



Musisi (Legal representative of the Zakayo Mwenga Katuva (Deceased) v Family Bank Limited & another (Civil Appeal E051 of 2023) [2024] KEHC 10324 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 10324 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E051 OF 2023
GMA DULU, J
JULY 31, 2024**

BETWEEN

**MARY NGARWA MUSISI (LEGAL REPRESENTATIVE OF THE ZAKAYO
MWENGA KATUVA (DECEASED)) APPELLANT**

AND

FAMILY BANK LIMITED 1ST RESPONDENT

COLLETA MUKONYA KANU 2ND RESPONDENT

*((From the decision in Civil Case No. E58 of 2020 delivered by Hon.
T. N. SINKIYLAN (PM) on 25th August 2023 at Voi Law Courts))*

JUDGMENT

1. In a judgment delivered on 25th August 2023, the learned trial Magistrate found that liability was not proved by the plaintiff and concluded the issue of liability in the following terms:-
 - “55. On liability: the court agrees with the defence submissions in entirety on the issue of liability.
 56. Having resolved blame worthiness for causing the accident and found the defendant’s liability has not been proved, the reliefs sought in the amended plaint are not warranted. The plaintiff’s suit is dismissed.
 57. Costs follow the event. The court has no reason to depart from the guiding principle in this case. The plaintiff will bear the defendant’s costs of the suit.”
2. Aggrieved by the decision of the trial court, the appellant who was the plaintiff in the trial court, has come to this court on appeal through counsel Shariff Ramadhan & Company Advocates, on the following grounds:-



1. The learned trial Magistrate erred in law and in fact in misapplying the place of police abstract in evidence before the court.
 2. The trial court erred in law and in fact in misapplying and misinterpreting the place of OB (Occurrence Book) as an official document of proof of event.
 3. The trial court erred in finding that no basis was laid on how the police concluded that the driver of the respondent's vehicle (the canter registration number KCG 881D) was to blame for the accident when the police abstract report conclusively blamed the respondent driver and even preferred criminal charges against him.
 4. All in all the learned Magistrate erred in law and in fact in her evaluation, interpretation and application of evidence before the court thereby arriving at the wrong conclusion/judgment.
 5. The learned Magistrate erred in law and in fact in finding that special damages for loss of use of Motor Vehicle Registration Number KAT 603H was not proven and further erred in disregarded the appellant's assessors report when no alternative report had been tendered in rebuttal.
 6. Indeed, the trial Magistrate erred in law and in fact in assuming the expert role as an assessor and biasly disregarded the assessors report without any basis.
 7. The learned Magistrate erred in law and in fact in not awarding material damage to the plaintiff when the same was specifically pleaded and proven to the required standard of law.
 8. The trial court erred in finding that the appellant did not prove liability to the required standard of proof when the same was specifically proven and the respondent's driver charged for causing death by dangerous driving, the appellant sustained serious and severe injuries as a result.
 9. The learned Magistrate erred in law and in facts in failing to consider the uncontroverted evidence that the respondent's driver fled the scene immediately thereafter.
 10. The learned trial Magistrate erred in law and in fact in finding that both parties have equally discharged their burden of proof, when the Defendant called no single witness to testify on its behalf, therefore, he did not in any way challenged the proof discharged by the plaintiff.
 11. The trial court was biased in concluding that even if liability and been proven, her judgment would still favour the respondent for reasons that the respondent's submissions are the only ones that convinced the court on award of general damages.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Shariff Ramadhan & Company Advocates for the appellant, as well as the submissions and second submissions filed by Jengo Associates Advocates for the 2nd respondent. I have not seen any submissions filed for the 1st respondent Family Bank Limited.
 4. This being a first appeal, I am bound to be guided by the legal principle set out in Section 78(1) of the Civil Procedure Act (Cap.21), that as a first appellate court, this court has jurisdiction to re-evaluate, re-assess, and re-analyse the entire record and draw its own conclusions. This principle has been applied and restated repeatedly by courts. In my view, it will suffice if I only cite the case of Selle & Another =Versus= Associated Motor Boat Company Limited & Others (1968) EA 123.



5. This is a claim of alleged negligence arising from a road traffic accident. The burden was on the plaintiff, now appellant, to prove her allegations of negligence against the respondents. This legal burden is codified under Section 107 and 109 of the Evidence Act (Cap.80).
6. This being a civil case, the standard of proof was on the balance of probabilities, which in simple terms means that the party alleging negligence must establish through evidence that the allegation of negligence or want of care by the other party, was more likely to be true than not.
7. In the present case, of alleged negligence in a motor traffic accident, the appellant who was the plaintiff, called four (4) witnesses. On their part, the respondents elected not to call any witnesses, and thereafter the respective advocates for the parties filed written submissions.
8. In brief PW1 Mary Ngarwa Musisi testified that she was wife of the victim, now deceased, who operated a matatu (mini bus) which was hit in a road traffic accident and he later died in 2019. She relied on her witness statement and several other documents, which were not contested and were filed as part of the court record.
9. In cross-examination, she stated that the accident occurred on 30th December 2017, but that the victim (husband) died in May 2019. She stated that her husband was a businessman. She did not witness the accident.
10. In re-examination, she stated that the deceased was in the matatu business.
11. PW2 was PC James Kilonzo of Voi Traffic Base, whose evidence was on 30th December 2017 a serious traffic accident which occurred at Maungu area was reported to the police at 12:40hours. On arrival of police officers at the scene, the driver of Mitsubishi Canter KCG 881D had already escaped.
12. It was his evidence that from the observation made at the scene, the driver of the said Canter vehicle had left his proper lane and collided with Nissan Matatu KAT 603H, and the driver of the matatu Zakayo Kavuta and others were injured.
13. He testified that a police abstract was later issued and P3 form also issued. According to him, the driver of the Canter vehicle, who had escaped, was to blame for the accident, as he failed to keep to his lane. He produced the Police Abstract and P3 (medical examination) form as exhibits.
14. In cross-examination, he stated that he was not the investigating officer and that in 2017, he was at Ngong Police Station not Voi Police Station. He stated also that no sketches of the scene were drawn. He explained that the entries in the police abstract form indicated which driver was to blame, and against whom intended charges for causing death by dangerous driving were to be preferred.
15. In re-examination, he stated that entries in the Police Abstract form were from the Occurrence Book. He confirmed that in 2017 he was not at Voi Police Station, and that another police officer recorded what was in the Police Abstract.
16. PW3 was Dr. Stephen K. Ndegwa, whose evidence was that he examined Zakayo Mwendwa Katuva, and on 24th May 2019 prepared a medical report, showing that the patient had suffered fracture of the right femur distal end; left tibia at proximal level; multiple fractures of 5th, 7th ribs on left side; wounds and lacerations on chest. There were also head injuries, and concussion meaning loss of consciousness, and bleeding from the chest. There was cut wound 5cm on the knee and blunt trauma to the abdomen. He relied on his medical report.



17. It was his evidence that the disability suffered was 40%, and that there would be future medical expenses of Kshs. 80,000/=, and that he charged Kshs. 3,000/= for the medical report and Kshs. 8,000/= for attending court.
18. In cross-examination, he stated that he saw the patient 17 months after the accident, and that the patient was admitted in hospital for 28 days and was conscious by then; and could tell his story but was weak and sickly. He denied knowing that the patient died two days after discharge from hospital.
19. PW4 was Johnson Maina a motor vehicle assessor, who assessed the motor vehicle of Zakayo Mwenga Katuva KAT 603H Nissan matatu which was extensively damaged, and declared a total loss. It was his evidence that at that time, the market value of such model of vehicle was Kshs. 750,000/= and salvage value was Kshs. 150,000/= He produced his assessment report as an exhibit. He stated that he was paid Kshs. 8,000/= fees for assessment, and was also paid Kshs. 5,000/= for attending court.
20. In cross-examination, he stated that the vehicle was 1997 vehicle locally assembled car. He maintained that the market value was Kshs. 750,000/= at that time.
21. At this point, the counsel for the plaintiff sought leave of the court to call an additional witness without giving particulars of the full names, nor the nature of evidence to be testified to. The name mentioned was only Naftali.
22. This request was opposed by defence counsel, and the court declined to grant the leave sought. The plaintiff then closed his case, and the defence also elected not to call evidence and thereafter, counsel on both sides filed written submissions.
23. From the above evidence and submissions, the trial Magistrate summarised the pleadings, as well as submissions and case authorities relied upon by counsel for the parties in her judgment.
24. On liability, the trial Magistrate went into great lengths and cited the submissions on both sides and case authorities relied upon. On the standard of proof, the trial Magistrate correctly relied on the case of *DT Dobie & Company Limited =Versus= Wanyonyi Wafula Chebukati (2014) eKLR* in which the statement made by the English Judge Denning J. (as he then was), was relied upon that:-

“.....proof on a balance of preponderance or probabilities means a win, however narrow.
A draw is not enough.”
25. In the present case, the defendants, now respondents elected not to call any evidence. Their pleadings were thus a mere allegation, and remained so. The case of *Linus Nganga Kiongo & 3 Others =Versus= Town Council of Kikuyu (2012) eKLR* cited by counsel is clear on this legal principle.
26. The appellant, had however, both the legal and evidential burden to call evidence to prove the alleged negligence on the balance of probabilities. If not, then her case would fail. She called four (4) witnesses, who were not eye witnesses. The victim of the accident having died could not testify. The police man who testified as PW2 was also not the investigating officer, but relied on official entries in the Police Abstract form to describe how the accident occurred and who was to blame.
27. I note that neither the respondents nor the court, doubted the truth of the entries in the Police Abstract form. None of them also purported to challenge the said entries on the ground of hearsay evidence or lack of authenticity. Their argument was just that, the said evidence of the appellant’s witness was so dilute that it fell short of proving the claim of negligence against the respondents, on the balance of probabilities.



28. In my view, applying the test of balance of probabilities alluded to above, the evidence tendered herein by the appellant on negligence did not result to a draw, but tilted the pendulum against the respondents. It was a win, though very narrow. The evidence of the police officer PW2 was admissible evidence, as it related to official police records, which are normal and common records relating to traffic investigations. Unless there was a contest on its source, or authenticity, which is not the case herein, courts have to rely on the same.
29. In my view therefore, unless the respondents doubted the source or authenticity of the Police Abstract report, which they did not do herein, that evidence stands as to who was to blame for the accident on the balance of probabilities. The tilted pendulum in favour of the appellant could only be turned to a draw or to a negative, if the respondent at least called a witness, to orally testify that what happened at the scene of the accident was different from what was contained in the police abstract report. They did not do so.
30. The pendulum in my view, could not be disturbed or tilted against the appellant by opinions or legal authorities expounded by counsel in submissions, however ingenious those submissions could be.
31. I thus find that the appellant proved negligence against the respondent on the balance of probabilities, and it is 100% liability. I so hold.
32. On the quantum damages assessed by the trial court, I have perused the judgment and considered the submissions on both sides. In my view, the claim for loss of use of the vehicle of Kshs. 10,000/= per day was not proved by the appellant on the balance of probabilities.
33. However, the award of Kshs. 800,000/= assessed by the trial Magistrate for pain and suffering was within the legal parameters of the discretion for award of general damages by the trial court, for a person who had suffered the severe injuries described herein above.
34. On the award for the value of the motor vehicle, the assessor PW4 stated in evidence that the market value of the vehicle at that time was Kshs. 750,000/= and the salvage value was Kshs. 150,000/=. In my view market value, and value of new vehicle are different descriptions; and the assessor talked of market value. No contra evidence was tendered, thus the assessor's evidence stood as such. This would mean that the value of the damaged vehicle was Kshs. 750,000/= minus Kshs. 150,000/= which would total Kshs. 600,000/=. In the absence of the respondents bringing any contra evidence to disprove that value, I so find that the recoverable value of the damaged motor vehicle from the respondent was Kshs. 600,000/=: which was proved on the balance of probabilities.
35. Lastly, I agree with the trial Magistrate on the costs for vehicle assessment Kshs. 8,000/= and costs of medical report Kshs. 3,000/= and costs of grant of letters of administration Kshs. 20,000/=. Thus out of the pleaded special damages, I will award Kshs. 20,000/= for letters of administration plus Kshs. 3,000/= for medical examination plus Kshs. 8,000/= for assessors fees, which is Kshs. 31,000/= as special damages.
36. The award of damages to the appellant are thus as follows:-
 - i. Kshs. 800,000/= for general damages pain and suffering
 - ii. Kshs. 600,000/= for the damaged and written off motor vehicle
 - iii. Kshs. 20,000/= for letters of administration
 - iv. Kshs. 8,000/= for motor vehicle assessment
 - v. Kshs. 3,000/= for medical examination



37. I allow the appeal to the extent above.

38. I award costs and interest of the suit and this appeal, to the appellant payable by the respondents.

DATED, SIGNED AND DELIVERED THIS 31ST DAY OF JULY 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Ms. Mbaka for appellants

Mr. Kioko holding brief for Mr. Jengo for respondents

