



**Wafula v Wafula (Civil Appeal 33 of 2022) [2023] KEHC 17708 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17708 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA**

**CIVIL APPEAL 33 OF 2022**

**JRA WANANDA, J**

**MAY 26, 2023**

**BETWEEN**

**STEPHEN WAFULA ..... APPELLANT**

**AND**

**FRED BARASA WAFULA ..... RESPONDENT**

**JUDGMENT**

1. This Appeal arises from a suit seeking compensation for injuries sustained as a result of a road accident. The Appeal is against the determination of liability by the trial Court. In the suit, the Respondent was the Plaintiff whereas the Appellant was the Defendant.
2. By the Plaint filed on 20/09/2019, the Respondent sued the Appellant seeking general damages for pain and suffering, loss of earning capacity and/or future earning capacity, special damages, costs of the suit and interest. It was alleged that the accident occurred on 28/07/2019 along the Mumias-Bungoma road and involved a motorcycle registration number KMEN 047L which the Respondent was riding and the motor vehicle registration number KCJ 186N Toyota Prado driven and owned by the Appellant.
3. It was also alleged that the Appellant drove his said motor vehicle carelessly and negligently thus causing him to lose control thereof and to ram into the rear of the Respondent's motor cycle. It was further alleged that as a result, the Respondent suffered severe injuries. From the medical Report produced in evidence, among other injuries, the Respondent suffered a crushed right leg leading to amputation below the right knee joint.
4. The Appellant filed his Statement of defence on 15/04/2021 wherein he denied liability, and in the alternative, blamed the Respondent for causing or contributing to the accident.
5. The suit then proceeded to full trial wherein the Respondent called 5 witnesses. These were the Respondent himself, a clinician, a doctor, an eye-witness and a traffic police officer. On his part, the Appellant testified on his own behalf.



6. After the hearing, the trial Court delivered its Judgment on 10/06/2022 whereof the Appellant was found 100% liable. Damages were then awarded to the Respondent as hereunder:
- General Damages Kshs 2,000,000/=
- Loss of earning capacity Kshs 800,000/=
- Future medical expenses Kshs 250,000/-
- Total Kshs 3,050,000/-
7. Costs and interest were also awarded to the Respondent.
8. Aggrieved by the trial Court's finding on liability, the Appellant filed this Appeal on 17/06/2022. In the Memorandum of Appeal, the following grounds were cited:
- i. That the learned trial Magistrate erred in law and fact in holding the Appellant 100% liable in negligence and by making a finding that the Appellant was solely liable for the occurrence of the accident without taking into consideration the evidence adduced.
  - ii. That the learned trial Magistrate erred in law and fact by failing to apportion liability on the basis of contributory negligence on the part of the Respondent in view of the evidence on record thereby arriving at erroneous decision on liability.
  - iii. That the learned trial Magistrate erred in law and fact by failing to consider the submissions by the Appellant on the issue of liability hence arriving at an erroneous decision.

### **Hearing of the Appeal**

9. The Appeal was canvassed by way of written submissions. The Respondent, through his Advocates, Messrs Alwanga & Co., filed his on 13/01/2023 whereas the Appellant filed his on 18/01/2023 through Messrs Onyikwa & Co.

### **Appellant's Submissions**

10. Counsel for the Appellant submitted that is not in dispute that the road accident occurred and that the only question to be answered in this Appeal is who is to blame for the same. He faulted the trial Magistrate for finding the Appellant 100% liable and argued that the testimonies and evidence adduced did not demonstrate any blame against the Appellant.
11. According to Counsel, the clinician's (PW1) and doctor's (PW2) evidence did not aid the Court in determining liability since their testimonies were only in regard to the nature of the injuries suffered by the Respondent after the accident. Regarding the Respondent's testimony, he posed the question: how could the Respondent have seen the Appellant driving recklessly and at a high speed when the Respondent was at all material times in front of the Appellant's motor vehicle that allegedly hit him from the rear. Counsel submitted that in the circumstances, the Respondent's evidence was hearsay.
12. Counsel further submitted that although the alleged eye-witness (PW4) blamed the Appellant for causing the accident, during cross-examination, the eye-witness conceded that he was driving behind the motor cycle and could not therefore see the position of the Respondent's vehicle on the road. He submitted that in the circumstances, the eye-witness could not tell whether the Respondent was to equally blame for the accident. Counsel contended that the eye-witnesses' testimony could not therefore assist the Court in arriving at a finding on whether the Respondent was equally. He further submitted that the traffic police officer (PW5) who produced the police abstract was not the investigating officer in the matter and that in any event, the officer did not produce the Occurrence



Book (OB) or the sketch map which Counsel maintained were vital documents. He submitted that such documents, had they been produced, would have assisted the Magistrate in determining how the accident occurred and who was to blame. He further submitted that the officer stated that no one was charged with a traffic offence in the matter. He therefore reiterated that the officer's evidence could not have attributed any blame upon the Appellant.

13. He further submitted that the Appellant testified that he had just passed a junction and his speed was therefore minimal. He contended that there is no way that the Appellant could have been driving at a high speed just after the junction. He added that during the hearing, the Appellant (DW1) testified that just after passing Mayoni junction, the motor cycle rider (Respondent) carrying a passenger suddenly entered the road while riding from the left towards the right-hand side, that he tried to avoid the accident by both hooting and swerving further right but unfortunately the cyclist was too close and therefore brushed the left side of his vehicle, that due to the impact the Respondent and his passenger fell on the tarmac. Counsel contended that from the above testimony, it is clear that the accident was primarily caused when the Respondent suddenly entered the main road whilst trying to cross from the left side to the right side without ascertaining that the road was clear. He maintained that the Respondent was thus 100% liable for causing the accident.
14. He further submitted that the Appellant undertook due diligence by leaving his vehicle at the scene of the accident and reporting the matter to the police station at Mumias who then conducted investigations. According to him, it is unfortunate that the investigations report that could have exonerated the Appellant from all liability was not produced in Court. Finally, he argued that the Respondent did not take the requisite safety measures to avoid the accident. He relied on the decision in *MJ (Minor suing through his father and next friend) JM & 2 Others v Swalleh O. Shanny* [2019] eKLR and submitted that the fact that an accident occurred did not imply that the Appellant was liable for the same.

### **Respondent's Submissions**

15. On his part, the Respondent's Counsel submitted that the traffic police officer (PW5) confirmed that charges were preferred against the Appellant for careless driving as evidenced in the police abstract, that the Respondent testified that both the Appellant's motor vehicle and the Respondent's motor cycle were headed towards the same direction, that the motor cycle was therefore in front of the motor vehicle and that the Appellant rammed into the motor cycle from the rear. He contended that this testimony was corroborated by the eye-witness (PW4) who was also driving along the same road behind the Appellant's motor vehicle. He blamed the Appellant for failing to keep distance and driving at an excessive speed in the circumstances.
16. Counsel dismissed the Appellant's claim that the Respondent was guilty of contributory negligence or that it is the Respondent who brushed his motor cycle against the left side of the Appellant's motor vehicle. He maintained that these allegations are not plausible since the accident occurred a few meters after Mayoni junction as was confirmed by the Respondent's own testimony and also that of the police officer (PW3) and the independent eye-witness (PW4). He further submitted that although the Appellant contended that he was never charged for causing the accident, the duty to charge lies squarely with the police and not the Respondent. He added that for this reason, the Appellant cannot claim that he is not to blame simply because he was not charged. He relied on the decision in *Jennifer Mathenge v Patrick Muriuki Maina* [2020] eKLR.
17. He maintained that the traffic officer's evidence was helpful in determining liability since the police abstract that he produced indicated that charges were to be preferred against the Appellant for causing



the accident. According to Counsel, the testimonies of the traffic officer and of the eye-witness exonerated the Respondent from any blame and put blame squarely on the Appellant.

18. He further argued that the attempt by the Appellant to lay blame on the Respondent by alleging that it is the left side of his motor vehicle that got damaged because allegedly the Respondent had entered the road from the left side, was contradictory since the accident occurred after the junction. Counsel argued that in any event, the Appellant did not produce any motor vehicle examination report to confirm the said assertions. Finally, Counsel supported the trial Magistrate's finding of liability against the Appellant. He asserted that the findings were proper and well-reasoned since the Respondent proved his case on a balance of probabilities.

### **Analysis & Determination**

19. Being a first appeal, this Court is guided by the principles set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123 where the duty of an Appellate Court was stated to be as follows:

“..... 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. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

### **Issue for Determination**

20. I have perused the record, submissions by the parties and the authorities cited and find that the issue for determination in this appeal is “whether the trial Magistrate erred in finding the Appellant 100% liable for causing the accident”:
21. I will now analyse and determine this issue.
22. On the matter of determination of liability in a road traffic accident, I quote the decision in *Stapley v Gypsum Mines Limited* (2) (1953) AC 663 in which Lord Reid stated as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it ..... The question must be determined by applying common sense to the fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly cause the accident. I doubt whether any test can apply generally.”

23. It is not in dispute that an accident indeed occurred on 28/07/2019 along Mumias-Bungoma road involving the motor vehicle registration number KCJ 186N driven by the Appellant and a motor cycle registration number KMEN 047L which the Respondent was riding. On one hand, the Appellant blames the Respondent for causing the accident whilst on the other, the Respondent blames the



Appellant. In light of these two rival accounts, to determine where liability lies, the Court will draw upon the evidence recorded before the trial Court.

24. In his testimony, the Respondent (PW3) stated that on the material date, he was riding his motor cycle from Bungoma and while at Mayoni junction, heading towards Mumias, the Respondent's vehicle which was being driven behind him knocked him from the rear, that he was on the extreme left side of the road and that the Appellant was driving at a high speed and had moved to his side before knocking him from the rear. He blamed the Respondent for failing to not maintain a safe distance.
25. PW4, an eye witness, also blamed the Appellant and testified that the Appellant knocked the motor cycle from behind. He told Court that they were all heading towards the same direction and that the accident occurred after the junction at Mayoni along the Bungoma-Mumias road. He too told the Court that the Appellant would not have knocked the motor cycle had the Appellant kept safe distance.
26. PW5, traffic officer, confirmed the occurrence of the accident and produced the police abstract. He however did not have nor produce the Occurrence Book (OB) nor the sketch maps. On cross-examination, he conceded that he was not the investigating officer in the matter and that he did not visit the scene of the accident. He however confirmed that the accident was reported at the station.
27. On his part, the Appellant (DW1) testified that he was driving from Bungoma heading to Kisumu, that he is the owner of the motor vehicle registration number KCJ 186N, that the accident occurred just after the Mayoni junction and that the part involved was the left wing of his motor vehicle. He told the Court that there were many people at the scene including boda boda (motor-cycle taxi) riders and well-wishers, that he does not remember the part of his vehicle that was damaged but the rider and passenger fell on the left side of the road.
28. From the evidence that was tendered before the trial Court, it is not in dispute that the accident occurred and that it involved the Appellant's said motor vehicle and the Respondents said motor cycle. I agree that since the police officer who testified as PW5 was not the investigating officer in the matter and since he did not produce the police file or sketch map, his evidence was not of much assistance to the Court in determining how the accident occurred or who was to blame for the same. However, there was an eye witness, PW4, who told the Court that he was driving behind the Appellant's motor vehicle and that they were all headed towards the same direction when the Appellant knocked down the Respondent's motor cycle from the rear. This piece of evidence is not disputed.
29. It is clear that the accident occurred in broad day light at around 9:00 am. From the evidence on record it is, in my view, more probable than not that the Appellant hit the Respondent from the rear and that PW4 being right behind the Appellant's vehicle was able to witness the accident occur. I am therefore satisfied that the evidence of PW4 corroborated the Respondent's evidence that indeed the Appellant knocked him from behind. I am not persuaded by the Respondent's attempt to shift blame to the Appellant. From the evidence and even from Appellant's own testimony, it is evident that the accident occurred right after the Mayoni junction and that the Respondent was riding on the left side of the road when the Appellant knocked him. The Appellant himself told the Court, during cross-examination, that the Respondent together with his pillion passenger fell on the left side of the road. When I place this evidence on legal scale of balance of probabilities, it is more probable than not that the Appellant was driving at a high speed and also failed to keep a safe distance.
30. I therefore find that the Appellant failed to pay attention to other road users when he knocked the Respondent. I also find that the Appellant failed to prove his allegations of contributory negligence against the Appellant. This Appeal therefore fails.



**Final Orders**

31. For the foregoing reasons, I uphold the trial Court’s finding that the Appellant was wholly liable for the accident. I do not therefore find any basis for interfering with the determination of the trial Court on the issue of liability.
32. In the end, this Appeal is hereby dismissed with costs to the Respondent.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 26<sup>TH</sup> DAY OF MAY 2023**

.....

**WANANDA J. R. ANURO**

**JUDGE**

