



REPUBLIC OF KENYA



**Mwangi v Obaga & 2 others (Civil Appeal E281 of 2023)  
[2024] KEHC 8202 (KLR) (Civ) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8202 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E281 OF 2023**

**JK NG'ARNG'AR, J**

**JUNE 26, 2024**

**BETWEEN**

**SAMUEL MACHARIA MWANGI ..... APPELLANT**

**AND**

**GILBERT OTERO OBAGA ..... 1<sup>ST</sup> RESPONDENT**

**KEFA OSIEMO MACHEGWA ..... 2<sup>ND</sup> RESPONDENT**

**CHARLES OBARE MACHEGWA ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal from the judgment and decree of the Chief Magistrate's Court at Nairobi  
(J.P. Aduke, SRM.) delivered on 30th March 2023 in CMCC No. 2550 of 2020)*

**JUDGMENT**

1. The appellant was the plaintiff in CMCC No. 2550 of 2020. By plaint dated 17<sup>th</sup> June 2020, the appellant sued the 1<sup>st</sup> and 2<sup>nd</sup> respondents as the beneficial and/or registered owners of motor vehicle registration number KCL 289S. The 3<sup>rd</sup> respondent was sued as the driver of that said motor vehicle. The appellant averred that on 17<sup>th</sup> February 2020, his authorized driver was driving his motor vehicle registration number KBH 956X along Thika Road. Suddenly, the said motor vehicle was hit on the rear right side by that of the respondents' causing extensive damage. As a result of the damage, the appellant sought special damages in the sum of Kshs. 287,160.00, costs of the suit together with interest thereon.
2. By judgment of the learned magistrate dated 30<sup>th</sup> March 2023, the appellant's suit was dismissed with no orders as to costs. Dissatisfied with those findings, the appellant filed his memorandum of appeal dated 11<sup>th</sup> April 2023 that raised four grounds impugning the findings of the trial court. I have taken the liberty to summarize those grounds as follows: that the trial court erred in fact and in law by ignoring the uncontroverted evidence of the eye witness thereby arriving at an erroneous conclusion on liability;



that a police abstract is not the only piece of evidence that can prove negligence in such a claim; that the appellant's submissions were not considered; and that he ought to be awarded special damages. For those reasons, the appellant urged this court to allow the appeal, set aside the judgment of the trial court by substituting the same with an order allowing the suit as prayed in his plaint. He further prayed for costs of this appeal.

3. The appeal was heard on the basis of the parties' written submissions. However, as at the time of writing this judgment, I was only in receipt of the appellant's submissions. The appellant relied on his written submissions dated 21<sup>st</sup> May 2024 to urge that though the police abstract was illegible, it ought not to have been used against him as to find that he had not proved his case on a balance of probabilities. This is because PW1, an eye witness, testified as to the occurrence of the accident. He cited the case of *Catherine Mbithe Ngina vs. Silker Agencies Limited* [2021] eKLR and *ZOS vs. CAO* [2019] eKLR to submit that the absence of police evidence was not fatal to an accident claim. On quantum, the appellant produced the assessment report, assessment fees, the investigation report and receipt of investigation to justify the award sought.
4. I have considered the record of appeal and the appellant's submissions, examined the evidence and analyzed the law. This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze 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. [See *Abok James Odera t/a A.J Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR].
5. The evidence on record reveals that the suit was undefended as the respondents did not participate in the proceedings. The appellant called PW1 James Wanjau Waceke, the driver of the appellant's motor vehicle to the stand. His evidence was that as he was passing Muthaiga on 17<sup>th</sup> February 2020, while driving motor vehicle registration number KBH 956X, the 3<sup>rd</sup> respondent, driving motor vehicle registration number KCL 829S at an excessive speed, rammed violently into the rear right side of the appellant's motor vehicle. As a result of the impact, the appellant's motor vehicle was forced into a sideways position standing across rather than alongside the road. According to PW1, the 3<sup>rd</sup> respondent additionally rammed into other motor vehicles.
6. Following the accident, PW1 informed the appellant PW2 about the incident. He thereafter proceeded with the other drivers to Pangani Police Station where the accidents were reported. According to PW1, the 2<sup>nd</sup> respondent was blamed for causing the accident as he was driving at an extremely high speed and failed to stop, slow down or control the vehicle. Furthermore, PW1 contended that the vehicle was defective and was carelessly driven.
7. PW2 instructed Poly-Tech Assessors to quantify the extent of damage and approximate the cost implications. They prepared an assessment report dated 24<sup>th</sup> February 2020 estimating that the costs of repairs totaled Kshs. 262,160.00. PW2 paid Kshs. 5,500.00 for their services. He thereafter retained the services of Touchline Insurance Investigators to establish the owners of motor vehicle registration number KCL 829S revealing that the same belonged to the 1<sup>st</sup> respondent. For that service, PW1 paid Kshs. 19,500.00. PW1 also relied on the police abstract which revealed that the 2<sup>nd</sup> respondent was the owner of the motor vehicle. PW2 thereafter instructed his advocates to file the suit and recover damages on his behalf.
8. In dismissing the appellant's case, the trial court held as follows:

“With respect to liability, I have seen a copy of the police abstract on record which is not legible ad (sic) as such, I am unable to ascertain who is to blame for causing the road accident



herein. As at the date of writing this judgment, I have seen a copy of NTSA search records confirming the identity of the owner of the motor vehicle KCL 829S as the 1<sup>st</sup> defendant as at March 2020. The police abstract before me is completely illegible. There is no investigation report from the police on record and nothing further to shed light on who was to blame for this accident. In the absence of any further supporting proof of ownership and evidence of conclusive report on who is to blame for the accident, I am unable to ascertain and apportion liability. In the circumstances, I find that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants are not liable. I have relied on section 8 of the *Traffic Act*, Cap 403 Laws of Kenya and the reasoning of the court in *Wellington Nganga Muthoira vs. Akamba Public Road Services & another* [2010] eKLR

9. Were those findings proper? It is trite law that a police abstract does not establish negligence. It merely indicates the fact of an accident occurring. [see *Kennedy Nyangoya vs. Bash Hauliers* [2016] eKLR]. It was thus not proper for the trial magistrate to conclude that the absence of the police abstract failed to establish who was to blame for the accident. It is also noted that the appellant's case was uncontroverted. However, the absence of cross examination and vitiation of the evidence by way of defence does not automatically establish that the appellant proved his case to the required standard.
10. The appellant submitted that based on the evidence of PW1, an eye witness, the respondents were liable for the accident. According to PW1, while driving motor vehicle registration number KBH 956X, the 3<sup>rd</sup> respondent, driving motor vehicle registration number KCL 829S at an excessive speed, rammed violently into the rear right side of the appellant's motor vehicle. As a result of the impact, the appellant's motor vehicle was forced into a sideways position standing across rather than alongside the road. According to PW1, the 3<sup>rd</sup> respondent additionally rammed into other motor vehicles. He blamed the 2<sup>nd</sup> respondent for causing the accident as he was driving at an extremely high speed and failed to stop, slow down or control the vehicle. Furthermore, the vehicle was defective and was carelessly driven.
11. Unfortunately, the evidence adduced was so scanty to establish how PW1 was able to see how the accident occurred if he was hit from the rear? What was the actual speed of the motor vehicle? What was the activity of PW1 during the accident? What steps did PW1 take to avoid the accident? Was PW1 in motion or at a standstill? Where exactly did the accident occur and on which side of the road? The scanty evidence does not establish on which side of the road the accident occurred. Could it be that PW1 was the one on the wrong and caused the accident? What parameters were used by PW1 to arrive at the conclusion that the respondent's motor vehicle was defective?
12. In my view, the evidence was lacking in credibility as to establish that indeed on a balance of probabilities, the respondents were liable in negligence. Since liability was not proved, I see no need to establish quantum. For this reason, I find that the appellant has failed to discharge his burden of proof to the required standard. Consequently, the appeal lacks merit and is hereby dismissed with no orders as to costs.

It is so ordered.

**DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE, 2024.**

.....

**J.K. NG'ARNG'AR, HSC**

**JUDGE**

In the presence of:-

M/s Njoroge for the Appellant



No appearance for the Respondent

Court Assistant- Peter Ong'idi

