



**Ndiithi v Musyoka & another (Civil Appeal E164 of 2021)
[2024] KEHC 14142 (KLR) (Civ) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 14142 (KLR)

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

CIVIL

CIVIL APPEAL E164 OF 2021

MA OTIENO, J

OCTOBER 29, 2024

BETWEEN

SAMUEL NDIRITU NDIITHI APPELLANT

AND

ANNASTASIA MUTHEU MUSYOKA 1ST RESPONDENT

STEPHEN WAWERU THUO 2ND RESPONDENT

*(An appeal from the Judgement and Decree of Honourable M.W.
Murage (Mrs), Principal Magistrate, delivered on 24th February 2023)*

JUDGMENT

Background

1. This is an Appeal from the decision of the magistrate's court delivered on 26th February 2021 in the Milimani CMCC No. 2522 of 2017 in which the 1st Respondent (then a Plaintiff) sued both the Appellant and the 2nd Respondent (then 1st and 2nd Defendants) seeking compensation for injuries suffered in a road accident that occurred on 2nd March 2017 along Lunga Lunga Road, Nairobi involving the Appellants' motor vehicle registration No. KAX 919L Scania Renault which was then driven by the 2nd Respondent and a Nissan Matatu, motor vehicle registration number KAM 290T, in which the 1st Respondent was a passenger.
2. In a plaint dated 10th April 2017, the 1st Respondent (then a Plaintiff) pleaded that on the date of the accident, she was a fare paying passenger in the motor vehicle registration number KAM 290T when the vehicle was rammed onto by the Appellant's motor vehicle registration No. KAX 919L Scania Renault, then being carelessly driven by the 2nd Respondent.



3. On 24th February 2023, the trial court rendered its judgment in the dispute and found the Appellant and his driver, the 2nd Respondent, 100% liable for the accident. Consequently, the Court awarded the 1st Respondent a sum of Kshs. 200,000/- in general damages and a further Kshs. 6,550 in special damages.

The Appeal

4. Aggrieved by the decision of the trial court, the Appellants vide their memorandum appeal dated 25th March 2021 lodged an appeal to this court, raising seven grounds of appeal that; -
 - i. The learned trial magistrate erred in law and fact and misdirected herself by going on a frolic of her own and fabricated facts and/or manufactured evidence in her analysis of the evidence and assessment of liability.
 - ii. The learned trial magistrate erred in law and fact by proceeding to hear the matter without giving directions on how the case would proceed against the 2nd Respondent, who did not enter appearance and was unrepresented and therefore not given an opportunity to defend himself.
 - iii. The learned trial magistrate erred in law and fact and misdirected herself by failing to consider that the documents filed by the 1st Respondent to wit the Police Abstract did not support her case and consequently the judgment.
 - iv. The learned trial magistrate erred in law and fact and misdirected herself by failing to consider in her judgment that the 2nd Respondent who was the driver of motor vehicle registration number KAM 644S, Nissan Matatu was already a party to the suit and the Appellant did not need to enjoin him in the suit.
 - v. The learned trial magistrate erred in law and fact and misdirected herself by failing to consider the pleadings and submissions filed by the parties and particularly the Appellant's submissions wherein he submitted that the 2nd Respondent was not his driver, agent and/or servant for vicarious liability to arise.
 - vi. The learned trial magistrate erred in law and in fact by failing to critically analyze the evidence adduced by the parties thereby arriving at the wrong judgment.
 - vii. The learned magistrate erred in law and in fact by making findings which were not supported by the evidence on record.
5. The appeal was canvassed by way of written submissions. The Appellant's submissions is dated 21st May 2024 whilst the Respondents did not file any submissions despite this court's directions of 8th August 2024. This appeal will therefore be decided solely on the basis of the documents in the Record of Appeal and the Appellant's submissions.

Appellant's submissions

6. On whether the 1st Respondent proved her case that the Appellant and/or his driver were liable in negligence, it was Appellant's submissions that the 1st Respondent failed to adduce sufficient evidence at the trial court as to discharge the legal burden of proof placed on her by section 107 of the Evidence Act to warrant the finding by the trial court that the Appellant was 100% liable of the accident.
7. Citing the case of Ndiritu v Ropkoi & Another [2004] eKLR, the Appellant submitted that the 1st Respondent being the plaintiff in the lower court had the duty to prove on a balance of probabilities, that she was injured by the negligent act of omission for which the Appellant was responsible.



8. The Appellant further submitted that the 1st Respondent failed to call the police officer who investigated the accident in support of her case. That the 1st Respondent only produced a police abstract despite her not being the maker of the same. That in any event, a police abstract is not does not give enough probative value but is to be corroborated by investigations by the police officers to show negligence on the side of the Appellant and/or his driver.
9. It was further the Appellant's submissions that no eye witness was called by the 1st Respondent to corroborate her testimony as to the occurrence of the accident. According to the Appellant, the 1st Respondent had the onus of calling an eye witness to corroborate her evidence. For this reason, the Appellant maintained that the 1st Respondent never discharged the burden of proof on the negligence of the Appellant and/or his driver to the required standards.
10. Relying on the decision in *Sally Kibii & Another v Francis Ogaro* (2012) eKLR the Appellant submitted that the failure by the 1st Respondent call either the police who investigated the accident or an independent witness to corroborate here evidence, significantly undermined the credibility of her case, particularly as against the Appellant.
11. On the finding by the trial court that the Appellant was vicariously liable for the negligent acts of the 2nd Respondent, the Appellant submitted that that finding by the trial court was not supported by the evidence on adduced by the parties at trial. That the 1st Respondent failed to prove the existence of any employer-employee relationship between the 2nd Respondent and the Appellant for the Appellant to be held liable for the actions of the 2nd Respondent.
12. According to the Appellant, for vicarious liability to arise, the 1st Respondent needed to demonstrate in evidence at trial that the 2nd Respondent was using motor vehicle registration number KAX 919L at the express or implied request of the Appellant who was the owner of the said vehicle at the time of the accident for vicarious liability to arise, a duty the 1st Respondent failed to discharge.
13. The Appellant asserted that evidence on record at trial indicates that the 2nd Respondent was not and has never been his agent, driver or employee. That from the proceedings in the lower court, it is evident that the driver of the Appellant's motor vehicle registration No. KAX 919L Scania Renault at the time of the accident in question was one, Isaac Ng'ang'a Wairore who testified as DW1 at trial, and not the 2nd Respondent as was alleged by the 1st Respondent.
14. The Appellant submitted that from the evidence on record, the 2nd Respondent was at the time the driver of the driver of motor vehicle registration number KAM 644S and not the Appellant's vehicle. That it is the 2nd Respondent who was solely to blame for the accident.
15. In view of the above, the Appellant maintained that the 1st Respondent did not prove negligence and liability thereof on the part of the Appellant and/or his driver or agent. That the evidence adduced by the parties at trial clearly shows that the driver of motor vehicle registration number KAM 644S was negligent and to blame for the accident.
16. On damages, the Appellant submitted that amount of Kshs. 200,000/- awarded by the trial court was high and excessive. Citing the case of *George Mugo & another v A K M (Minor suing through next friend and mother of A M K)* [2018] eKLR, the Appellant submitted that an amount of Kshs. 60,000/- would in the circumstances of the case be sufficient to compensate the 1st Respondent for the injuries suffered as a result of the accident.
17. In the premises, the Appellant prayed for orders that; -
 - a. The appeal be allowed.



- b. The Honourable Court be pleased to set aside the judgment of the lower court and dismiss the lower court case against the Appellant's with costs.
- c. In the alternative if the court was to make a finding that the Appellant was liable for causing the accident, the general damages awarded by the lower court be reduced to Kshs 60,000/=.
- d. The Appellant be awarded costs of the Appeal and of the lower court suit.
- e. Any other Order in the interests of justice.

Analysis and determination

18. This being a first appeal, the duty of this court is to reevaluate and reassess the evidence tendered at trial with a view of reaching its own conclusion, keeping in mind that unlike the trial court, it did not have the advantage of observing the demeanor of the witness and hearing their evidence first hand. See the Court of Appeal decision in *Peters v Sunday Post Limited* [1958] EA where the court stated that; -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses.....the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

19. The court is equally aware that an appeal to this court is by way of retrial and this court is not bound by the findings of the trial court merely because it did not have the advantage of hearing the witnesses testify and seeing their demeanor as was held in the case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA where the court stated that: -

“...I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial courtis 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...”

20. I have carefully reviewed the Appellant's memorandum of appeal filed herein, pleadings and proceedings from the lower court as well as the Appellant's submissions dated 21st May 2024 and note that the Appellant's main issue with the trial court's judgment is its findings on liability.

21. The issue of damages awarded by the trial court being inordinately high was only raised by the Appellant in his submissions. None of the seven (7) grounds of appeal raised by the Appellant in his memorandum of appeal dated 25th March 2021 specifically raised the issue of quantum of damages awarded by the trial court.

Liability

22. It is trite law that pursuant to Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya the legal burden of proof on a claimant. On the other hand, the evidential burden of proof is imposed under section 109 and 112 of the same Act on both parties. See *Anne Wambui Ndiritu v. Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, where the Court of Appeal stated 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 cast 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.”

23. The principle governing apportionment of liability in tort is that it is a discretionary exercise and that the appellate court should only interfere when it is clearly wrong and based on no evidence or on the application of wrong principle. This was the holding in *Khambi and Another v. Mabithi and Another* [1968] EA 70, where the court stated that: -

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

24. The first thing I intend to deal with is the Appellant’s submissions that the 1st Respondent failed to prove that he was vicariously liable for the actions of the 2nd Respondent. That the 2nd Respondent was not the driver of his motor vehicle registration number KAX 919L Scania Renault at the time of the accident in question.
25. I have reviewed the pleadings, proceedings and the evidence that was tendered at trial and note that the 1st Respondent in her Complaint dated 10th April 2017 alleged that motor vehicle registration number KAX 919L Scania Renault which is owned by the Appellant herein was then being driven by Stephen Waweru Thuo, the 2nd Respondent herein.
26. On 19th April 2018, a statement of defence was filed on behalf of both the Appellant and the 2nd Respondent wherein they both denied the 1st Respondent’s assertion in the complaint that they were owner and driver respectively of the subject motor vehicle. The both sought to put the 1st Defendant (then the Plaintiff) to strict proof thereof at the hearing.
27. On 17th December 2020 when the matter came up in court for the hearing of the Plaintiff’s case, the 1st Respondent testified as PW1 and adopted her statement of 10th April 2017 as evidence in court. The 1st Respondent told court that she was then seated in the motor vehicle registration number KAM 644S when she heard a loud bang from behind. That it is the Appellant’s motor vehicle registration number KAX 919L Scania Renault which had hit the motor vehicle registration No. KAM 644S from behind.
28. The 1st Respondent also produced documents listed in her list of documents dated 10th April 2017 as exhibits PEX 1-7. Part of the documents produced by the 1st Respondent in court included P3 Form issued by DTO Industrial Area on 23rd March 2017 and a Police Abstract 2nd March 2017 (PEX-3).
29. A review of both the P3 form and the Police abstract reveals that the accident was reported at the Industrial Area Police Station on 2nd March 2017 under OB26/2/3/2017 and that the accident involved motor vehicle registration number KAX 919L Scania Renault whose driver was recorded in the police abstract to be Stephen Waweru Thuo (the 2nd Respondent herein) and the motor vehicle registration KAM 644S, then being driven by a Mr. Isaack Nganga. The details of both drivers, which included their telephone numbers and insurance particulars of both vehicles were recorded in the police abstract.
30. The police abstract indicates that it is the driver of motor vehicle registration number KAX 919L Scania Renault who is to blame for the accident.
31. For the defence, Mr. Isaac Nganga Wairore testified and adopted his witness statement dated 28th January 2019 but filed in August 2020. No document was produced by the witness as exhibit in the



- trial. The witness told court that on the material day, he was the one who was driving the Appellant's motor vehicle from Donholm and that when he reached near the House of Manji, he saw a motor cycle overlapping from the right. That in his attempt to avoid hitting the motorcyclist, he swerved thereby hitting the subject matatu (KAM 644S) which was at the time overlapping. He blamed the driver of the matatu for the accident.
32. I however note that witness statement of Mr. Isaac Nganga Wairore, though in the court file, is not stamped by the court as having been filed and/or received.
 33. Mr. Isaac Nganga further testified that Traffic Police officers the police from the Industrial Area Police Station came to the scene of the accident and directed that the two motor vehicles be driven to the police station. On cross examination, he told court that the police officers were not wrong in blaming him for the accident.
 34. The Appellant herein did not give any evidence in court despite having recorded his witness statement on 28th January 2019. Further, the statement is also not stamped received by the court.
 35. The question that then begs is, who was actually driving the Appellant's motor vehicle registration number KAX 919L Scania Renault as at the time of the accident? Is it Mr. Stephen Waweru Thuo as indicated in the police abstract (and pleaded in the plaint) or was it Mr. Isaac Nganga Wairore who testified at trial to have been the driver of the vehicle on the material day?
 36. The answer to this question is critical because it will determine whether the Appellant would be vicariously liable. If it is established that the driver of the vehicle was at the time was Mr. Isaac Nganga Wairore (DW 1), then the 1st Respondent's claim that the Appellant was vicariously liable for the actions of his agent (Mr. Stephen Waweru Thuo – 2nd Respondent) would definitely fail.
 37. It is not in dispute that the Appellant's motor vehicle registration No. KAX 919L Scania Renault was involved in a road traffic accident on 2nd March 2017 along Lunga Lunga Road Nairobi and that that accident was reported at the Industrial Area Police Station on the same day under OB26/2/3/2017. That the accident also involved motor vehicle registration No. KAM 644S Nissan Matatu. It is also not dispute, in fact it is expressly admitted by DW1 in evidence, that the police blamed the driver of the Appellant's motor vehicle. Who then was the driver of the Appellant's vehicle at the time?
 38. Taking into account the evidence on record and weighing the testimony by the DW 1 against the entry in the police abstract, I find the information in the police abstract more credible, first, the report was made to the police on the same day of the accident while the Respondent's witness statement is made almost two years after the accident. Secondly, the entry in the police abstract was made by the police, public officers who have no interest in the matter. Finally, it cannot be that all the other particulars recorded by the police in the abstract (including insurance details) were all correct except the name of the driver to the Appellant's motor vehicle.
 39. It is also important to note that while the Advocates who initially entered appearance and filed a statement defence on behalf of both the Appellant and the 2nd Respondent ceased acting for the 2nd Respondent, the statement of defence which was filed on behalf of both the Appellant and the 2nd Respondent was never amended to exclude the 2nd Respondent.
 40. On the Appellant's argument that the 1st Respondent failed to call the police officer who investigated the accident in support of her case and that the 1st Respondent only produced a police abstract despite her not being the maker of the same. It is the court's view that the failure to call an investigating officer is not of itself ground enough to dismiss a plaintiff's claim.



41. It is trite law that the purpose of a police abstract is to support the fact that an accident was reported. Equally settled is the principle that the mere fact that the police officer who testify is not the investigating officer is not a ground enough for dismissing a claim. See the case of *Techarad Steam & Power Limited v Mutio Muli & Mutua Ngao* [2019] eKLR where the court held as follows: -

“Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigations officer is not necessarily fatal in accident claims...” [emphasis added]

42. The fact that the police abstract was produced by the 2nd Respondent as opposed to the police is equally not fatal. The 1st Respondent in her testimony before the trial court testified that after the accident, good Samaritans took her to Modan Medical Healthcare Clinic where she was treated and discharged the same day and that she later went to Industrial Area Police Station where the accident had been reported and that while there, she recorded a statement and was issued with a P3, and later a police abstract.

43. It is settled law that a police abstract is merely evidence that an accident happened and that the accident was reported at a particular station. As indicated elsewhere in this judgment, the fact that the accident on 2nd March 2017 involving the Appellant’s motor vehicle in question and that that the accident was on the same day reported at the Industrial Area Station is not in dispute, at least based on the testimonies of the both PW1 and DW1 who testified before the trial court. See the case of *Peter Kanithi Kimunya v. Aden Guyo Haro* [2014] eKLR the court stated that: -

“A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was ‘reported’ at a particular police station.”

44. From the evidence on record, the 1st Respondent was merely a fare paying passenger paying passenger in the motor vehicle registration No. KAM 644S. She was not the driver. Consequently, even assuming that the allegation by the Appellant’s witness at trial (DW1) that the driver of motor vehicle registration No. KAM 644S was to blame for the accident, that finding would only affect apportionment of liability between the two drivers and does not extend to the 1st Respondent in her capacity as a passenger in the motor vehicle registration No. KAM 644S.

45. From the above discussions, I am persuaded that the trial court was right in its finding that the 2nd Respondent was 100% liable for the accident and that the Appellant was vicariously liable for the negligent acts of the 2nd Respondent.

46. Regarding the Appellant’s submissions that the quantum of damages awarded by the trial court was inordinately high and excessive, I reiterate the position that no appeal was taken by the Appellant on the issue. I will therefore not delve any further on the same.

47. In the premises, the appeal is found to be without merit and is hereby accordingly dismissed.

48. No order for costs is made since none of the Respondents participated in this appeal.

49. It so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 29TH DAY OF OCTOBER 2024



ADO MOSES

JUDGE

In the presence of:

Moses Court Assistant

N/A..... for the Appellants

N/A..... for the Respondent

