



REPUBLIC OF KENYA



**KENYA LAW**  
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**Irungu v Muthoni & another (Civil Appeal E581 of 2023)  
[2024] KEHC 11827 (KLR) (Civ) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11827 (KLR)

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

**CIVIL**

**CIVIL APPEAL E581 OF 2023**

**AM MUTETI, J**

**SEPTEMBER 26, 2024**

**BETWEEN**

**JOSPHAT KIBATHI IRUNGU ..... APPELLANT**

**AND**

**MARY MUTHONI ..... 1<sup>ST</sup> RESPONDENT**

**SS MEHTA & AMP; SONS LTD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal judgement of the Honourable Wendy Micheni (MRS) CM  
delivered on 9th June 2023 in Nairobi CMCC Suit No. E5078 of 2020.)*

**JUDGMENT**

**Introduction**

1. The Appellant in this matter was the plaintiff in the Lower Court. He has filed his appeal challenging the whole of the decision arrived at by the learned Honourable Magistrate who dismissed the Appellants suit on account of failure to prove liability as against the respondent.
2. The Appellant has raised 6 grounds of appeal as here under: -
  - i. That the learned Honourable Magistrate erred in law and in fact in holding that the Appellant was entirely to blame for the accident against the weight of evidence.
  - ii. That the learned Honourable Magistrate erred in both law fact by relying on evidence not present at the place of the accident.
  - iii. That the learned Honourable Magistrate erred both in fact and law by holding that the Appellant was not entitled to damages for the injuries yet the evidence placed before the Court clearly indicated the Appellant was hit motor vehicle registration number KCK 826T.



- iv. That the learned Honourable Magistrate erred in law by holding that the Appellant was not entitled to damages for the injuries yet the evidence placed before the Court clearly indicated the Appellant was hit by motor vehicle registration number KCK 826T.
- v. That the learned Magistrate failed to analyze the evidence before him and in drawing the judgement avoided to determine all the issues placed before the Court.
- vi. That the learned Honourable Magistrate erred in law by ignoring pleadings, evidence and submissions by both parties thus making a lopsided and unjust determination.

### **Analysis**

3. The duty of this Court as a first appellate Court is able stated in *Selle & Another v Associated Motor Boat Company Ltd* (1968) EA 123. The Court is expected to review the evidence tendered before the Lower Court re-appreciate the same and draw its own conclusions. The Court is enjoined to ensure that in doing so it gives due allowance to the Lower Courts findings on fact given that the appellate Court did not have the opportunity to hear the witnesses, noting that the Lower Court's conclusions do not bind the High Court.
4. The Appellants appeal will turn on three main things in my view: -
  - a. Whether the learned Honourable Magistrate was correct in her analysis of evidence.
  - b. Whether the decision to exonerate the respondents from blame for the accident was supported by evidence.
  - c. Whether the conclusions arrived at were justifiable in law with regards to liability.
5. On the first matter the evidence placed before the Magistrate by the Appellant was through the testimony of the appellant and the documents filed together with his statement which he provides as P. Exhibits 1-9.
6. According to the Appellant on 18<sup>th</sup> Sep 2017 at around 7:00pm he was riding a motor cycle KMDE 241U towards Thika from the Nairobi Central Business District.
7. He states that he says he was moving at a speed of about 50km/hr and was hit from behind by a motor vehicle causing him to fall on the left side of the road.
8. The appellant identified the motor vehicle to be a motor vehicle registration no KCK 826T.
9. As a result of the accident the Appellant claims to have suffered a fracture of the left femur.
10. He goes further in his evidence to state that he was assisted to hospital by a good Samaritan where he stayed up to 3<sup>rd</sup> October 2017.
11. The Appellant blames the accident on the motor vehicle KCK 826T for driving at high-speed overtaking when it was not safe to do so, failing to keep distance and hoot while overtaking.
12. His list of documents included: - A demand letter dated 21<sup>st</sup> July 2020, a medical report by DR. W.M, a discharge summary, a receipt of Ksh3000, discharge summary from ST. Peters Orthopedic and surgical Specialty Centre, copy of records of motor vehicle KCK 826T, P3 from, police abstract.
13. At the hearing the Appellant denied having been hit by a matatu that escaped from the scene and maintained it was motor vehicle KCK 826T a double cabin.



14. The Appellant further testified that the person who took him to hospital arrived at the scene after the accident had happened.
15. The Appellant vehemently denied being hit by a matatu that escaped. He testified as the only witness in support of his case.
16. The defendant called DWI Sergeant Josphat Nyakundi from Kasarani traffic base. He gave evidence making reference to OB report OB/13/12/9/2017. According to the witness the OB report read: -

“It was a hit and run incident. From the OB there is clear statement I have the plaintiff was hit by mukindu matatu and thrown off the pavement”
17. The abstract showed that the case was pending under investigation.
18. Upon cross examination the officer testified that at the foot there was indication that the rider was hit by unknown matatu and knocked by the pickup.
19. The witness however did not see the pick-up. The witness was clear that he was neither the investigating nor the officer who visited the scene.
20. The other witness who testified in the matter was Mary Muthoni Njoroge the 1<sup>st</sup> respondent in the matter. She similarly adopted her statement and testified that what the Appellant told the Court was all lies.
21. According to her she heard a bang behind, her car stopped and she got out to see what had happened only to find a man lying down and heard a man inside a white car say “amegongwa na hio basi na ikatoroka”.
22. The witness further stated that there was a police patrol car nearby which stopped and the officers came to her, told her that her vehicle was not damaged but the officer said that she should take the victim to the hospital.
23. The 1<sup>st</sup> respondent went and recorded a statement with the police.
24. The 1<sup>st</sup> respondent also testified that she called the Appellants wife in and the pastor to whom she was referred to by the Appellant. This act by the 1<sup>st</sup> respondent demonstrates the conduct of an innocent motorist willing to assist the Appellant out of the situation she found him in. It is not conduct that is consistent with that of a party guilty of causing the accident.
25. Her position however was that it is the Appellant who hit the rear bumper of the car.
26. CPL Peter Okuta Of Jogoo road police station testified as the 3<sup>rd</sup> witness for the defence. The witness testified that the 1<sup>st</sup> respondent informed him that the Appellant was hit and rammed on to her vehicle. He took her vehicle to the station for inspection and later had it released to the 1<sup>st</sup> Respondent. He denied being the investigating officer of the accident.
27. At the scene of the accident the witness says the Appellant was with other cyclists.
28. The evidence set out above is what the learned Honourable Magistrate was called upon to consider and determine who was to blame for the accident and if at all it was the Respondent then what damage should be paid to the Appellant.
29. The burden of proof in all civil cases is on a balance of probabilities. The Appellant was obliged to ensure that he was able to discharge that burden if at all he desired the Court to believe and act on his evidence as against the Respondents.



30. He ought not only to have established the occurrence of the accident but also the liability of the Respondents jointly and severally
31. The claim being hinged on negligence, the Appellant had to prove that the Respondents were jointly and severally negligent and as a result therefore he had suffered damage.
32. The Plaintiff's evidence should be such that the Court on a balance of probabilities can safely conclude that the accident occurred as a result of negligence on the part of the defendant.
33. If the Plaintiff's evidence is equally balanced by the defence as to the extent of proving that the accident might have been a result of lack of care on the part of the Plaintiff or another party the, the Plaintiff's claim would fail.
34. The facts constituting negligence must be proved see *Ashcroft v Mersey Regional Health Authority* (1983) 2 ALL ER 245;(1985)2 ALL ER 96n.
35. In many cases of alleged negligence, the Plaintiff knows only that he has been injured. He may however not be able to establish how he came about to suffer the injury.
36. The Court cannot act without evidence to find a defendant negligent on the basis of mere allegations without proof.
37. The Appellant in this matter suffered injury in circumstances that he could barely explain. Although he maintained that the vehicle that ran over him was that driven by the 1<sup>st</sup> Respondent, he did not explain exactly in what respect the 1<sup>st</sup> Respondent was negligent.
38. The Respondents through the 3 witnesses called in defence attributed the accident to another motor vehicle which remained unknown.
39. The police officers who went to the scene when the Appellant and the 1<sup>st</sup> Respondent were at the scene observed the scene.
40. None of the police officers was called by the Plaintiff to support his claim. The evidence on record remained the word of the Appellant against that of the Respondents and their witnesses.
41. The Appellant did not particularize the actions of the 1<sup>st</sup> Respondent that could lead the Court to a finding that it was out of her actions that the accident occurred.
42. The Appellant testified that he was hit from behind. It follows therefore that he cannot have been hit by the 1<sup>st</sup> Respondent who was ahead of him. The 1<sup>st</sup> Respondent on her part testified that she was hit from behind and when she got out the car, she found the Appellant in the pavement and overheard another driver say that the Appellant was hit by another vehicle that fled the scene.
43. It is interesting to note that the Appellant did not even seek to call the investigating officer of the case as his witness yet he was the only independent witness who could independently confirm to the Lower Court whether it was the 1<sup>st</sup> Respondent's car that hit the Appellant or not.
44. It was the Plaintiff case thus the burden lay on him. By failing to call that evidence he left the Court with two very contradictory positions.
45. It was his desire to be believed thus he should have had evidence that could discharge the burden and discount the Respondent's defence.
46. The version of the 1<sup>st</sup> Respondent that the Appellant was hit by a matatu from behind and tossed forward hitting the first Respondent from the rear was supported by CPL Okuta.



47. I find, just like the Magistrate did, that taking into account the totality of the evidence adduced before Court the Respondents could not be held liable.
48. The issue of liability having been determined against the Appellant by the learned Honourable Magistrate she went ahead and considered what would have been the award to the Appellant had he succeeded in proving negligence.
49. It is therefore not true that the learned Honourable Magistrate did not consider all the issues before her.
50. The submissions by the Appellant on liability that the Magistrate did not subject the entire evidence a thorough and exhaustive analysis, cannot be sustained in the face of the record. It is not in doubt the Magistrate carefully and properly analyzed the evidence.
51. The Appellants counsel did not even attempt to deal with the aspect of there having been a third motor vehicle at the scene that may as well have been the one responsible for the accident, as contended by the Respondents.
52. The Appellant accuses the Court of being lopsided in its analysis but I am afraid to note that in fact their submissions are couched in a matter that does not accord due weight to the evidence adduced. The appellants case could not stand before the Lower Court in the face of the evidence tendered by the Respondents. The appellant did not discharge the burden of proof.

### **Conclusion**

53. The Appellant has failed to establish negligence on the part of the Respondents, this Court finds that the appeal lacks merit and it is therefore dismissed with costs to the Respondents.
  - a. It is Interests at Court rates on (c) (d) and (e) until payment in full.

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

**HON. A.M MUTETI**

**JUDGE**

In the presence of

Kiptoo: Court Assistant

Mwaura Kamau for the appellant

Ms Kamau for the respondent

