



REPUBLIC OF KENYA



**Ekesa & another v Langi & 2 others (Civil Appeal E768 of 2021)
[2024] KEHC 9321 (KLR) (Civ) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9321 (KLR)

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

CIVIL

CIVIL APPEAL E768 OF 2021

JM OMIDO, J

JULY 25, 2024

BETWEEN

OWINO KANOT EKESA 1ST APPELLANT

HABIL KEETA MBETSA 2ND APPELLANT

AND

JAMES OYOO LANGI 1ST RESPONDENT

HELLEN MORAA MASTAR 2ND RESPONDENT

JEREMIAH AMBITA OKAT 3RD RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. D. O. Mbeja, Principal Magistrate delivered on 29th November, 2021 in Nairobi CMCC No. 318 of 2019)

JUDGMENT

1. This appeal is on liability, preferred by Owino Kanot Ekesa and Habil Keeta Mbetsa (hereinafter referred to as “the Appellants”), against the judgement and decree of Hon. D. O. Mbeja, Principal Magistrate delivered on November 29, 2021 in Nairobi CMCC No. 318 of 2019, which was a tortious liability claim.
2. In the matter before the lower court, the 1st and 2nd Appellants were the 1st and 2nd Defendants respectively. The 1st Respondent herein was the Plaintiff while the 2nd and 3rd Respondents were the 3rd and 4th Defendants respectively.
3. Judgement on liability in the lower court was entered in favour of the 1st Respondent at 100% against the Appellants and 3rd and 4th Respondents jointly and severally. The trial court proceeded to



assess special damages at Ksh.4,900/- and general damages for pain, suffering and loss of amenities at Ksh.200,000/- in favour of the 1st Respondent.

4. Being aggrieved with the judgement on the issue of liability, the Appellants presented the following grounds of appeal vide a Memorandum of Appeal dated November 26, 2021:
 1. That the learned Magistrate erred in law and in fact in holding the 1st and 2nd Appellants were (sic) in any way liable for the accident giving rise to the claim by the 1st Respondent.
 2. That the learned Magistrate erred in law and in fact in holding and finding that the 1st Respondent had proved to the required standard that the 2nd Appellant contributed to the accident giving rise to the subject suit.
 3. That the learned Magistrate erred in law and in fact in holding and finding that the 1st and 2nd Appellants were jointly and severally liable with the 2nd and 3rd Respondents when the evidence tendered was so clear that the accident was solely caused by the 3rd Respondent and hence the 2nd Respondent vicariously liable.
 4. That the learned Magistrate erred in law and in fact in holding that the 1st and 2nd Appellants were jointly and severally liable with the 2nd and 3rd Respondents instead of apportioning liability despite the fact that there was an interlocutory judgement against the 2nd and 3rd Respondents and further the 1st and 2nd Appellants had filed a notice of claim against the co-defendants.
5. This being the first appellate court, I am required under Section 78 of the Civil Procedure Act and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] EA 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
6. In *Sielle*, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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.”
7. Going back to the evidence before the trial court, the 1st Respondent (the Plaintiff in the lower court matter), presented the suit vide a plaint dated December 20, 2018, seeking for special and general damages, costs of the suit and interest, arising out of injuries that he sustained in a road traffic accident that occurred on June 26, 2018.
8. The 1st Respondent called Dr. Cyprianus Okere as PW1. The witness told the court that he examined the 1st Respondent on July 17, 2017 and prepared a medical report which he produced as an exhibit. The 1st Respondent sustained blunt injuries to both knees and lower limbs.
9. In his testimony, the 1st Respondent adopted the contents of his witness statement dated December 20, 2018. As per his statement, he was involved in a road traffic accident on June 26, 2018. He stated therein that he was lawfully walking off the road, along the 1st Avenue, Eastleigh when motor vehicles registration number KCK xxxx and KCA xxxx were so recklessly and carelessly driven and/or managed



- that the same collided, causing motor vehicle registration number KCK xxxx to veer off the road and knock down the 1st Respondent, as a result of which he sustained injuries. He blamed the two drivers for the accident, which was reported at Makongeni Police Station.
10. The 1st Respondent produced the following documents in support of his case: Police abstract dated June 26, 2018. Copies of records for the two vehicles. Demand letter dated July 16, 2018. Statutory notice dated 16th July, 2018. X-ray request/report form from Mama Lucy Kibaki Hospital. P3 form. Medical report prepared by Dr. Cyprianus Okere dated July 17, 2018. Receipts for Ksh.4,900/-.
 11. The 2nd Appellant testified as the first defence witness (DW1) and told the lower court that he worked as a taxi driver and had 15 years driving experience. He adopted the contents of his statement dated November 23, 2020. In the statement and his testimony, the 2nd Appellant stated that on June 26, 2018, he had parked motor vehicle registration number KCK xxxx along 1st Avenue, Eastleigh at Biafra area.
 12. That at an instance, motor vehicle registration number KCA xxxx was driven at a high speed and failed to maintain distance and rammed into the rear side of his vehicle and that as a result, his vehicle was pushed and hit the 1st Respondent, who was standing in front of his vehicle.
 13. The 2nd Appellant stated that police officers investigated the matter and wholly blamed the driver of motor vehicle registration number KCA xxxx for the accident. The 2nd Appellant also blamed the 1st Respondent and stated that he was negligent as he did not heed to the warnings that the 2nd Appellant gave, which included hooting.
 14. On being cross-examined, the 2nd Appellant stated that his vehicle was completely off the road when it was hit by the other vehicle.
 15. The Appellants called Police Constable Ayub Mathenge of Makongeni Police Station who testified before the lower court as DW2 and told the court that the accident in question occurred on June 26, 2018 at about 5.30pm involving the aforesaid vehicles and the 1st Respondent, who sustained injuries.
 16. The officer told the trial court that as per the documentation in the police file, the investigations that were conducted showed that the driver of motor vehicle registration number KCA xxxx was to blame for the accident for failing to keep distance.
 17. It is noteworthy that the 2nd and 3rd Respondents (the 3rd and 4th Defendants in the lower court matter) did not enter appearance and that interlocutory judgement was entered against the two on February 10, 2020 at the formal request of the 1st Respondent (Plaintiff in the lower court).
 18. It is further instructive from the record of the lower court that the Appellants filed in the lower court a Notice of Indemnity Against Co-Defendants (against the 2nd and 3rd Respondents) dated June 15, 2021 in which they claimed indemnity against the 2nd and 3rd Respondents as the owner and driver, servant and/or agent respectively of motor vehicle registration number KCK xxxx on the basis that they were negligent and vicariously negligent respectively, and listed thereunder particulars of negligence that they attributed the 2nd and 3rd Respondents with.
 19. From the evidence on record, the 1st Respondent merely stated that the drivers of both motor vehicles were negligent. With respect to motor vehicle registration number KCA xxxx, the 1st Respondent did not explain why he held the driver of the said vehicle liable in negligence. He did not in his evidence or statement that he adopted describe the manner in which the said driver managed or controlled the vehicle. In my view thereof, the 1st Respondent did not prove any of the particulars of negligence that



he pleaded in the plaint as being attributable to the 1st Appellant who was the driver of the said vehicle, or the 2nd Appellant who owned it.

20. With regard to the 2nd and 3rd Respondents, the effect of their failure to enter appearance and file a defence and the subsequent interlocutory judgement against the two meant that they admitted the Plaintiff's claim on liability. The court in the case of *Roy Transmotors v Silkin Limited & another* [2004] eKLR held that the effect of an interlocutory judgment is that judgment on liability is final and the plaintiff need not prove this. Judgment on liability was therefore proved against the 2nd and 3rd Respondents the moment interlocutory judgement was entered against the two.
21. The 2nd Appellant's evidence was that he had parked his car off the road and that it is motor vehicle registration number KCK xxxx that was negligently driven, causing it to lose control and ram into the rear of his vehicle.
22. The evidence of the police officer who was called by the Appellants was that the driver of motor vehicle registration number KCK xxxx was wholly to blame for the accident. This evidence corroborated that of the 2nd Appellant.
23. The age-long principle of the rule of evidence is that he who alleges a fact must prove it. This rule has been grounded in law under Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya. The same was enunciated by Majanja, J. in the case of *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR when he said that:

“...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya), which provides:

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”

24. In the judgement of the lower court, the learned trial Magistrate observed and held as follows:

“Evidence so far on record suggests that the second defendant and the fourth defendants (*sic*) are to blame for causing the accident. They ought to have taken reasonable measures to avoid the accident by slowing down or otherwise acting in a manner that could have aided them to avoid the accident having in mind the presence of other road users reasonably expected on the road. It is apparent from the evidence so far on record that the second defendant and fourth defendant were negligent. This court is inclined to hold the defendants (*sic*) second and fourth defendants liable for causation of the accident and the first and third defendants are vicariously liable. Consequently, judgement is entered in favour of the plaintiff against the defendants jointly and severally on liability at 100% all the circumstances of the case considered.”

25. As can be seen from the original record and as stated above, other than merely stating that the drivers of both vehicles were to blame for the accident, there was no evidence adduced in the manner in which the driver of motor vehicle registration number KCA xxxx was negligent. Negligence on the part of the 2nd Appellant was therefore not proved. It follows that there can be no vicarious liability as against the 1st Appellant, who was the registered owner of the vehicle that was being driven by the 2nd Appellant.



26. On the part of the driver of motor vehicle registration number KCK xxxx, I have above stated that both the 2nd Appellant and the police officer particularized in their respective testimonies the negligence of the driver of the said vehicle (the 2nd Respondent) by stating that she was speeding and failed to keep distance.
27. Consequently, it is my finding that the trial magistrate erred by reaching the finding that the 2nd Appellant was negligent, which finding was not made on the basis of the evidence that was on record. I take guidance from the decision of *Mburu & 6 others v Kirubi (Civil Appeal E246 of 2021)* [2023] KEHC 3599 (KLR) (20 April 2023) (Judgment) in which L.N. Mugambi, J. stated thus:
- “This court nevertheless appreciates 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 the court is shown demonstrably to have acted on wrong principles in reaching the findings.” (Emphasis mine).
28. From the foregoing, my persuasion is that liability as against the Appellants was not proved and the suit against the two ought to have been dismissed.
29. In the result, I allow the appeal in the following terms:
1. I hereby set the lower court’s finding on liability and substitute therefore with the following:
 - a. Judgement on liability is entered at 100% in favour of the 1st Respondent (the Plaintiff in the lower court matter) against the 2nd and 3rd Respondents (the 3rd and 4th Defendants in the lower court matter) jointly and severally.
 - b. The suit as against the 1st and 2nd Appellants (the 1st and 2nd Defendants in the lower court) is dismissed with costs.
 2. As the appeal was in respect of liability only, I will not interfere with the trial court’s findings on quantum.
 3. The 1st Respondent shall bear the Appellants’ costs of this appeal.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 25TH DAY OF JULY, 2024

JOE M. OMIDO

JUDGE

For the Appellants: Ms. Kamau.

For the 1st Respondent: Ms. Adhiambo.

For the 2nd Respondent: No appearance.

For the 3rd Respondent: No appearance.

Court Assistant: Ms. Njoroge.

