



**Mwatech Enterprises v Jihan Enterprises Ltd (Civil Appeal  
127 of 2021) [2023] KEHC 17524 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 17524 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 127 OF 2021  
DKN MAGARE, J  
APRIL 27, 2023**

**BETWEEN**

**MWATECH ENTERPRISES ..... APPELLANT**

**AND**

**JIHAN ENTERPRISES LTD ..... RESPONDENT**

**JUDGMENT**

1. The Appeal relates to an accident on 26/6/2016, involving motor vehicle Registration No. KAZ 135B, owned by the Respondent and KAS 257F/ZB 1753 Mercedes Benz. The Appeal is mainly on liability for the accident. The Appellant filed a memorandum of Appeal on 7/9/2021 and Notice of Appeal on the same date.
2. There is no provision for filing the Notice of Appeal in the High Court. Order 42, rule 1. Of the civil procedure Rules provides as doth: -
  - “(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
  - (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”
3. There is thus no basis for filing a notice of Appeal to the High court. It is thus expunged from the record. The memorandum of Appeal suffices and the appeal is filed within time.

**Duty of the appellate court**

4. 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.

5. This was aptly stated in the cases of *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

“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...But 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...”

6. In, this principle was set out in *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123". Where the court of Appeal stated as doth: -

“..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...”

7. The burden of proof is set out in the case of *In Kamanduu Kaumba & another v Kingsway Motors* [2020] eKLR, Justice Ruth Sitati, as then she was stated as follows: -

“10. It is a well-known principle of law that the burden of proof in most civil trials is balance of probabilities, which means that the side with the stronger evidence, however slight the edge may be is the one that wins the case. In *Black’s Law Dictionary Tenth Edition* at page 1373, the phrase “balance of probabilities” is defined under the phrase “preponderance of the evidence” as

“The greater weight of the evidence, not necessarily by the greater number of witnesses testifying to a fact, but by evidence that has the most convincing force, superior evidentiary weight that though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue, rather than the other.”

### **Appellant’s submissions.**

8. The Appellant submitted on Grounds 1 and 4 as one and Grounds 2, 3, 5 and 7 as another set, which I add that grounds 6 and 8 are also under this score.
9. The proper practice was to have only two grounds for Appeal instead of a repetitive paragraph memorandum of Appeal. The grounds as summarized by the Appellant were: -
  - i. There was no reasons and evidence adduced for 20:80 liability. This is on the basis that no evidence of negligence or contributory negligence were adduced.
  - ii. The evidence was contradictory and had no witnesses on the matters decided on.
10. The Appellant that does not raise any issue on Quantum.



## Respondents submissions

11. The Respondent filed submissions dated 18/1/2023 on 20/1/2023.
12. The Respondent posited that Motor Vehicle Registration No. KAS 257F/ZB 1753 suddenly reversed and as a result caused the accident. On cross examination, he argued the appellant's witness agreed that he had indicated in his evidence in chief that the Appellants motor vehicle, reversed due to its weight.
13. The Respondent places blame for the Accident on the Appellant's vehicle's capacity. They assert that the court found the Appellant's evidence contradictory. They deny the need to report within 24 hours. They argue that it is where there is injury to a person dog or cattle that the accident should be reported within 24 hours.
14. They view noncompliance with Section 75 of the Traffic Act, to be a traffic offence without a bearing on the Civil liability. The remedies in the traffic act are found in the realm of traffic or criminal sanctions and not basis for imputing liability.
15. In *Rapid Kate Services & another v Fredrick Ringera* [2019] eKLR, the court stated: -

“ 31. Mwera, J (as he then was) in *Erastus Wade Opande vs. Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007 was of the opinion that:

“Much as other court proceedings can be placed before a trial court as an exhibit, the trial court is bound to proceed and determine a dispute before it on the evidence of witnesses who appear before it...Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings. It is always open to advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of facts deposed to therein, although the witness is not called as a witness in the civil suit, provided this agreement is absolutely clear and unambiguous. It is not for the Judge to read proceedings in traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, but it is also well-known that both parties to an accident might have driven carelessly for their respective types of carelessness. If the contents of a record of traffic proceedings arising out of a motor accident cannot become evidence in a civil suit arising out of that accident, equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent...The practice by advocates, not to call the relevant witnesses but opt to produce as exhibits proceedings like in the traffic case or police investigation files is to be deprecated.

Therefore the learned trial Magistrate was not bound to accept the evidence of the eyewitness in the traffic case, as final in the civil case before him.”



16. Consequently, nothing turns on the fact that the accidental was not reported in time What matters is how it occurred.

### **Pleadings**

17. The Respondent in their plaint dated 26/9/2017 filed for material claim, and prayed for special damages of Ksh. 110,404.41. The particulars of negligence were particularized in paragraph 4(a) – (f). The Respondent filed a witness statement dated 26/9/2021 by Mohammed Sheebi Ali.
18. The Appellant filed defence on 26/11/2018. Their defence was that the matter was resolved and no report was made to the police. They blame the Respondent for the accident
19. However, there are no particulars of negligence of contributory negligence set out in the Defence. This is crucial in view of the dictates of order 2 Rule 4 (1) of Civil Procedure Rules. In that rule a party is required to specifically plead claims that point to the grounds that a claim is unsustainable. The said Rule states as follows: -

- “(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
- (a) which he alleges makes any claim or defence of the opposite party not maintainable;
  - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
  - (c) which raises issues of fact not arising out of the preceding pleading.”

### **Analysis**

20. The one aspect that I agree with the appellant is that there was no basis for holding the appellant 80% liable. I therefore set aside the finding on liability at 80:20. I have to therefore relook at the evidence and find a proper finding on liability.
21. From the defence, the defendant had only 2 defences.
- a. The Respondent was wholly to blame.
  - b. The accident was never reported.
22. Particulars of negligence are elements which must be pleaded. In this case the defendant did not plead negligence or contributory negligence. The court thus had a duty to find either parties fully liable, by allowing the whole claim or dismissing the same. Apportioning liability of whatever nature was not open to the court. There was no reason for apportioning liability.



23. In the case of EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR, Justice R.E.ABURILI, was of the view that: -

“This is the principle espoused in the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where the Court of Appeal stated the following with regard to the duty of a first appellate court:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held, inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

24. In the case of Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which 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 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.

25. However, you cannot proceed to prove that which you have not pleaded.

26. In *Rapid Kate Services & another v Fredrick Ringera* [2019] eKLR, justice G V Odunga, stated as doth; -

“As to whether the apportionment of liability was proper, in *Khambi and Another vs. Mahithi and Another* [1968] EA 70, it was held 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

27. Whereas I agree with the Appellant, I do not necessary confirm that they are to blame or not. The principle that the court missed is that this particular case was an either or. It is either, the Respondent proved their case or not. There were no particulars pleaded and the court had no jurisdiction to apportion liability. However, strong the evidence is, the court has no power to apportion liability without particulars.



28. The evidence will not guide. Though there is no cross appeal, the court cannot allow an illegality to stand. once a party decides not to plead contributory negligence, they placed themselves in a precarious place, where they have to show, that no-one was to blame for the accident.
29. They cannot prove negligence on part of the Respondent which they have not pleaded. To that extent the court improperly exercised its discretion. This court been a retrial, should then proceed and assess liability, while bearing in mind that it did no hear the witnesses nor observe their demeanor, as the trial court did.
30. On 24/2/2020, the Mohamed Badi Hamisi testified on behalf of the Respondent. He stated that he was the Driver of motor vehicle registration No. KAZ 135B, at Logistics Solutions yard at Jomvu. He was driving up hill when the motor vehicle in front started reversing without any signal. The said motor vehicle KAJ 257F/ZB 1753 Mercedes Benz was owned by the Appellant.
31. The reversing of the vehicle resulted in the Respondent's motor vehicle being knocked. The road was one lane and narrow. He tried to hoot in vain. He had 10-12 meters between the vehicle. On cross examination, he stated that there was another vehicle behind him. The appellant's driver should not have reversed, according to the Respondent.
32. The police produced a police abstract as confirming the occurrence of the accident. Other witnesses testified but their testimony is not germane to the issue at hand. The police stated that it was the Respondent who reported the accident. The appellant never reported the accident.
33. The Appellant's witness testified that he was rammed from behind while driving uphill but did not suffer any damage. No police officer was called to the scene of accident.
34. On cross examination the appellant's driver stated that according to the witness statement it is the truck that moved backwards. He alleged that he did not report because issues were settled. He did not explain the nature of settlement.
35. From the evidence tendered, it is common ground that the appellant did not report the accident while the Respondent did so, albeit late. The accident is however confirmed to have occurred.

### **Issues**

- a. Who is to blame is negligence.
- b. Whether the defence of settlement was proved.

### **Whether the defence of settlement was proved.**

36. A settlement is a compromise of a claim. There was no single allegation in evidence on what was settled and by whom. This question was not put to any of the witnesses for the Respondent. No cheque in settlement or other evidence of settlement was produced in evidence.
37. The claim for settlement is therefore untenable. It is a bid to misled the court obfuscate issues and lead the court into a wild goose chase. It is dismissed in limine. The aspect of not reporting the accident is purely a matter of criminal law. There is already section 73 of the [Traffic Act](#) provides as follows: -

“73. Duty to stop and report

- (1) If, in any case, owing to the presence of a motor vehicle on a road, an accident occurs whereby injury or damage is caused to any person, vehicle, dog or cattle, the driver of the motor vehicle shall



stop, and if required to do so by any person having reasonable grounds for so requiring give his name and address, and also the name and address of the owner and the identification marks of the vehicle.

- (2) Any other person in the vehicle at the time of the accident shall also, if required to do so, give his name and address.
- (3) If in the case of any such accident as aforesaid the driver of the motor vehicle for any reason does not give his name and address to any such person as aforesaid, or if any injury has been caused to any person, dog or cattle, the driver shall report the accident at a police station or to a police officer as soon as reasonably possible, and in any case within twenty-four hours of the occurrence thereof.
- (4) The owner of a motor vehicle shall supply the police with all information necessary for the identification of a driver involved in an accident.

38. Indeed Section 75 of the [Traffic Act](#) which provide for penalty as follows: -

“Any person who contravenes or fails to comply with any of the provisions of this Part shall be guilty of an offence and liable on first conviction to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding three months, and on each subsequent conviction to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding six months or to both.”

39. The province of the Traffic offence is circumscribed under Article 157 of [the constitution](#). It is not ours to deal with. The article provides as doth:

- “(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
  - (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
  - (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
  - (c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

40. This leaves, one issue who is to blame in negligence. Given that there is no pleading for contributory negligence the court will have to find that the Defendant is not liable for it to dismiss the suit otherwise the court cannot apportion liability in absence of pleading.



41. In contributory negligence this is also informed by the decision of Court of Appeal (Gicheru Kwach and Tunoi, JJA in Maina Kaniaru and Another =vs= Josephat M. Nang’odun (1995) eKLR where the court stated:-

“On appeal by the plaintiff it was held, allowing the appeal, that contributory negligence had to specifically pleaded by way of defence to plaintiffs claim of negligence; that, since there had been no such plea, the judge had erred in law in finding that the plaintiffs negligence had contributed to the accident.

The authority, though not of course in any way binding on this court, is directly on the point and is in favour of the proposition on which the appellant relies herein. With all due respect to the learned judge it was not open for him to treat the matter as if there was a plea of contributory negligence before him. Again, it was an error on his part having disallowed the application to amend the defence to hold that he still had a discretion to consider the issue in final judgment.”

42. This court has a right to interfere on the finding of liability, if it is shown that a finding was based on no evidence at all. In attempting to explain negligence and contributory negligence the court in Moisi Bridge Quaru Ltd =vs= Martin Omuge Edoan, Justice E.K. Ogola, on 31/1/2022 stated as doth: -

“What the above principle attempts to explain is that the negligence calculus is a framework for a trial court faced with such situational analysis to decide what precautions the reasonable person would have taken to avoid the harm. The classic definition of negligence given by Alderson B in Blyth vs Birmingham Waterworks Co. (1843 – 60) ALL ER 478.

“Negligence is the omission to do something which a reasonable man, guided upon those with ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”

In my view negligence and contributory negligence in infinite forms and would therefore depend on a case-to-case basis. Furthermore, once the plaintiff has established a prima facie case showing the defendant is guilty of negligence the onus to discharge that burden in rebuttal rests with the defendant. In the instant appeal both the evidence and submission indicate that the Respondent was employed as truck driver to ferry stones from the Appellants quarry.”

43. In this case, once the Respondent established, prima facie that the Appellant was liable, there was no room, to find contributory negligence in absence of pleading to that that effect. The appellants non suited themselves by failing to plead contributory negligence.

44. I note that the parties are the agreement was that the accident indeed occurred on the said date. There is a contradiction within the appellant’s evidence. In the written witness statement, the witness admits that his vehicle reversed due to its weight. In oral evidence he changed tune.

45. A witness statement is a written document and need not be understood to the context that the oral evidence or parole evidence cannot, change or explain the contents of the document.

46. Although referring to an agreement the court of appeal had this to say in the case of Harambee Co-operative Savings & Credit Society v Mukinye Enterprises Ltd [1982] eKLR,

“it is obvious to me that he considered that the interpretation of the written agreement was the firm and best basis not only for determining what the parties had bargained for, but also



the applicable ambit of the agreement itself. The authorities we follow are at one, that where a contract is wholly in writing, its interpretation is exclusively within the jurisdiction of the judge; and that courts insist that “the parties are to be confined within the four corners of the document in which they have chosen to enshrine their agreement.”

47. In the circumstances, I believe the Respondents version of evidence. I hold and find that the Appellant reversed onto the Respondent’s Vehicle. doubt in my mind that the appeal has no merit. Other than the realigning the judgment with pleadings, the same is dismissed with costs.

### **Determination**

48. I therefore make the following orders: -

- a. The finding of liability at 80:20 is hereby set aside as the issue of contributory negligence was not pleaded, and is substituted with a finding that the appellant was 100% liable.
- b. Consequently, other than the above correction, the appeal stands dismissed with costs of Ksh. 75,000/= to the Respondent.
- c. For avoidance of doubt the judgment entered for the Respondent is as follows: -
  - i. Liability 100% against the appellant.
  - ii. Special damages 110,404.41.
  - iii. The said special damages attract interest from the date of filing in the subordinate court.
  - iv. The Respondent to have the costs of this appeal of Ksh 55, 000/=
  - v. The Respondent to have costs of the Court below.
- d. The file be closed.
- e. 30 days stay of execution

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 27<sup>TH</sup> DAY OF APRIL, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**DENNIS KIZITO MAGARE**

**JUDGE**

**In the presence of**

No Appearance for the Appellant

Miss Layoo for the Respondent.

Court Assistant - Firdaus

