



**Warui v National Land Commission & another (Civil Appeal
69 of 2019) [2022] KEHC 26 (KLR) (13 January 2022) (Judgment)**

Neutral citation: [2022] KEHC 26 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 69 OF 2019
A MSHILA, J
JANUARY 13, 2022**

BETWEEN

PETER MURIUKI WARUI APPELLANT

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

*(Appeal from the judgment of Hon.V.S. Kosgei Resident Magistrate
Karatina delivered on 29th October, 2019 in PMCC No.3 of 2018)*

JUDGMENT

1. This is an Appeal from the judgment of Hon.V.S. Kosgei Resident Magistrate Karatina delivered on 29th October, 2019 in PMCC No.3 of 2018 wherein the appellants' claim was dismissed with no order as to costs; his claim arose from a road traffic accident which occurred whilst he was lawfully riding his motor cycle registration number KMDK 765N along Karatina- Sagana Road near Kangocha; the 1st respondent as the driver, servant or agent of the 2nd respondent so negligently drove GKB 387D Toyota Prado that he caused the vehicle to collide into the rear of the motor cycle thereby occasioning the appellant with serious bodily injuries.
2. The appellant's claim was dismissed by the trial court with no order as to costs; being dissatisfied with the judgment in its entirety, the appellant filed this instant appeal and listed four (4) grounds of appeal as are summarized hereunder;-
 - i. The trial court erred in finding that the appellant had failed to prove his case on a balance of probabilities; despite the weight of the evidence failed to find in favour of the appellant;



- ii. The trial court ought to have assessed Liability at 100% against the respondents as they had all failed to enter appearance and file defence despite being served with the summons and pleadings;
 - iii. The trial court erred in failing to assess the general damages for pain, suffering and loss of amenities in favour of the appellant;
3. When this Appeal came up for hearing, the parties were directed to file and exchange written submissions; hereunder is a summary of the parties rival submissions.

Appellants Case

4. The appellant maintains that the respondents failed to enter appearance and file defence within the prescribed time and there was no rebuttal of the appellants claim; on that basis the trial court erred in failing to find the respondents 100% liable and instead took the position that the appellant had failed to prove its case against the respondents.
5. The 1st respondent did not controvert the appellants statement of the appellant that he caused the vehicle he was driving hit the motor cycle which the appellant was lawfully riding.
6. It was trite law and practice that the trial court to assess general damages in any event whether the claim succeeds or not; the appellant prayed that the appeal be allowed as it was merited; that the judgment of the trial court be set aside; and substituted with a judgment in favour of the appellant as had been prayed for in the Plaint.

3rd Respondent's Case

7. The appeal was opposed and the 3rd respondent submitted that the burden of proving the civil case lies with the appellant and he had to prove it on a balance of probabilities; the law requires that he who alleges must prove the facts and in the absence of sufficient documentary evidence or oral testimony to support the allegations then the claim must fail in its entirety.
8. The mere occurrence of the alleged accident involving the appellant was not proof of the 1st respondent's negligence; the trial court was correct in its assessment of liability bearing in mind the circumstances of the case and the appellant's testimony which fell short of the legally accepted standard of proof on a claim for negligence.
9. The appeal was devoid of any merit and that it be dismissed with costs to the 3rd respondent.

Issues for Determination

10. After having read the rival written submissions filed herein and having read the Record of Appeal this court has framed only one issue for determination; and the issue is as set out hereunder;
 - i. Whether the appellant proved his claim to the desired threshold;

Analysis

11. The Court of Appeal case of Farah Awad Gullet vs CMC Motors Group Limited [2018]eKLR sets out the parameters under which an appellate court can interfere with a decision of a trial court; it held that:

‘This is a first appeal. Our mandate is to re-appraise, re-assess and re-analyze the evidence on record before us and arrive at our own conclusions on the matter and give reasons either way. (See the case of Sumaria & Another vs Allied Industries Limited [2007] 2KLR). We are also reminded that we should be slow in moving to interfere with a finding of fact by a trial



court unless it was based on no evidence, or based on a misapprehension of the evidence or the judge had been shown demonstrably to have acted on a wrong principle in reaching the finding he/she did. (See also *Musera vs Mwechelesi & Anor* [2007]2KLR 159.’

Whether the appellant proved his claim to the desired threshold;

12. The question posed is whether the appellant proved his case to the required standard; the trial court had pointed out in its judgment that there was no material placed before it upon which liability on the part of the 1st respondent could be founded; yet the record reflects that the matter proceeded for hearing and the only evidence presented to court was that of the appellant; despite the 3rd defendant having filed a Statement of Defence on behalf of the 1st and 2nd respondent none of the respondents called any witness to testify and to substantiate the allegations made in the defence; this would then mean that the appellant’s evidence was uncontroverted.
13. In civil proceedings the threshold of proof is on a balance of probability; this court makes reference to the case of *Miller vs Minister of Pensions (1947) 2 ALL ER 37* where Lord Denning discussing that burden of proof had this to say;

‘That degree is well settled. It must carry a reasonable degree of probability, but not high as required in a criminal case. If evidence is such that the tribunal can say ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.’

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.’
14. At the hearing the appellant adopted his witness statement dated 19/01/2018 and his evidence was that on 3/06/2017 he was lawfully riding his motor cycle along Karatina Road when he was hit from behind by the respondents driver who was driving motor vehicle Toyota Prado registration number GKB 387D and as a result he sustained bodily injuries; he stated that the 1st respondent was to blame for the accident as he had failed to keep a safe distance; the appellant produced the Police Abstract dated 8/06/2017 which confirmed that there was an accident and it also contained the particulars of the appellant’s motor cycle and the respondents motor vehicle.
15. The outcome of the accident as indicated on the Police Abstract was that the matter was ‘pending under investigation’; this court concurs with the observation of the trial court that the Police Abstract only proved that an accident occurred but in no way proves liability.
16. To prove liability the appellant needed to adduce evidence on how the accident occurred and who was to blame on a balance of probability; the record reflects that the appellant did in fact testify and stated that he was hit from the behind due to the failure of the respondent of not keeping a safe distance; the onus then shifted to the respondents driver who then has to challenge and rebut this evidence by bringing evidence to the contrary demonstrating which side of the road he was on and the speed at which he was driving; failure by the respondent to challenge the evidence adduced by the appellant confirmed the fact that the appellant was indeed hit from the behind and the respondent’s driver was to blame.
17. The 3rd respondent had filed a Memorandum of Appearance and a Statement of Defence dated 3/07/2018 but the matter proceeded in the absence of the respondent’s which means that no defence witness was ever called to testify during the trial; which would then also mean that the appellants



evidence was and still remains unchallenged; as was held in the case *Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others NBI HCCC No. 1243 of 2001* Lessit J (as she then was) expressed herself as follows;

‘It is trite law 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.’

18. Similarly, in the case of *Janet Kaphiphe Ouma & Another vs Marie Stopes International (Kenya) Kisumu HCCC No.68 of 2007* the court held;

‘In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of its assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement of 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.’

19. Upon re-evaluating the evidence on record this court finds that the undisputed facts are that there was an accident which occurred on the 3/06/2017 involving the appellant’s motor cycle and the 2nd respondent’s motor vehicle which was being driven by the 1st respondent; and also finds that failure by the respondent to challenge the evidence of the appellant confirms the fact that the appellant was hit from behind and the respondents are to blame.

20. This court finds that the trial court misapprehended the evidence before it and by doing so it arrived at an erroneous decision; and is satisfied that the appellant discharged his burden of proof to the desired threshold and finds that there are good reasons that warrant interference of the trial court’s finding dismissing the appellant’s suit on the grounds that he had failed to prove his case to the desired threshold.

21. This ground of appeal is found to have merit and it is hereby allowed.

22. On liability: this court makes reference to the Police Abstract which indicates that the matter is ‘pending under investigation’; as no further evidence was adduced on this issue this court makes an apportionment on a ratio of 80%:20% with the respondents bearing the larger portion.

23. On Quantum: Even after finding that the defendants were not liable it is trite law that the trial court must proceed to make an award for general damages; in this instance the trial court is found to have erred in law as it failed to make an award for general damages after making its finding that the respondents were not liable.

24. This court is therefore tasked with making an award for damages based on the injuries set out in the Medical Report dated 11/10/2017; the appellant sustained the following injuries;

- i. Cut wound to right wrist
- ii. Bruises on dorsum of both hands
- iii. Friction injury to left parietal region of the head
- iv. Friction injury to right lateral chest wall
- v. Friction injuries and cuts on knees; and
- vi. Bruises over right lateral malleolus and left medial of the ankles.



25. The medical reports concludes by stating that the appellant suffered multiple soft tissue injuries and the scars are well healed and did not suffer from any disabilities; an award for general damages in the sum of Kshs.200,000/- is found to be adequate and special damages of Kshs.3000/- as proved.

Findings And Determination

26. For the forgoing reasons this court makes the following findings and determinations;
- i. The appeal is found to have merit and it is hereby allowed.
 - ii. The trial courts judgment delivered on 29/10/2019 is hereby set aside and substituted with a judgment in favour of the appellant; the respondents are found jointly and severally liable for the accident;
 - iii. Liability is apportioned at a ratio of 80:20 with the respondents bearing the larger portion;
 - iv. General damages for pain and suffering Kshs.200,000/-
 - v. Special Damages Kshs. 3000/-
 - vi. Costs of the suit and interest from the date judgment was delivered.
 - vii. The appellant shall also have costs of this appeal.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 13TH DAY OF JANUARY, 2022.

HON.A.MSHILA

JUDGE

