



**Mburu v Kariuki (Civil Appeal E542 of 2022)
[2023] KEHC 21721 (KLR) (Civ) (25 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21721 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E542 OF 2022

AN ONGERI, J

AUGUST 25, 2023

BETWEEN

MARY WANJUHI MBURU APPELLANT

AND

JOHN NJOROGE KARIUKI RESPONDENT

*(Being an appeal from the judgment and decree of Hon. J W. Munene
(RM) in Milimani SCCC E175 of 2022 delivered on 23/6/2022)*

JUDGMENT

1. The respondent in this appeal John Njoroge Kariuki was the claimant in Milimani SCCC E175 of 2022 where he filed a claim against the appellant seeking special damages in the sum of Kshs 293,990 in respect of the repairs, assessment fee and tracing fee plus costs and interest for damages to the respondent's motor vehicle registration No KCL 789J occasioned by the appellant's motor vehicle registration KAT 495Y.
2. The accident occurred on 18/3/2019. The appellant denied ownership of the motor vehicle and she also denied that the accident occurred.
3. The court dismissed the claim against the 1st respondent and found the appellant liable and entered judgment against the appellant in the sum of Kshs 293,990 plus costs of the suit and interest.
4. The appellant has now appealed against the said judgment in the following grounds;
 - a. The learned adjudicator erred both in law and in fact in making a finding on liability that the appellant was liable for the accident which occurred on March 18, 2019 involving motor vehicles registration numbers KCL 789J, a Toyota Hiace owned by the respondent and KAT



495Y Isuzu Lorry owned by the appellant and therefore arrived at a wrong conclusion that the respondent had proved his case against the appellant on a balance of probability.

- b. The learned adjudicator erred in law and in fact by entering judgement in favour of the respondent as against the appellant as prayed for in the amended statement of claim dated February 28, 2022.
 - c. The learned adjudicator erred in law by misapprehending and failing to fully appreciate the facts obtaining in the case before the subordinate court and consequently arrived at a wrong conclusion on liability
 - d. The learned adjudicator erred both in law and in fact in failing to appreciate and consider at all and/or ignored the pleadings filed by the appellant and the totality of the evidence tendered at the hearing by the parties in support of their respective positions in the matter and therefore arrived at a wrong conclusion
 - e. The learned magistrate erred both in law and in fact in failing to appreciate and consider and therefore ignored the appellants written submissions as well as the cited authorities and therefore arrived at the wrong conclusion.
5. The parties filed written submissions as follows; the appellants submitted that PW3 testified that he was driving the motor vehicle registration number KCL 789J on the fateful morning at about 5.00 am from Kinoo heading to Limuru. PW3 further testified that he reached Rironi where slowed down due to rumble strips and noted a lorry heading in the same direction on a different lane being driven at high speeds. PW3 testified that he was driving on the inner lane when the said lorry swerved to his lane in avoiding a collision with another motor vehicle which was ahead.
 6. The appellants submitted that from PW3's testimony it was clear it was contradictory and therefore could not be relied on by the court on the issue of liability. The appellants driver driving from behind could not have possibly ended up hitting the respondent's motor vehicle's front bumper and damaging the radiator panel which is located at the front middle part of the bumper.
 7. The appellant submitted that PW2 a police officer who produced the abstract further contradicted the testimony of the respondent. In his testimony PW2 indicated that he did not visit the scene of the accident and confirmed that no witness statements were recorded by the police and there was no sketch diagram by the investigating officer showing the point of collision of the motor vehicles in question.
 8. The appellants argued further that the police abstract only proves that the occurrence of an accident was reported to a particular police station and cannot be relied on in proving liability of the accident.
 9. The respondent submitted that PW2 Constable Ndiege Odhiambo produced the police abstract dated March 18, 2019 which confirmed that an accident had occurred between the two vehicles. PW1 told the court that the respondent and the appellants motor vehicles were headed in the same direction to Limuru and on reaching the location of the accident the appellants motor vehicle tried to overtake the respondents motor vehicle but there was an oncoming vehicle on the opposite lane. The appellant desperate to avoid a head on collision forced its way to the respondent's lane and hit the respondents motor vehicle on the front left side.
 10. The respondent contended that no material was placed before the court by the appellant to controvert the evidence produced. There was gross negligence on the part of the appellants driver and therefore the trial court was correct in its finding. The appeal herein is merely a denial and not sufficient defence.
 1. This being a first appeal the duty of the first appellate court is to re-evaluate the evidence before the trial court and to arrive at its own conclusion whether or not to support the findings of the



trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle v Associated Motor Boat Co.* [1968] EA 123 it was held in the following terms: -

“ An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An 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 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 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.”

11. The issues for determination are as follows,
 - i. Whether the appellant was 100% liable for the accident that occurred on 18/3/2019.
 - ii. Whether the trial court ignored the appellant’s evidence and submissions.
12. On the issue as to whether the appellant was 100% liable the evidence of the respondent’s driver was that he was driving motor vehicle registration No KCL 789J in the inner lane when the lorry which was on the outer lane drove towards his lane and hit his motor vehicle on left side.
13. I have considered the evidence of the Appellant’s driver and I find that the Trial court was right in finding that it was the Appellant’s driver that was responsible for the accident.
14. The police abstract also indicated that it was the Appellant’s driver who was blamed for the accident.
15. Although the Appellant’s driver was not charged with any traffic offence, the fact that the officer who visited the scene blamed him for the accident tilts the balance in favor of the respondent.
16. I find that the trial court was right on finding that the appellant’s driver was 100% liable.
17. I also find that the special damages were specifically pleaded and proved as required by law.
18. The trial court’s decision was based on the evidence. I find that it is not true that the appellant’s evidence was ignored.
19. The appeal herein lacks in merit and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF AUGUST, 2023.

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A. N. ONGERI
JUDGE

In the presence of:



..... for the Appellant

..... for the Respondent

