Osoro & another v Akango (Civil Appeal 13 of 2022)
[2023] KEHC 23558 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23558 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 13 OF 2022

RPV WENDOH, J

OCTOBER 12, 2023

BETWEEN

MESHACK OSORO ..... 1ST APPELLANT

B.O.M SDA MIXED SECONDARY SCHOOL ..... 2ND APPELLANT

AND

JANE AKANGO ..... RESPONDENT

(An Appeal from the Judgement and Decree of Hon. P. ARERI (PM) dated and delivered on 25/1/2021 in Migori CMCC No. 125 of 2020 Meshack Osoro & B.O.M. KEA SDA Mixed Secondary School vs Jane Akango)

JUDGMENT

1. The appeal subject of this judgement arose from the judgement and decree delivered on 25/1/2021 in Migori Chief Magistrate's Court No. 125 of 2020 Meshack Osoro & B.O.M. KEA SDA Mixed Secondary School (hereinafter the appellants) v Jane Akango (hereinafter the respondent).

2. The respondent instituted a suit by a plaint dated 28/7/2020, seeking general damages for pain and suffering, special damages of Kshs. 5,500/=, costs of the suit and interest on the aforementioned at court rates. The respondent pleaded that the 2nd appellant was the registered owner of motor vehicle registration number KCP 982K (suit motor vehicle) which was being driven and/or controlled by the 1st appellant as the authorized driver, servant and/or agent.

3. It was further pleaded that on or about 23/12/2019, at around 6.00p.m. along the Migori - Sirare Road near Msomi TTC, the respondent was travelling as a pillion passenger on a motorcycle on her correct lane when the 1st appellant allegedly managed, controlled and/or drove the suit motor vehicle at a high speed and while attempting to overtake another motor vehicle, the suit motor vehicle veered off its lane to the respondent's correct lane thereby hitting her causing multiple bodily injuries.

4. The respondent particularized the negligence on the part of the 2nd appellant, her driver, servant and/or agent, the particulars of injuries and special damages. The respondent sought to rely on the doctrine of res ipsa loquitor.

5. The appellants filed a statement of defence dated 19/9/2020. They denied liability and put the respondent to strict proof. The appellants further particularized and attributed negligence to a third party and the respondent. The appellants asked the trial court to dismiss the suit with costs.

6. The suit proceeded for hearing with the respondent testifying as PW1, CP1 No. 89421 Joseph Chacha PW2. The defence presented one witness Meshack Osoro Ndubi DW1. Parties further recorded a consent that the testimonies do apply in CMCC No. 125 of 2020 and CMCC No. 126 of 2020.

7. The trial court allowed the respondent's suit by awarding Kshs. 200,000/= as general damages, Kshs. 5,500/= as special damages, costs and interest of the suit.

8. Being aggrieved by the decision of the trial court, the appellants commenced this appeal and preferred eight grounds of appeal which will be broadly addressed on two grounds:-

    a. The trial Magistrate erred in law and in fact in finding that the appellants were 100% liable for the accident, a finding that was not supported by the evidence and the pleadings.

    b. That the quantum of general damages for pain, suffering and loss of amenities is inordinately high, erroneous, oppressive and punitive which amounts to a miscarriage of justice.

9. Directions were taken that the appeal be canvassed by way of written submissions. The appellants faulted the manner in which the trial Magistrate's judgement was delivered. The appellants submitted that the judgement did not comply with the provisions of Order 21 Rule 4 of the *Civil Procedure Rules*. The appellant placed reliance in the Court of Appeal Case of *Timsales Limited v Samuel Kamore Kihara* (2016) eKLR where the court found that the judgement of the trial court did not comply with Section 25 of the *Civil Procedure Act* and Order 21 Rule 4 of the *Civil Procedure Rules*; that the Court of Appeal found that the High Court ought not to have assumed the role of the trial court but it should have remitted the matter back to the trial court for rewriting of the judgement. The appellants submitted that this court should allow the appeal on this basis and remit the mater back to the trial court to write a proper judgement.

10. On the issue of negligence, it was submitted that there was contradictory evidence by the respondent and the 1st appellant on how the accident took place. The appellants submitted that the evidence of PW2, was that the point of impact was on the left lane facing Migori which was the correct lane of the bus; that the evidence of the 1st appellant was that the motorcycle riding behind the motorcycle he was riding on, hit the rear of the accident motorcycle which then hit the rear of the bus, thus it did not connote any negligence on the 1st appellant's part. The appellants further submitted that the scratch marks were on the rear of the bus but not on the front part of the bus that was hit by the motorcycle. In that regard, the appellants urged the court to find that there was no evidence to support acts of negligence against the appellants and the suit by the respondents ought to fail.

11. On whether the appellants erred by not joining the offending motorcycle, they submitted that it was not their duty to bring proceedings against the one who caused the accident but it was the respondent's duty. It was further submitted that the respondent had not shown any negligence against the appellants and none of the particulars alleged in the plaint was proved by way of evidence; that the respondent ought to have sued the correct tortfeasor which he did not do. To support these propositions, the appellants referred on the cases of HCCA No. 5 of 2013 *Damaris Wanjiru Nderi v George Ngero Kanyi* (2017) eKLR, HCCA No. 54 of 2018 *Daniel Muthini Maweu v Gideon Misheck* (2020) eKLR

and Court of Appeal cases CACA No. 177 of 2002 *Sammy Ngigi Mwaura v John Mbugua Kagani & Another* (2006) eKLR and CACA No. *Abbay Abubakar Haji Patuma Ali Abdulla v Freight Agencies Ltd* (1984) eKLR. The appellants urged this court to interfere with the decision of the trial court and order that the respondent's suit fails.

12. In opposing the appeal, the respondent filed submissions dated 16/1/20123. On the issue of liability, the respondent submitted that his evidence was corroborated by the evidence of Joseph Chacha, the Police Corporal who upon visiting the scene of the accident and after conducting his investigation, blamed the driver of the suit motor vehicle for not keeping his lane; that the 1st appellant in his testimony did not apportion blame to the rider of the motorcycle but instead another motorcycle whose existence could not be ascertained. The respondent relied on the cases of *James Gikonyo Mwangi v D.M. (Minor suing through his mother and next friend IMO)* (2016) eKLR, Migori HCCA No. 6 of 2015 *Agroline Hauliers Ltd & Another v Michael Abong Kisemba and Kisii* HCCA No. 71, 72 and 73 of 2013 *Tom Ombita Ndago & Another v Alfonse Omondi Otieno & 2 Others* where the courts were of the view that they could not apportion liability for contributory negligence for a party who was not cited as a third party. The respondent urged the court to find that the trial court rightly found that the appellants were 100% liable.

13. On the issue of quantum, the respondent asked this court to find that the general damages awarded by the trial court were not inordinately high and the same should be upheld.

14. This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another v Associated Motor Boat Co. Ltd* (1968) EA 123.

15. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held: -

> " An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."

16. Guided by the above principles, I have considered the record of appeal, the proceedings in the trial court and the submissions by both parties. The main issues for consideration are:-

    a. Whether the trial Magistrate's judgement complied with the law;

    b. Whether the trial court's finding on negligence was proper;

    c. Whether the trial court applied the correct principles in assessment of damages.

17. On the propriety of the judgment delivered, Order 21 Rule 4 of the *Civil Procedure Rules* provides: -

> Judgements in defended suits shall contain a concise statement of the case, the points of determination, the decision thereon, and the reasons for such decision."

18. A judgment should therefore contain a summary of the case of both parties in the suit, the issues for determination, the decision and the reasons thereof. I have carefully scrutinized the judgement rendered by the trial Magistrate. The learned Magistrate summarized the facts as contained in the plaint of the respondent and thereafter the defence of the appellants. The Magistrate further summarized the testimonies of PW1, PW2 and DW1.

19. On the issue of negligence, the trial court addressed its mind to it although not in an elaborate manner and considered, which party was negligent and made its finding. Further, the trial court proceeded to address itself on the issue of quantum of damages.

20. I have considered the facts in the case of *Timsales Limited* (supra) where the trial Magistrate declined to write the judgement since he could not understand the typed proceedings and in particular the manner in which the exhibits were marked. The trial court ordered that the matter be heard de novo for it to acquaint itself with the facts. On appeal to the High Court, the court heard the parties on merit and rendered its judgement on the matters of controversy between the parties before the subordinate court. On the second appeal, the Court of Appeal faulted the Superior court for assuming the role of the trial court to the extent of addressing itself on the merits and the demerits of the facts before the trial court. The Court of Appeal held that the Superior Court was only limited to address itself on the matters on appeal before it, which was setting aside the ruling of the trial court instead of rendering its judgement on the substantive suit filed in the trial court.

21. The aforementioned facts are distinguishable from the facts before this court. As I have analyzed above, the trial court did take its time to write a judgement, although not elaborately, a concise judgement which captured the necessary facts of the dispute before it. This court does not find fault in the judgement of the trial court.

22. In *Micheal Hubert Kloss & Another v. David Seroney & 5 Others* (2009) eKLR the Court of Appeal stated that "the determination of liability in a road traffic case is not a scientific affair" and proceeded to quote Lord Reid in *Stapley v Gypsum Mines Ltd* (2) [1953] A.C. 663 at p. 681 as follows: -

> To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ... The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

23. The respondent's case was based on the alleged negligence of the 1st appellant. The Court of Appeal in *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* (1991) 2 KAR 258 held: -

> There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

24. In *Masembe v. Sugar Corporation and Another* (2002) 2 EA 434, it was held that:-

> Negligence is not actionable per se but is only actionable where it has caused damage and in that regard the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage or injury complained of; and where the damage was caused by the negligent acts of different persons, to assess the degree of their respective responsibility and blameworthiness, and apportion liability between or among them accordingly...There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct." (emphasis).

25. Musinga J (as he then was) in *South Nyanza Sugar Co. Ltd v. Wilson Ongumo Nyakwemba* (2008) eKLR quoting with approval *Statpack Industries Limited v. James Mbithi Munyao* HCCA No. 152 of 2003 (UR) where it was held that:-

> It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence."

26. On the issue of liability, this court will consider the testimonies of the witnesses particularly on the manner in which each party alleged the accident took place.

PW1 testified: -

> I was from Migori headed to Magodho. Magodho is towards Sirare...on reaching Migori TTC there was an oncoming vehicle a bus yellow in colour registration number KCB 982K. We were on the left hand side of the road on the tarmac at the pedestrian lane. The bus attempted to overtake a white saloon car ahead of it and it came to our side and knocked us down."

On cross - examination, PW1 testified: -

> We were travelling towards Sirare direction. The bus came from the opposite direction...there were several motorcycles behind us. I did not see any motorcycle loosing control and hitting us. The bus came to our side and hit us. It was overtaking a saloon car. The bus only hit us. The front side of the bus hit us."

On re-examination, PW1 stated: -

> The rider of motorcycle maintained his lane. The bus left its lane and came to our lane."

PW2, Joseph Chacha the traffic officer testified: -

> The driver of the motor vehicle did not keep his lane."

On cross - examination, he testified: -

> The motor vehicle was from Sirare to Migori while the motorcycle was from Migori to Sirare...the possible point of impact was on the left lane as you face the Migori direction... the damage was nearside the corner panel scratched."

DW1 testified: -

> The damage was a scratch on right side near the lights. The accident happened as I was from Sirare going to Kisii. After I passed the 1st motorcycle, the 2nd motorcycle hit the one with passengers and forced him to lose control and hit my vehicle. The accident was caused by the rider who did not have a passenger."

On cross-examination he testified:-

> I was driving from Sirare to Migori on the left side of the road. There were two motor cycles from Migori going to Sirare...the one with passengers was in front. The rider and my vehicle were on different lanes. There was space on this lane. The other rider hit him from behind. I blame the rider who did not have a passenger. I have not brought him to court. That is not my work."

On re-examination, he testified: -

> The motorcycle with passengers hit my vehicle."

27. The common aspect from the testimony of all the witnesses is that the driver of the suit motor vehicle was driving from Sirare heading towards the general direction of Kisii while the motorcycle on which the respondent was riding on together with two other passengers was coming from Migori towards the general direction of Sirare. The police officer testified that he had the sketch plan which was in the police file but he did not produce it in court.

28. From the evidence of the parties, this court has understood that both the suit motor vehicle and the motorcycle were being ridden and driven respectively on the left lane of the road only that they were heading in different directions. The motorcycle was being ridden on the pedestrian walkway heading towards Sirare while the bus was being driven on the main road heading towards Kisii.

29. The driver of the suit motor vehicle did not lay any blame in the motorcycle on which PW1 was but blamed an unknown motor cycle for hitting the motorcycle in which the respondent was being ridden on and the impact thereof was that it hit the suit motor vehicle. The driver of the suit motor vehicle, contradicted himself when he testified:-

> After I passed the 1st motorcycle, the 2nd motorcycle hit the one with passengers and forced him to lose control and hit my vehicle."

30. The above testimony seems to suggest that both the driver and the two motor cycles were heading towards the same direction but not in the opposite direction, which is the case here. This means that there were two motorcycles ahead of the suit motor vehicle and when the driver passed one of the motor cycles, it is only logic that he now came in between the two motorcycles. Hence, it would not have been possible for one motor cycle to hit another one from behind.

31. This court is of the view that PW1's version of the events is more probable than not that the driver of the suit motor vehicle may have attempted to overtake another vehicle ahead of it or for some reason, it swerved to the pedestrian side of the road where the motorcycle in which the respondent and the

other two pillion passengers were on and it hit them. It is also more probable than not, that the suit motor vehicle was being driven at a high speed to the extent that the driver would not have been in a position to apply brakes on time. The explanation by the driver of the suit motor vehicle that it was another motorcycle which hit the one being ridden on, is not convincing. The Court of Appeal in *Joyce Mumbi Mugi v. The Co-Operative Bank of Kenya Limited & 2 Others* Civil Appeal No. 214 of 2004 opined that:-

> If a "*matatu*" is driven in a normal and at reasonable speed, there would be no reason why it would run into a hippopotamus or veer off the road and smash into a tree. If a vehicle does any of those things, some explanation ought to be offered by the driver of the vehicle. The explanation may be that the driver, for some reason of his own, was not in control of the vehicle; or it may be that the hippopotamus suddenly ran into the path of the vehicle; or it may be that through no fault of the driver, there was a sudden tyre burst, the driver lost control and the vehicle veered off the road and ran into a tree. But the explanation has to be there. The explanation can be given by the driver; or it can be given by a passenger who was in the vehicle and saw what happened; or it can be given by a bystander who saw the hippopotamus suddenly dash onto the road in front of on-coming vehicle...Vehicles, when normally driven at reasonable speed, do not just do certain things. Though the vehicle is being driven on a wet road by itself would not make the vehicle swerve onto the path of on-coming vehicle. If something of the kind happens there must be an explanation as to the reason for the particular event happening. Vehicles when normally driven on the correct side of the road and at reasonable speed do not run into each other."

32. In the absence of a sketch map to show how the accident occurred, it therefore remains uncertain on how to apportion the blame. Needless to say, an accident did occur. The respondent was one of the three pillion passengers on the motorcycle. In essence, the motor cycle had a total of four people including the rider. Raphael Onyango who testified as PW1 acknowledged on cross examination that he knew it was an offence to carry more than one passenger in a motorcycle and some blame must be apportioned for there cannot be a wrong suffered without damages. Had the cyclist carried only one passenger as is required of him by the law, he may have swerved to avoid the collision. Odunga J (as he was then) in *Rentco East Africa Limited v Dominic Mutua Ngonzi* (2021) eKLR held:-

> It was not disputed that the Respondent and another person were pillion passengers on the said motor cycle. The law does not permit more than one pillion passenger to be carried on a motor cycle. By riding on the said motor cycle against the law, the Respondent exposed himself to danger. Such conduct cannot go un-condemned and it should not be rewarded. Accordingly, the Respondent ought to shoulder some blame for such reckless conduct. Accordingly, I find that the Appellant ought not to have been found 100% liable. I set aside that finding and substitute therefore 70% liability for the driver of the motor vehicle and find the Respondent 30% liable."

33. I am of the same view that the respondent should carry some blame owing to the danger which she exposed herself while riding as one of the three pillion passengers on the motorcycle. Although the rider was found to be blameless, I herein set aside and substitute the liability to 90%:10% in favour of the respondent.

34. On the issuance of third party notice, the appellants blamed a certain unknown motorcycle. It is the appellants' opinion that the respondent should have sued the unknown motorcycle which hit them from behind. Order 1 Rule 15 (1) of the *Civil Procedure Rules* stipulates that: -

> (1) Where a defendant claims as 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, he 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, and such leave shall be applied for by summons in chambers ex parte supported by affidavit..."

In *Kenya Commercial Bank v Suntra Investment Bank Ltd* (2015) eKLR the Court held that: -

> In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 rule 15 - 22 of the Civil Procedure Rules. And liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the *Civil Procedure Rules*."

35. The respondent's claim was against the appellants. It is the appellants who sought to blame and introduce a third party to the claim but not the respondent. Therefore, it was upon the appellants to issue the third party notice to the other motorcycle since they were of the view that it was a necessary party to these proceedings so that the issue of liability would have been determined between them. In the absence of joining third parties to the proceedings, the appellants would ordinarily shoulder 100% liability. As I have pronounced myself hereinbefore, the respondent will bear 10% liability for the fact that he endangered himself by allowing to ride as an excessive pillion passenger.

36. On the issue of the general damages, although the appellants contested the same, they did not submit on it or offer a different proposition from the amount awarded by the trial court. The respondent urged this court to uphold the decision of the trial court on the general and special damages awarded. This court finds no reason to disturb the award in damages. In my view, the award was quite fair. The same applies to the award on special damages.

37. In the end, the appeal partially succeeds on the issue of liability. The judgement and decree of the Hon. P. Areri (PM) dated and delivered on 25/1/2022 is hereby set aside. The following orders do issue: -

Liability - 90:10% in favour of the Respondent.

General Damages - Kshs. 200,000/=

Special Damages - Kshs. 5,500/=

Sub total - Kshs. 205,500/=

Less liability 10% - Kshs. 20,550/=

Total - Kshs. 184, 950/=

38. Interest on the decretal amount will be at court rates from the date of judgment. The respondent is also awarded the costs of the suit and half costs of this appeal.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 12TH DAY OF OCTOBER 2023.

R. WENDOH

JUDGE

Judgement delivered in the presence of;

Mr. Karanja for the Appellants.

Ms. Amayo h/b Mr. Owade for the Respondent.

Emma & Phelix Court Assistants.