



REPUBLIC OF KENYA



**Ali v Ahmed & 2 others (Civil Appeal E038 of 2023)
[2024] KEHC 16970 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16970 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E038 OF 2023
F WANGARI, J
OCTOBER 31, 2024**

BETWEEN

MATANO KHAMISI ALI APPELLANT

AND

BRIEK AHMED 1ST RESPONDENT

YUSUF NASORO 2ND RESPONDENT

KENGA CHARO MANGI 3RD RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. J.B Kalo, Chief Magistrate delivered on 16/02/2023 arising from Mombasa CMCC No. 3412 of 2000. The Appeal is only on liability.
2. The Appellant pleaded that the trial court erred and misapprehended evidence in arriving at the finding on liability where he apportioned 100% in favour of the Appellant as against the 1st and 2nd Respondent, and exonerating the 3rd Defendant.
3. The Appellant in the lower court pleaded that on 15/07/2001, he was a passenger in motor vehicle registration no. KAL 230M driven by the 1st Respondent and owned by the 2nd Respondent, when it was negligently driven and collided with motor vehicle registration no. KAH 628E belonging to the 3rd Respondent, and which was dangerously parked on the road.
4. The Appellants entered appearance and filed Defence denying the particulars of negligence and injuries pleaded in the Plaint. At the time of the hearing, only he Appellant and his witnesses testified. He blamed both the vehicles for negligence. The traffic police officer also testified and stated that after investigations, it was found that the 1st Respondent was to blame for the accident, and he was even charged with a traffic offence.



5. The Respondents did not testify nor call witnesses. The Trial Court heard the parties and proceeded to render judgement where the Court found liability as stated herein above.
6. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.

Submissions

7. The Appellant filed written submissions. It was submitted that the evidence produced overwhelmingly proved that the Respondents were 100% liable for the accident. Both their vehicles having collided, they are presumed to be negligent unless such evidence is challenged. They relied on authorities which I have perused.
8. The 3rd Respondents on the other hand submitted that the trial court's finding on liability should not be interfered with. It was submitted that the Appellant during cross examination in the primary suit, stated that he blamed the driver of the vehicle that he was travelling in i.e. the 1st Defendant. It was submitted that the Appellant had failed to proof negligence on the part of the 3rd Respondent.

Analysis

9. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
10. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

Liability

11. The Appellant urges this court to find that the trial court erred in finding 100% liability against the 1st and 2nd Respondent and exonerating the 3rd Respondent, as they were all to blame for the accident. He prayed that the lower judgment on liability be set aside and in lieu, enter judgment on liability against all the Respondents equally.
12. On the other hand, the 3rd Respondent submitted that the Judgement of the trial court on liability was faultless and should not be disturbed.
13. The role of this court is thus to reevaluate the evidence and arrive at my independent finding on liability. In *Ephantus Mwangi and Another v Duncan Mwangi Civil Appeal No. 77 of 1982* [1982-1988] 1KAR 278 the Court of Appeal held that:

“A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if



the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

14. I have perused the record of appeal filed in Court and the written submissions and authorities cited in support and opposition to the Appeal.
15. In re-evaluating the evidence, I note like did the trial court the investigating officer blamed the 1st Defendant driver for the accident. I also note that the Appellant in its submissions stated that the Appellant during cross examination equally blamed the 1st Defendant driver for the accident. However, having perused the proceedings, the Appellant stated that the police were lying to state that the 3rd Respondent was not to blame. He said he witnessed the accident.
16. I note that the Appellant was the only witness to the accident. The Investigating Officer unfortunately did not file a sketch plan for the scene of the accident to corroborate the evidence of the Appellant that the 3rd Defendant’s vehicle was dangerously parked on the road.
17. These are matters of evidence and the Appellant had the legal burden of proof. On this subject, Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya provides that:

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.
18. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
19. It follows that the initial burden of proof lied on the Appellant, but the same may shift to the Respondents, depending on the circumstances of the case.
20. Therefore, as found by the trial court, it was indeed difficult to find the 3rd Respondent liable for the accident in the absence of the sketch plan and an independent witness who could have been at the scene of the accident immediately prior or during the occurrence thereof.
21. On a balance of probability, I am unable to fault the trial court. The finding on liability was in tandem and reflected the evidence and testimonies presented by the parties before the court. I uphold the finding on liability.
22. The Appellant did not appeal against the award of damages I will not disturb the award under this head.

Determination

23. In the upshot, this court orders as hereunder;
 - a. The Appeal is dismissed.
 - b. No orders as to costs.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31ST DAY OF OCTOBER, 2024.

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F. WANGARI

JUDGE

In the presence of;

Maundu Advocate for the Appellant

Aisha Said Advocate for the Respondent

M/S Salwa, Court Assistant

