered on 31st January 2022, in Milimani CMCCC No. 1587 of 2020)

JUDGMENT

1. The suit at the primary court was initiated by the appellant, against the respondnet, for compensation, arising from a road traffic accident, which allegedly happened on 26th October 2019. The appellant was a passenger in motor-vehicle registration mark and number KCK 315T, cruising along the Githunguri Road, Utawala, Nairobi, when the same allegedly lost control and landed in a ditch, and as a consequence, the appellant suffered injury. The respondent herein was the alleged owner or driver of the said vehicle. The appellant attributed negligence on the respondent. The respondent filed a defence, in which he denied everything pleaded in the plaint. In the alternative, he pleaded that, if any accident happened, it was caused by the actions of the driver of an unknown vehicle, who swerved into his pathway, forcing him to take evasive action, hence the crash.

2. A trial was conducted, wherein 3 witnesses testified for the appellant, while 2 testified for the respondent. Judgement was delivered on 31st January 2022. The suit was dismissed, on grounds that liability had not been proved against the respondent. On damages, the court ruled that it would have awarded Kshs. 500,000.00 general damages and Kshs. 6,050.00 special damages, if the case had been proved against the respondent on liability.

3. The appellant was aggrieved, hence the instant appeal. The grounds in the memorandum of appeal, dated 3rd May 2023, revolve around the appellant not being capable of taking any blame for the accident, for she was a passenger in the accident vehicle; the evidence presented by the appellant being clear enough to justify a judgement in her favour; and failure to appreciate and consider that evidence.

4. Directions were given on an unknown date, for disposal of the appeal by way of written submissions. There has been compliance, by both sides.

5. The appellant submits that the respondent blamed a third party for the accident, yet there was no collision with the alleged third party. In any case, it is submitted, that the respondent did not join the alleged third party. It is submitted that a party who blames a third party has a duty to join that third party, and Order 1 rule 15 of the Civil Procedure Rules, Mburu Samson & another vs. Boaz Masita Osindi [2021] eKLR (Ng'etich, J), Gachanji Muhoro & Sons Ltd vs. Titus Mwala Nduva [2015] eKLR (Jaden, J), and Benter Atieno Obonyo vs. Anne Nganga & another [2021] eKLR (Chemitei, J), are cited.

6. The respondent submits that the appellant was asleep when the accident happened, and so she could not explain what happened. It is submitted that the appellant did not establish negligence against the respondent. Statpack Industries vs. James Mbithi Munyao [2005] eKLR (Visram, J) is relied upon. Although Hamid Abdulrahman Abdalla & another vs. Dixon Ngoti Mwakondi & another [2015] eKLR (Kasango, J) and Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR (Aburili, J), are not cited in the body of the written submissions, their copies are annexed to, and were filed simultaneously with the written submissions.

7. There is really only one issue for determination, whether the appellant had proved that the respondent liable for the accident. The issue of costs is incidental to that.

8. It is trite that he who alleges proves. Section 107 of the *Evidence Act*, Cap 80, Laws of Kenya, places the burden of proof on the person claiming. That person bears the legal burden, and the evidential burden. Upon discharging the evidential burden, by adducing evidence sufficient to discharge the legal burden, the burden shifts to the other side. In the instant case, the trial court was of the view that the evidence presented by the appellant did not discharge the legal burden, and, therefore, the burden did not shift to the respondent.

9. So, what happened at the trial? Of the 3 witnesses presented by the appellant, only PW2 and PW3, the appellant herself, are relevant, for the purposes of liability, for PW1 was the doctor who examined the appellant for the purposes of the medico-legal report. As the appellant was a passenger in the accident vehicle, she was an eyewitness to what transpired. She testified that she was awake, and saw what happened. According to her, their vehicle was negotiating a bend, or corner as she called it, and the respondent, who was driving, had encroached on the lane for oncoming vehicles, he encountered an oncoming vehicle, whereupon he swerved to avoid a head-on collision, he tried to steer back to his lane, but he lost control, and the vehicle landed in a ditch. She said that the driver was speeding. The testimony of PW2 was not very useful, so far as liability was concerned, for he was not an eyewitness, and relied only on third party accounts. He, however, testified that he blamed the respondent, albeit without explanation.

10. The respondent testified that he swerved to avoid a head-on collision with a speeding oncoming vehicle, which had encroached onto his lane. He stated that the accident did not occur at a bend, but rather at a straight stretch, after he had emerged from a bend. He explained that there was a stationary vehicle on the road, and the oncoming vehicle swerved to avoid that vehicle, and entered into his lane. He asserted that the appellant was asleep as at the time the accident happened. DW2 was a passenger in the

accident vehicle, and the owner thereof. He said that he was sitting at the back of the accident vehicle. He asserted that the appellant was asleep. He stated that the accident happened when that other vehicle got into their lane, as it avoided the stationary vehicle.

11. The testimonies of the 3 eyewitnesses are on all fours on the point that the accident happened, as the driver swerved to avoid a head-on collision with an oncoming vehicle. They diverge on only one point, the reason for the swerving. Whereas the appellant said that the respondent was negotiating a corner, and had encroached on the lane of oncoming traffic, and was serving to avoid an oncoming vehicle; the respondent's case was that it was the oncoming vehicle which had encroached on his lane, as it was evading a vehicle that was stationary on the road. The trial court was faced with these 2 rival versions, and was called upon to decide on which of the 2 it was to believe.

12. So, how did the trial court resolve the puzzle? It chose to believe the respondent. Why? Ostensibly, on grounds that the appellant was asleep, and did not know what was happening. Where did the trial court get that story, that the appellant was asleep? From the respondent, the person that she was blaming for the accident. What was the basis for believing the respondent, when the appellant herself had not alluded to being asleep? The trial court did not give any reasons. In any case, the mere fact that she might have been asleep should not be construed to mean that negligence could not been established from the facts presented by both sides, or agreed as between the 2 sides. The case by the appellant was dismissed on only one ground, that the appellant was asleep. It was a matter of the word of the appellant against that of the respondent. Yet, the narrative the appellant gave mirrored that of the respondent, save for the stationary vehicle that was allegedly being avoided by the oncoming vehicle.

13. Could negligence be attributed to the respondent? Yes. In the first place, the appellant was a passenger in the vehicle belonging to the respondent, whether driven by him or by an authorised agent. The owner of that vehicle or the driver owed a duty of care to the appellant, as a passenger. The accident happened while she was riding in that vehicle, and the issue as to whether the driver cared for or had regard for his passenger would arise. There was no dispute that the appellant was in the accident vehicle. There was no dispute that there was an accident. There was no dispute that the accident happened while the driver was avoiding an oncoming vehicle. The issue was whether the action that the driver took, while avoiding that oncoming vehicle, could be said to be negligent. It could be, depending on the evidence placed on record. Whether the appellant was asleep, at the material time, was not a material issue, in view of the available evidence .

14. Was the evasive action taken by the respondent negligent? The appellant testified that she saw no stationary vehicle at the scene, and, therefore, the question of evasive action being taken by the oncoming vehicle did not arise. The alleged stationary vehicle was critical to the puzzle, for it was the foundation of the accident, according to the respondent. Were it not for that stationary vehicle, according to the respondent, there would have been no accident, for the oncoming vehicle would not have swerved onto his lane, forcing him to drive his vehicle into a ditch. The defence by the respondent was built around the alleged stationary vehicle, yet no concrete evidence was placed on record on the existence of that vehicle. The registration details of that vehicle were not obtained, nor presented in court. No pictorial evidence was obtained, and presented in court, relating to that alleged stationary vehicle. So, without any concrete evidence, that that alleged stationary vehicle existed, to explain the swerve by the respondent into a ditch, the explanation by the respondent, as to how he ended up in that ditch, would be hollow. The trial court should have considered that.

15. Secondly, that swerve into the ditch must have been very violent, if the injuries sustained by the appellant were anything to go by. She sustained fractured ribs and a rapture of the spleen, both of which caused internal bleeding into the abdominal cavity and severe abdominal trauma. She was admitted in hospital for 5 days. The appellant testified that the respondent had been speeding. The accident vehicle

was not in a collision with another vehicle. The injuries, sustained by the appellant, were consistent with an accident involving a speeding vehicle, for the injuries would not have been that severe, if the vehicle was at a slow or moderate speed. Surely, the trial court had enough material before it, to find that the respondent was negligent. It was at night, 4.00 AM, and a car was driven into a ditch, where a passenger was badly hurt, as its driver tried to avoid a head-on collision. It could be true that there was a stationary vehicle that was on the way of the other vehicle, and that the appellant was asleep, but how would one explain the violence that occasioned the severe injuries that she sustained, except that the vehicle must have been speeding, hence, in an attempt to avoid the other vehicle, the driver was unable to control his vehicle, due to the speed he was at, hence the accident.

16. I am alive to the position that I did not have the benefit of seeing and hearing the parties testify, which the trial court had the advantage of. However, I have the record of what transpired before that court. My analysis of that material points to negligence on the part of the driver of the accident vehicle. Whether the appellant was asleep, during the incident, would not diminish the fact of the violence of the accident, and the possibility that the accident vehicle was being driven at such a speed, as not to allow the driver to control his vehicle, when he encountered the other motor-vehicle, whether it was on his lane or not.

17. Liability should have been attributed to the respondent, and the suit ought not have been dismissed. As the appellant was a passenger in the accident vehicle, liability should have been assessed at 100%, for no liability can be attributed to a person or entity that has not been made a party to the suit. It was the responsibility of the party alleging that the accident was caused or contributed to by another vehicle to have the owner of that other vehicle brought into the suit, either as third party or co-defendant. In the absence of such joinder, the driver of the vehicle, in which the accident victim was a passenger, bears full liability.

18. Consequently, it is my finding and holding that the appeal herein has merit. I hereby allow it, by setting aside the order, dismissing the said suit, and substituting it with an order finding and holding the respondent 100% liable for the accident. As the parties have not addressed me on the damages, I shall adopt the figures that the trial court had proposed, that is to say Kshs. 500,000.00 general damages and Kshs. 6,050.00 special damages. The appeal is disposed of in those terms. The appellant shall have the costs of this appeal and of the suit below. It is so ordered.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 24TH DAY OF MAY 2024

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

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

Archer & Wilcock, Advocates for the respondent.