



REPUBLIC OF KENYA



**Mburia v Mbugua (Civil Appeal E081 of 2023)
[2024] KEHC 13523 (KLR) (Civ) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13523 (KLR)

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

CIVIL

CIVIL APPEAL E081 OF 2023

JM NANG'EA, J

OCTOBER 31, 2024

BETWEEN

JULIUS WACHIRA MBURIA APPELLANT

AND

PETER NJOROGE MBUGUA RESPONDENT

(Being an Appeal from the Judgement and decree of the Chief Magistrate's court at Nairobi, Milimani Commercial Courts (Hon. S.A Opande – PM) in CMCC NO. E10269 of 2021 delivered on 27.1.2023)

JUDGMENT

Grounds of appeal and reliefs sought.

1. The appeal before me is against the trial court's judgement on liability for the claim in which the court apportioned responsibility for the tortious act from which the cause of action arose in the ratio of 70% to 30% against the respondent.
2. Aggrieved by the judgement, the Appellant, the plaintiff in the suit, filed a Memorandum of Appeal dated 10.2.2023 upon grounds that may be condensed to only one ground namely,

That the Learned Trial Magistrate erred in law and fact by determining contributory negligence of 30% by the appellant against the weight of evidence.
3. It is proposed to ask the court to inter alia re-assess the evidence on liability and grant the costs of the appeal to the appellant.



Guiding legal Principles

4. This being a first appeal I am required to reconsider the evidence adduced, evaluate it and draw my own conclusions bearing in mind that I did not hear and see the witnesses who testified{ (see *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123 }. The Court of Appeal for East Africa in *Peters Vs. Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:
 - “ i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”

Background to the appeal

5. The appellant is challenging the trial court’s judgement on liability for the claim. The suit in the lower court arises from a road traffic accident that allegedly occurred on 28.3.2021 in Nairobi when the respondent’s motor vehicle registration number KCZ 732 H allegedly lost control due to negligent driving thereby colliding with another motor vehicle registration number KCT 308 K in which the appellant was travelling as a passenger. The appellant lodged the claim in the lower court praying for general damages for pain and suffering , special damages of Kshs. 4,750, the costs of the suit and any other appropriate relief (s) the court could grant.
6. The respondent entered appearance and filed defence to the suit. He traversed all the material averments therein , putting the appellant to strict proof. The respondent averred in the alternative that if it shown that the accident did occur on the material date then the appellant was to blame for his own negligent acts . The trial court was therefore urged to dismiss the suit with costs.
7. The appellant underscored the averments in the suit in his oral evidence. He told the court that it was motor vehicle registration number KCZ 732 H that rammed into motor vehicle registration number KCT 308 K in which he was travelling as a passenger, owing to negligent driving. He asserted that he was wearing a seat belt at the material time.
8. The appellant called police officer (PW1) who tendered a police abstract report of the accident. The witness informed the court that he was not the accident’s investigating officer. However, he attributed occurrence of the collision between the two vehicles to motor vehicle registration number KCZ 732 H as noted in the abstract report.
9. The respondent on his part testified reiterating the averments in his statement of defence. He told the court that after entering a roundabout, motor vehicle registration number KCT 308 K suddenly also joined the roundabout and his effort to swerve to avoid a collision was unsuccessful. The respondent also blames the appellant for contributory negligence for failing to wear a seat belt at the material time.
10. In apportioning liability for occurrence of the accident in the ratio of 70% :30% against the respondent, the learned trial magistrate observed that it was not in dispute that the respondent’s motor registration number KCZ 732 H entered the main road from a feeder road and therefore it should have given way.



The trial court added thus: “Due to uncertainty as to whether the plaintiff (read, the appellant) wore a seat belt, I shall assess liability at 70:30 in favour of the plaintiff (read, the appellant).

Analysis and determination

10. I have perused the record and considered the parties’ submissions in the lower court and in this appeal. The appellant submits that the issue of liability was not determined according to the applicable standard of proof on a balance of probability. Citing the case of *Kanyangu Njogu V. Daniel Kimani Maingi* (2000) eKLR and *William Kabogo Gitau V. George Thuo & 2 Others* (2010) 1 KLR 526 the appellant states that where the court is to decide between two probabilities a balance of probability is shown if there is evidence that one probability is more probable than not. Indeed, this is the legal position on as also held in the case of *Palace Investments Ltd Vs. Geoffrey Kariuki Mwenda & Another* (2007) eKLR .
11. The court is further referred to the judicial determination in *Naftaly Muiruri Macharia V. Samuel Maina & Another* (2018) eKLR and *Janerose Auma Ochumba V. John Nyangi & Another* (2021) eKLR in which no liability for occurrence of the subject road traffic accident was attributed to the claimant who was a passenger in the vehicle. The appellant further makes reference to the case of *John Kibicho Thirima Vs. Emmanuel Parsmei Mkoitiko* (2017) eKLR where my sister Justice Aburili observed that wearing a set belt is a legal requirement that does not prevent occurrence of an accident but only mitigates injuries.
12. The respondent’s advocates insist that the trial court rightly apportioned liability. Reliance is placed on the case of *Ribiru V. Ndung’u* (suing on behalf of the Estate the Late Joram Ndung’u Mwaniki) & 2 Others (Civil Appeal No. 37 of 2023) (2024) KEHC 339 (KLR) (25 January 2024) (Judgement) in which it was observed that interference with a trial court’s judgement on liability for a claim can only happen in exceptional circumstances, as in instances where wrong principles are invoked or proper legal principles are not taken into account. The court is told that there is no reason to interfere in the circumstances of this matter.
13. The respondent also takes issue with the appellant’s alleged failure to strap the vehicle seat belt at the matrial time. Reliance is placed on case law in *EMK & Another V. E00* (2018) eKLR in which a victim of an accident who was a passenger in the accident vehicle was found 20% liable for failure to fasten the seat belt.
14. It is common ground that the appellant was a passenger in motor vehicle registration number KCT 308 K that collided with the respondent’s vehicle registration number KCZ 732 H. His evidence that he was wearing a seat belt was not controverted. I agree that this court can only interfere with the trial court’s excrise of discretion if the court took into account irrelevant factors, failed to consider relevant factors or, was otherwise guided by wrong principles.
15. Like my sister Justice Aburili, I do not think that wearing of a seat belt could prevent occurrence of an accident per se . The fact only goes to mitigation of any injuries that may occasioned to a passenger in the event of a road mishap. I accordingly find that on the evidence and in the circumstances of this case, the appellant did not contribute in any manner or extent to the occurrence of the road accident in issue. If the respondent was attributing the accident to the manner of driving of motor vehicle registration number KCT 308 K, he was at liberty to seek to enjoin the owner and/or driver thereof as a third party but the necessary application was not brought for the court’s consideration.



Determination

10. The upshot is that the appeal is allowed. The lower court's judgement apportioning liability between the parties in the stated ratio of 70:30 against the respondent is set aside and substituted with this court's judgment that the respondent is wholly liable for the tortious act that caused the road accident from which the cause of action arose. The appellant is granted the costs of the appeal.

Judgement accordingly.

J.M NANG'EA , JUDGE.

JUDGEMENT DELIVERED VIRTUALLY THIS 31ST DAY OF OCTOBER 2024 IN THE PRESENCE OF:

The appellant's advocate, Ms Oginda

The respondent's advocate, absent

J. M NANG'EA, JUDGE

