



REPUBLIC OF KENYA



**Pandhai & another v Amingo (Civil Appeal E019 of 2021)  
[2023] KEHC 27485 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 27485 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E019 OF 2021  
MS SHARIFF, J  
JUNE 30, 2023**

**BETWEEN**

**HARJEET SINGH PANDHAI ..... 1<sup>ST</sup> APPELLANT**

**PURDUMAN HARJEET ..... 2<sup>ND</sup> APPELLANT**

**AND**

**NICHOLAS AWINO AMINGO ..... RESPONDENT**

*(Being an appeal from the Judgement and Decree of Hon E.M Onzere  
P.M in Tamu PMCC No. 25 of 2015 delivered on 2nd February, 2021)*

**JUDGMENT**

1. The suit subject of this appeal was commenced by the Respondent herein seeking damages occasioned by a road traffic accident involving tractor KTCA xxxx owned by the Appellants and driven by the Respondent at the time as their employee. The Plaintiff averred that as per his contract with the Appellants, it was the Appellants' duty to ensure the Respondent's safety while carrying out his duties.
2. He averred that as a result of the Appellants' breach of duty, the Appellants' tractor developed mechanical fault leading the steering to lock, tractor landed on a ditch occasioning personal injuries to the Respondent.
3. The Appellants filed their defence attributing the accident if any to the Respondent's negligence. The case proceeded to hearing. The Plaintiff PW-1 stated that he had driven the tractor to the workshop earlier for repairs. He was later told the same had been repaired and he proceeded with it to the farm and after loading while driving to the factory, the tractor lost control on the slope after the brakes and steering failed. He was injured and taken to Jaramogi Oginga Odinga Hospital.



4. PW-2 Lazarus Odhiambo Okula a motorcycle rider rescued PW-1 after the accident. He found him at the scene of the accident and took him to Chemelil Hospital before being referred to Jaramogi Oginga Odinga Hospital.
5. PW-3 Were Okombo produced a medical report he had prepared after examining the Respondent. He concluded the patient had sustained both soft tissue and bone injuries.
6. PW-4 PC Bwire Wanjala produced the abstract showing that the case was pending investigations. He confirmed the occurrence of the accident and that the Respondent was the driver of the tractor.
7. PW-5 Hellen Ambilo Mbaja, a Health Records Officer from Jaramogi Oginga Odinga Hospital produced the medical records issued to the Respondent. She confirmed he was treated in the hospital.
8. For the Appellants, Constant Juma Efumbi, the Appellant’s mechanic stated that he had inspected the tractor earlier and found it sound. He didn’t know why the accident occurred.
9. The Magistrate thereafter considered the evidence and found the Appellants 100% liable for the accident, awarded Kshs 500,000/- in general damages and Kshs.1,300 in special damages.
10. The Appellants being aggrieved moved this court on appeal raising the grounds set hereunder.
  - i. The learned trial Magistrate erred in finding the Appellants liable when the evidence on record as well as exhibits produced by the Appellant showed that the suit tractor didn’t have any pre-accident defects
  - ii. The learned trial Magistrate erred by considering matters that were not placed before the court and in so doing ventured into an arena of conflict which has cause great injustice to the Appellant.
  - iii. The learned Magistrate erred by holding the Appellants liable for the accident when the Respondent who was in control and management of the suit tractor failed to exercise due care ordinarily expected of a reasonable and prudent person.
  - iv. The learned trial Magistrate erred in making an excessive award in general damages in the face of the evidence adduced which decision has caused hardship t the Appellants.
  - v. The learned trial Magistrate erred in delivering a judgement that was against the weight of evidence and the law.
  - vi. In arriving at his decision, the trial magistrate did so in a speculative and cursory manner not guided by any set of principles and failed to exercise her discretion within the applicable principles of assessment of damages and her failure to adhere to the foregoing has occasioned a serious miscarriage of justice and ought to be reversed.
11. The appeal proceeded by way of written submissions. Only the Respondent filed his submissions which is basically a support of the trial court’s decision.

### **Analysis and determination.**

12. In a first appeal, the duty of the court was stated in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High 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 allowances in this respect”

13. My understanding of the claim before the trial court is that the Respondent was the Appellants’ employee working as a driver. The said driver was involved in a road accident while in the cause of duty. The Respondent thus attributed the occurrence of the said accident to the tractor’s mechanical failure. He asserted that the Appellants breached their duty of care by allowing him to drive a tractor which was faulty.
14. The issue then relates to the Appellants’ liability in the causation of the accident. In proof of this fact, the Respondent asserted that prior to the accident, the tractor had been serviced by DW-1 and thereafter released to him that it was in good working condition.
15. The Appellants on their part produced inspection reports showing that both the tractor and the trailer were in a good working condition. The issue of the Appellants liability in the accident is thus to be established from the facts surrounding the accident and the documents tabled before the trial court.
16. The burden of proof is always on the Plaintiff and the standard is always on a balance of probability. From the evidence on record, the inspection report was filed by the Appellant and the Respondent only produced largely proof of injuries sustained.
17. Under Section 107-109 of the *Evidence Act*, it is provided;
  107.
    - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
    - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
  108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
  109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
18. The provisions have been subject of several decisions from our courts, for instance in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013]eKLR where it was held;

We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the Appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the Appellant to call the expert witness. The Appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.
19. Applying the above decision to the instant case, my finding is that the Respondent’s claim is anchored on negligence that the tractor was mechanically faulty leading to the accident. This position is contested



by the Appellants who produce a certificate of inspection showing that the same was mechanically sound.

20. This impliedly means that the Respondent ought to have adduced evidence showing that the tractor prior to the accident was faulty and therefore no fit for use at the time it was driven by him.
21. From the evidence on record, I do not find any evidence led by the Respondent that would be attributable as negligence on the Appellants' part. The Respondent's suit was not proved to the required standards and hereby proceed to set aside the trial court's judgement and substitute therewith an order of dismissing the Respondent's suit.
22. There shall however be no orders as to costs.

**DATED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF JUNE 2023**

**MWANAISHA .S. SHARIFF**

**JUDGE**

