



**Onkoba v Karonjo & another (Civil Appeal E038 of 2022)
[2023] KEHC 20379 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 20379 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E038 OF 2022
WA OKWANY, J
JUNE 29, 2023**

BETWEEN

MWERESA KEPHA ONKOBA APPELLANT

AND

JOSEPH KARIUKI KARONJO 1ST RESPONDENT

JACKSON MWANGI 2ND RESPONDENT

(Being an Appeal Against the Judgment/Decree of Hon. B. O. Okong'o – RM Nyamira dated and delivered on the 4th day of August 2022 in the original Nyamira CMCC No. 174 of 2021)

JUDGMENT

1. The Appellant herein was the Plaintiff before the trial court where he sued the Respondent claiming damages arising out of a road traffic accident that occurred on January 18, 2021. The Appellant's case was that he was on the material day driving his motor vehicle Registration No KCS 566S along the Nyamira-Kisii Road when at Nyabioto area his vehicle was hit by the Respondent's motor vehicle Registration No KCU 564P. The Appellant attributed the accident to the negligence of the Respondent's driver/agent and stated that he sustained severe injuries in the said accident.
2. The trial court considered the case and entered judgement in favour of the Appellant for Kshs. 406,040/= for general and special damages. Liability was however distributed at 80:20 in favour of the Appellant thus triggering the filing of the instant appeal in which he challenges the trial court's findings on liability. According to the Appellant, the trial court should have held the Respondent wholly liable for the accident.
3. The Appeal was canvassed by way of written submissions which I have considered. The main issue for determination is whether the trial court arrived at the correct finding on liability.



4. The duty of the first appellate court is to subject the entire evidence presented before the trial court to fresh scrutiny in order to arrive at its own findings while bearing in mind the fact that it neither heard nor saw the witnesses testify (See [Uganda Breweries Ltd v Uganda Railways Corporation](#) [2002] 2 EA 634).
5. The Appellant's case was that the Respondent was wholly to blame for the accident as his motor vehicle was, at the time of the accident, overtaking a fleet of motor vehicles at a high speed when it lost control and rammed into his motor vehicle thereby causing the accident. He produced several exhibits in support of his case (P.Exh 1-10).
6. The Respondents, on their part, filed a Statement of Defence in which they denied responsibility for the accident and only produced a second medical report by Dr. Obondi (DEX1). They did not adduce any further evidence on how the accident happened.
7. It was not in dispute that an accident occurred on the material date involving the two vehicles. It was also not disputed that the accident occurred when the Respondents' motor vehicle was overtaking a fleet of vehicles. The Respondents did not controvert the Appellant's account on the sequence of events that led to the accident but argued that the Appellant ought to have taken reasonable steps to avoid the accident thus implying that the Appellant was partly to blame for the accident. The main issue for determination is whether the Respondent was wholly to blame for the accident.
8. In [Blyth v Birmingham Water Works Co](#) {1856} it was held thus:-

“Negligence is the omission to do something which a reasonable man, grieved upon those considerations which ordinarily regulate the conduct of human affairs, would do or something which a prudent and reasonable man could not do.”
9. In determining liability I am guided by the decision in [Stapley v Gypsum Mines Limited \(2\)](#) (1953) A.C 663 at P. 681 where Lord Reid reasoned that:

“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 caused the accident. I doubt whether any test can apply generally.”
10. In the instant case, the evidence showed that the Appellant's motor vehicle was on its correct side of the road when the Respondents' vehicle, which was overtaking several vehicles in a row lost control and rammed into it. This evidence was not controverted by the Respondents. In [Peter Ngigi & Another](#)



(suing as legal representative of the Estate of Joan Wambui Ngigi) v Thomas Ondiki Oduor & another
2019 eKLR it was held:-

“There are many authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements. In the case of *Shaneebal Limited v County Government of Machakos* [2018] eKLR, Odunga, J, relied on the cases below in reaching his judgment. In *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No 1243 of 2001* the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

Similarly, in *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC No 68 of 2007* Ali-Aroni, J. citing the decision in *Edward Muriga through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No 23 of 1997* held that:

“In this matter, apart from filing its statement of defence, the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.

In *Interchemie EA Limited v Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No 165B of 2000*, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. Mulwa J, however in the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.

In light of all these authorities, I am of the view that the position taken by the trial magistrate in dismissing the suit was not warranted.....In this regard, no evidence of apportionment of liability being available, 100% liability is attributed to the defendants jointly and severally.”

11. The trial magistrate made the following remarks on proof of the Appellant’s case: -

“...the court however finds that even though the Plaintiff has proved his case on a balance of probability, being a driver of motor vehicle KCS 566S at the time of the alleged accident, the Plaintiff equally ought to have controlled and/or swerved his motor vehicle so as to avoid the accident caused by the defendants’ motor vehicle...”



12. My finding is that, taking into account the uncontroverted fact that the Respondent's motor vehicle was overtaking several vehicles at a high speed when it lost control and hit the Appellant's vehicle, the trial court erred in finding that the Appellant should have taken steps to avoid the accident. My take is that, in the circumstances of this case, the Appellant could not have in any way been held responsible for the accident. I am guided by the decision in *Jabane v Olienja* [1986] KLR 661, at pg 664, where Hancox JA noted as follows: -

“I accept this proposition, so far as it goes, and this court does have the power to examine and re-evaluate the evidence and the findings of facts of the trial court in order to determine whether the conclusion reached on the evidence should stand – see *Peters v Sunday Post* [1958] EA 424. More recently, this court has held that it will not likely differ from the findings of facts of a trial judge who had the benefits of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did - see in particular, *Ephantus Mwangi v Duncan Mwangi Wambugu* (1982-88) 1KAR 278 and *Mwana Sokoni v Kenya Bus Services* (1982-88) 1 KAR 870” (See also L. Kimaru J. in *Sokoro Saw Mills Ltd v Grace Nduta Ndungu*[2006]eKLR).

13. I further find that the Respondents' driver owed a duty of care to other road users to drive his vehicle with care while observing the traffic rules. The Respondent's driver acted negligently when he decided to overtake several vehicles at once without paying keen attention to the Appellant's oncoming vehicle. I find that the Appellant cannot be faulted for the negligence of the Respondents' driver just because he happened to be on the road when the accident occurred. I am persuaded by the decision in *Duncan Kimathi Karagania v Ngugi David & 3 others* [2016] eKLR where it was held thus:-

“..... The mere fact that the matatu driver was on the road and driving a motor vehicle which was hit by the 3rd defendant's motor vehicle, by itself does not make the driver of the matatu contributory negligent or negligent at all for the occurrence of the accident and therefore responsible for the resultant injuries that the plaintiff sustained....”

14. It is my finding that the uncontroverted evidence tendered by the Appellant was sufficient to prove that the Respondents were wholly responsible for the accident on a balance of probability. This standard of proof was explained *In Re H C minors* {1996} AC 563 at 586 by as follows:-

“The balance of probability standard means that a Court is satisfied an event occurred, if the Court considers, that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the Court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegations, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation

15. Having regard to the findings that I have made in this judgment, I find that the trial court erred in finding that the Appellant contributed to the accident. I therefore set aside the trial court's finding on liability and find the Respondents 100% liable for the accident.

16. In the end, I find that the Appeal is merited and I therefore allow it. I find no reason to disturb the award of damages as the same was not challenged on appeal. I award the Appellant the costs of the Appeal.



17. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS
THIS 29TH DAY OF JUNE 2023.**

W. A. OKWANY

JUDGE

