



REPUBLIC OF KENYA



KENYA LAW
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**Reginah v Mwangi & another (Civil Appeal 40 of 2020)
[2023] KEHC 4048 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 4048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 40 OF 2020**

MW MUIGAI, J

APRIL 28, 2023

BETWEEN

MAILU MWENDE REGINAH APPELLANT

AND

ESTHER MUTHONI MWANGI 1ST RESPONDENT

MOREEN KAGURI M'ARIMI 2ND RESPONDENT

*(Being An Appeal From The Judgment And Decree Of Hon E. Michieka, Principal Magistrate
At Mavoko Law Courts Delivered On 11th May 2020 In Mavoko (PMCC No 511 of 2017)*

JUDGMENT

Trial Court Record

The Plaintiff

1. This suit was commenced vide a Plaintiff dated 8.05.2017 in which the Plaintiff contended that the Defendant was the registered owner of motor vehicle registration number KCH 871M and was vicariously liable for the acts, commissions, and omissions of her agent, servant and/or driver.
2. The cause of action arose on 23rd December 2016. The Plaintiff was lawfully travelling as a fare paying passenger in motor vehicle Registration number in motor vehicle registration number KBE 716 Y along Nairobi- Mombasa road when near Syokimau or thereabouts, the Defendant, her driver, servant or agent while in the course of employment drove motor vehicle registration number KCH 871M so recklessly, negligently and carelessly allowing it to knock motor vehicle registration number KBE 716 Y causing it to hit an electric post and causing serious injuries to the Plaintiff.
3. The negligence of the Defendant's driver was particularized as follows;
 - a. Driving at an excessive speed or at a speed that was so excessive in the circumstances of the case.



- b. Failing to slow down, stop or swerve in any other way as to avoid the accident.
 - c. Failing to exercise reasonable precautions on the said road to avoid the said accident.
 - d. Driving carelessly and over speeding in such an environment.
 - e. Permitting and allowing it to knock another vehicle.
 - f. Failing to ensure that the said motor vehicle was in proper working condition especially its tyres and brakes.
4. The Plaintiff contended that he sustained the following injuries; blunt injury to the shoulders, right upper arm, lower back, left leg resulting to formation of haematoma.
 5. The Plaintiff sought the following from the court;
 - a. General damages
 - b. Special damages of Kshs 26,010
 - c. Costs and interest of the suit.

Defendant Statement Of Defence

6. The Defendant filed a Defence on 28.03.2018 denying the contents of the Plaintiff but admitted that the accident occurred on 23.12.2016 along Mombasa Road near Syokimau and averred that the accident was caused by the negligence of the Plaintiff and the driver of motor vehicle registration number KBE 716 Y who contributed to the occurrence of the accident.
7. The negligence of the Plaintiff was particularized as failure to belt up, boarding an overloaded motor vehicle and failing to take due care and attention of her own safety.
8. The negligence of the driver was particularized as driving without due care and attention, failing to exercise any proper look out and to have any due regard for the motor vehicles expected to be on the road, failing to observe and heed the traffic Rules and regulations and the highway code, failing to keep a safe distance, hitting motor vehicle registration number KCH 871M from behind and causing the accident.
9. The Defendant opined that the accident was inevitable in spite of due diligence and care on her part as she was driving lawfully in the middle lane of a three lane road when a speeding 3rd party trailer whose registration number she could not register, which did not stop abruptly cut into her lane and in an effort to avoid collision swerved to her left when motor vehicle registration number KBE 716 hit her from behind as it was being driven too fast in the circumstances and also failed to keep a safe distance. She asked the court to dismiss the suit.
10. The Plaintiff filed a reply to the Defence on 3rd April 2018 reiterating the contents of the Plaintiff and denying the contents of negligence in the Defence.

Third Party Defence

11. Following service of the Third Party notice, a statement of Defence was filed on 19.2.2019 in which it was contended that motor vehicle registration number KCH 871M was registered in the joint names of the 1st and 2nd third party and this was done to protect its interest as a financier of the purchase of the vehicle. It was contended that upon repayment of the loan, the 2nd Third Party's interest will be extinguished and he was not a beneficial owner. He denied the contents of the 3rd party notice and



stated that he was a stranger to the alleged accident, it was not in use of the motor vehicle, it was not being driver by its agent, servant or employee and it was not in use for its benefit. Lastly, that the vehicle was not in the name of the 2nd Third Party. He prayed for the notice issued against it to be dismissed.

12. The Court dismissed the suit against the 2nd Third party vide and order dated 14.03.2019

1st Third Party Defence

13. The 1st third party filed a statement of defence on 27.3.2019 in which it denied ownership of motor vehicle registration number KBE 716Y Toyota Hiace and stated that the Defendant was to blame for the accident. It was contended that the particulars of negligence of the Defendant were;
- a. Driving motor vehicle registration number KCH 871 H in careless and haphazard manner.
 - b. Driving at a speed which was excessive on the circumstances.
 - c. Driving the motor vehicle off the road, on the Plaintiff's motor vehicle lane and dangerous overtaking.
 - d. Failing to keep proper control of the motor vehicle and thereby losing control and colliding with the Plaintiff's motor vehicle registration number KBE 716 Y.
 - e. Failing to heed to the presence and position of the Plaintiff motor vehicle.
 - f. Failing to apply brakes sufficient in time to avoid the accident.
 - g. Failing to observe traffic rules.
 - h. Failing to stop, slow down, swerve or in any way to manage and control the said motor vehicle to avoid the said accident.

Hearing

14. The Plaintiff called three witnesses. PW1 was Wilfred Mburugu, a police officer based at Athi River Police Station. He said he had OB 11/23/16 in respect to an accident that occurred on 23.12.2017 at Nation Area along Mombasa road involving motor vehicle KCH 871M Toyota Passo and motor vehicle KBE 716Y Matatu. He said that a passenger Moreen Kaguri was riding in the matatu and according to the report, the vehicles were headed towards Nairobi. The Toyota Passo suddenly changed lanes forcing the matatu to change lanes, veer of the road and hit an electric pole. He produced the police abstract.
15. Upon Cross examination, he stated that motor vehicle KCH 871M was blamed for the accident. It suddenly changed lanes without warning. He was not aware of any investigations. He said the initial report forms the basis of investigations and he did not have sketch plans in court.
16. There was no re examination
17. PW2 was DR. Titus Ndeti, he stated that he examined Moreen Kaguri on 27.1.17, prepared a report and he relied on her history, physical examination, medical summary and X- ray request forms. He said he was paid Kshs 3,000 for the report and Kshs. 10,000 for attendance.
18. Upon Cross- examination, he stated that she sustained soft tissue injuries. He saw her about a month after the accident. She was still in pain killers at the time and he expected complete healing.
19. PW3 was the Plaintiff. She stated that she was injured in a road traffic accident at Syokimau, she was a passenger in Motor Vehicle KBE 716 Y matatu. There was a saloon car in front of their vehicle, they



were on the left lane. The matatu wanted to overtake from off the road. She injured her shoulder, legs, arm and back and was treated at Shalom Hospital and Guru Nanak. She said she was not fully healed and has a blood clot on the leg. She blamed the matatu driver and saloon car and prayed for damages and costs of the suit. In her statement, she blamed the driver of motor vehicle registration number KCH 871 M for careless driving without caring about safety of other road users.

20. Upon Cross examination, she stated that their vehicle veered off the road while overtaking. She stated that the matatu was also to blame, it was overtaking from the side of the road, the saloon car was also overtaking from the wrong side.

Defence Case

21. The Defendant was DW1. She adopted her written statement and stated that she was in the middle lane, a trailer came to her lane, she swerved to the left. A speeding matatu hit her vehicle and she blamed the matatu driver. She contended that the lane was clear when she swerved and she did not go off the road, she was driving at 80 KPH.
22. Upon Cross examination, she stated that she has driven since 2005, there were three lanes at the spot and her vehicle was hit from the side. She swerved to the left to avoid being hit by the lorry.
23. In re-examination she stated that it was about 11am.

Trial Court Judgment

24. The Trial court made its determination centred around two issues. The court found the Defendant 100% liable for the accident. It found that the Defendant drove her vehicle in a careless manner with no regard to other road users by suddenly changing lanes and caused the accident.
25. On the issue of damages, the court found that an award of Kshs 200,000 was sufficient. It also awarded special damages of Kshs 26,010 which the court found had been proven plus costs and interest.
26. The defendant's case against the two 3rd parties was dismissed with no orders as to cost.

The Appeal

27. Dissatisfied by this judgment, the Appellant has appealed to this court seeking the following orders;
 - a. Spent.
 - b. The judgment of the Subordinate Court be set aside and this Appellate court be pleased to substitute the entry judgment wholly against the Appellant with a judgement apportioning liability between the Appellant and the 2nd Respondent at 50:50%.
 - c. This court be pleased to set aside the judgment on damages and or re- access the same.
 - d. Any other relief that this Honourable court deems fit to grant.
 - e. The 2nd Respondent be ordered to pay the costs of the Appeal and the costs in the lower court be shared equally between the Appellant and the 2nd Respondent.
28. The Appeal is founded on the following grounds;



- a. The Learned Trial Magistrate erred in law and in fact in holding the Appellant 100% liable in negligence for the subject accident when there was evidence on record of contributory negligence on the part of the 2nd Respondent.
 - b. The Learned Trial Magistrate erred in law and in fact in disregarding the Appellant's uncontroverted evidence on record that the 2nd Respondent's driver drove motor vehicle registration number KBE 716 Y at an excessive speed in the circumstances thereby contributing to the subject accident and subsequently failing to make a finding on contributory negligence by both drivers herein.
 - c. The Learned Trial Magistrate erred in law and in fact in failing to find the 1st Respondent's evidence contradictory and unreliable in spite of evidence being on record of such contradictions.
 - d. The Learned Trial Magistrate erred in law and in fact in failing to take into account the Appellant's written submissions on both liability and quantum and or failing to give reasons for disregarding the said submissions.
 - e. The Learned Trial Magistrate erred in law and in fact in accessing general damages at Kshs 200,000 for pain, suffering and loss of amenities which amount was/is manifestly excessive in the circumstances.
 - f. The Learned Trial Magistrate erred in law and in fact in failing to take into cognizance the fact that the Kenyan economy cannot sustain such huge awards.
29. The Appeal was canvassed by way of written submissions.

Appellant Submissions

30. The Appellant filed submissions on 20.09.2022 which was primarily founded on two grounds, liability and quantum.
31. On liability, it was submitted that the 3rd Party did not tender any evidence to controvert and/ or displace the Appellant's assertion that motor vehicle KBE 716 Y wholly caused the subject accident and she was entitled to indemnity from the 2nd Respondent. It was contended that since PW1 was not present when the accident occurred, his evidence was hearsay. She contends that from the 1st Respondent's evidence, the matatu was at the material time behind the saloon vehicle belonging to the Appellant and therefore owed it a higher duty of care and it was required to keep safe distance from the vehicle in front.
32. Further, that it is not clear whether the injuries sustained by the 1st Respondent were as a result of the collision between the two motor vehicles or between the 2nd Respondent's motor vehicle and the electricity pole. It was noted that there was no mention of the collision between the matatu and an electricity pole.
33. It was submitted that the matatu driver was speeding and it caused the accident and the Trial Court failed to take this into account as well as the fact that it was the matatu that hit the Appellant's vehicle from the back, that the matatu was overtaking from off the road as stated by the 1st Respondent. The Appellant contended that the matatu driver/owner failed to give their version of the accident and so the evidence of the Appellant remains uncontroverted. The court was urged to find the 2nd Respondent 100% liable or 50% liable.



34. Reliance was placed on the cases of *Salim S. Zein t/a Eastern Bus Service & Another vs Rose Mulee Mutua*, HCCA 147 of 1994, *Coast Bus Service Limited vs Sisco E. Murunga Ndanyi & 2 others* HCCA 192 of 1992, *Joyce Mumbi Mui v the Co-operative Bank of Kenya & 2 others*, *William Momanyi v Zipporah Kwamboka Abunda* [2010] e KLR and *Berkley –Steward Limited , David Cottle & Jean Susan Cottle v Lewia Kimani Waiyaki* [1987].
35. On Quantum, it was submitted that the award was manifestly excessive considering the injuries sustained were merely blunt injuries. The court was urged to reduce the award to Kshs 100,000. Reliance was placed on the case of *FM(minor suing through mother & next friend MWM) vs JNM & JDK* [2020] e KLR, *Edward Mutevi Maithya & Another vs Edwin Nyamweya* [2022] e KLR and *Elizabeth Wamboi Gichoni v Virginia Acheng Achola* [2019] eKLR.

1st Respondent Submissions

36. The Respondent filed submissions on 17.10.2022 in which it was contended that the 1st Respondent proved its claim proved her claim by calling witnesses and confirming that she was a passenger in the motor vehicle registration number KBE 716Y. The evidence of PW1 and PW3 corroborated each other and were concrete and airtight enough to hold the Appellant 100% liable.
37. On quantum, it was submitted that the Trial Court was justified to award Kshs 200,000 and it relied on the documentary and oral evidence on record together with the cited authorities attached to the submissions. It was contended that there was no cogent evidence of rebuttal that the 1st Respondent did not suffer the said injuries to warrant any interference with the amount awarded and there was no 2nd medical report produced to rebut the evidence of the medical report by Dr. Titus Ndeti as being excessive or arriving at the wrong principles. Reliance was placed on the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5.
38. The 2nd Respondent had not filed submissions at the time of writing this judgement.

Determination

39. The Court considered the Trial Court record, the Memorandum of Appeal and the submissions by parties on record. The only issues that are for determination before this Court are that of liability and quantum, specifically general damages.
40. This being the first appeal, Section 78 of the *Civil Procedure Act* the Court will re-evaluate the evidence tendered before the Trial Court and come to its own independent conclusion taking into account the fact that this Court did not have the advantage of seeing and hearing the witnesses as they testified. This principle is in the case of *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 where Sir Clement De Lestang stated 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 demeanor of a witness is inconsistent with the evidence in the case generally (see Abdul Hammad Sarif v Ali Mohammed Solan (1955, 22 EACA 270).”



41. It is not in contention that an accident occurred on 23rd December 2016 along Nairobi- Mombasa road when near Syokimau involving motor vehicle Registration number KBE 716 Y in which the Plaintiff was a passenger and motor vehicle registration number KCH 871M. The injuries sustained by the Plaintiff as pleaded are in tandem with what has been presented in the medical report by Dr. Ndeti dated 27.01.2017, the only contention according to the Appellant is whether the injuries were caused by the accident between the two motor vehicles or the matatu hitting the electricity pole. The award of special damages is not disputed.

Liability

42. On the issue of liability, the Appellant contends that the 2nd Respondent should also be apportioned a part of the blame and should indemnify her of the accident. The 2nd Respondent denied being the owner of Motor Vehicle registration number KBE 716 Y, Toyota Hiace and from the record, the Appellant did not produce any document to prove ownership.
43. The only document on record is a motor vehicle search that was attached in an application when the 1st third party sought to be struck out but since it was produced as evidence before the court, the court cannot address its mind to it. Matters of production of evidence during hearings are well spelt out. The Appellant's witness ought to have produced evidence to support its case. Upon admission of a third party into a case, the burden of proof is upon the person alleging to prove, in this case the Appellant. He or she ought to prove that the 3rd Party is liable and to what extent.
44. The Court of Appeal while dealing with this question in the case of *Mbuthia Macharia v Annah Mutua Ndwiiga & another* [2017] e KLR observed that;
- “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift” to the party who would fail without further evidence?”
45. The 2nd Respondent denied its involvement in the accident and beyond that, nothing has been placed to rebut these allegations. Further, despite there being evidence from the eye witness PW3 that the matatu was also to blame for the accident for overtaking, at this point, this court is not sure who the owner of the matatu, Toyota Hiace is. This court would have otherwise found on liability but in the circumstances, it is difficult to find the 2nd Respondent liable as there is doubt as to whether she is the right party or not. As it stands, the police abstract dated 23.1.2016 stated that KCH 871 M to blame and that remains uncontroverted, this is corroborated by the evidence of the PW1 and PW3. In addition, as at 27.4.2017, owner of KCH 871M was Mailu Mwende Regina. On a balance of probability, the 1st Respondent proved its case. I am therefore not convinced that the Trial Court made a mistake in its finding of the Appellant 100% liable for the accident.
46. The Appellant contends that the award of Kshs 200,000 for pain and suffering was manifestly excessive in the circumstances. Under this head, the case of *Stanley Maore v Geoffrey Mwenda* [2004] eKLR the Court of Appeal stated: -

“.....Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general



approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

46. The 1st Respondent in the Plaintiff pleaded that the injuries she sustained were blunt injury to the shoulders, right upper arm, lower back, left leg resulting to formation of haematoma. According to the medical report by Dr. Ndeti dated 27.01.2017, the Respondent suffered similar injuries to those in the Plaintiff and in his opinion she ‘..suffered harm, she sustained soft tissue injuries of moderate severity which caused her pain and suffering.’
47. I have considered the authorities cited by the Appellant but I note that the same were not placed before the Trial court for consideration. I have however looked at those that were placed before it and I don’t find a reason to interfere with the award in the circumstances.

Disposition

48. The Appeal is therefore dismissed with costs to the 1st Respondent.

DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 28TH APRIL 2023(VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

In The Presence Of

No Appearance - For The Appellant

No Appearance - For The Respondent

Geoffrey - Court Assistant(s)

