



REPUBLIC OF KENYA



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**Mutethya v Kitungu (Civil Appeal E002 of 2021)
[2022] KEHC 18072 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 18072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E002 OF 2021**

**RK LIMO, J
SEPTEMBER 28, 2022**

BETWEEN

NANCY MALUKI MUTETHYA APPELLANT

AND

PAUL NGULA KITUNGU RESPONDENT

*(An Appeal from the judgement of Hon. I. G. Ruhu Resident
Magistrate vide Mwingi PM's Court Civil Case No. 30 of 2018)*

JUDGMENT

1. This is an appeal those arose from the judgement of Hon I G Ruhu Resident Magistrate vide Mwingi PM's Court Civil Case No 30 of 2018. In that case the appellant had sued the Respondent owing to a Road Traffic accident that occurred on January 28, 2017 along an earth road in a place known as Nzeluni, Mbovu Area involving the Respondent's motor vehicle Registration No KCD 648L and motor cycle Registration No. KMDV 641S upon which the appellant was riding on as a pillion passenger.
2. At the trial the appellant's case was to the effect that the respondent's motor vehicle was driven carelessly and that owing to respondent's negligence he veered off his lane and collided with the above cited motor cycle injuring the rider who later succumbed to the injuries sustained and the appellant who sustained the following injuries namely: -
 - a. Closed fracture shaft of the right femur
 - b. Deep cut wound of the right knee
 - c. Swelling of the Right Lower Limb
 - d. Right thigh injuries



- e. Multiple bruises
- f. Pains
3. On the other hand, the respondent blamed the motor-cycle rider for negligence and carrying 2 pillion passengers including the appellant herein.
4. The record shows that at the trial, the appellant testified and closed her case but the respondent opted not to call any witness.
5. The trial court evaluated the evidence tendered by the appellant and in its judgement found that there was insufficient evidence to blame the respondent and dismissed the appellant's case. The trial court found that the investigations carried out by the respondent had absorbed the respondent of any blame in the accident. The trial court for good measure found that had the appellant proved her case on liability he would have awarded Kshs. 800,000 in general damages and Kshs 144,444 as special damages.
6. The appellant felt dissatisfied with the trial court's finding and filed this appeal raising the following grounds namely: -
 - i. That the trial court erred by dismissing the appellant's case.
 - ii. That the trial court failed to consider the evidence placed before him.
 - iii. That the trial court erred by relying on extraneous documents that were not produced during the trial.
 - iv. That the trial magistrate erred in law by failing to apply the required standard of proof in civil matters.
 - v. That the learned magistrate failed to consider relevant evidence and considered irrelevant and extraneous matters.
7. In her written submissions done through learned counsel M/s E K Mutua & Co Advocates, the appellant faults the trial court for relying on evidence not tendered during trial. She contends that her case against the respondent was uncontroverted because the respondent called no witness to controvert her evidence. She relies on the decision of *Linus Nganga Kiongo & 2 Others versus Town Council of Kikuyu* [2012] eKLR to buttress her contention.
8. She further contends that she discharged her burden of proof in her case to the required standard and faults the trial court for making contrary finding.
9. The Respondent has opposed this appeal vide written submission by his learned Counsel M/s Marire & Mogusu Advocate. He contends that the appellant under cross examination revealed that the boda boda she was riding on as a pillion passengers was carrying two pillion passengers inclusive of the appellant instead of one as per traffic regulations.
10. The respondent points out that the appellant was not wearing a helmet at the time and that the rider of the ill-fated motorcycle could not be confirmed whether he was licensed or not to ride the motor cycle on a public road.
11. He contends that the appellant was unable to prove her case when she had the burden of proof as stipulated under Section 107 of the *Evidence Act*.
12. He points out that the Police Abstract tendered showed that the investigations regarding the accident was pending under investigations and blames the appellant for not calling the investigating officer to



shed light on liability. He relies on the decision of Kennedy Nyangoya versus Bash Hauliers to buttress his contention. He further relies on the following decisions: -

- i. *Sally Kibii & Anor. versus Francis Oraro* [2012] eKLR
- ii. *Quest Resources Ltd. versus Japan Port Consultants Ltd.* [2015] eKLR.

13. This court has considered this appeal and the grounds raised. I have also considered the response made and the authorities cited. The issues for determination in this appeal are 2 namely;

- i. Whether the appellant's case against the respondent was proved to the required standard in law.
- ii. If so, whether the decision on quantum was justified.

Whether the appellants case was proved to the required standard

14. It is true that the law (Section 107 of *Evidence Act*) places the burden of proof to whoever alleges. The appellant pleaded that the respondent was negligent in the manner he managed his motor vehicle Registration No KCD 648L and particularized the items of negligence attributed to him. The law placed the burden on her to prove any or all the particulars of negligence.

15. I have looked at her evidence at the lower court. Her evidence was brief. She testified that she was adopting her witness statement dated April 26, 2018 as her evidence in Chief. In that statement she blamed the respondent for swerving his motor vehicle into the side of the boda boda she was riding on as a pillion passenger. She stated that the boda was heading to Mwingi while the respondents motor vehicle was headed the opposite direction from Mwingi.

16. When pressed under cross-examination by respondent's Counsel, she conceded that the bodaboda was carrying 2 pillion passengers including her and that she had no protective helmet at the time. She also tendered supporting documents (P Ex 1 to P Ex 7) to support her claim.

17. The record from the trial court indicates that the respondent did not call any witness because when the appellant closed her case, the respondent possibly through Counsel (say so because the record is not very clear) stated that "we do not intend to call any witness."

18. He further indicated that the defendant was relying on "the list of documents dated 5th June, 2018 and closed his case. The list of documents referred are listed as: -

- i. Investigation report from Gaskin Insurance Investigators & Assessors dated 29th June. 2017.
- ii. Copy of defendant's driving license.
- iii. Motor vehicle inspection Report.
- iv. Copy of Police Abstract.
- v. Dr P M Wambugu Medical Report
- vi. Statement of Paul Ngula Kitungu (Respondent herein).

19. The appellant in this appeal has raised a valid and legitimate point which is the undeniable fact that the trial court heavily relied on the above list of documents when the same were not properly tendered and subjected to interrogation by way of cross-examination. A perusal of the judgement by the trial court supports that point of fact and law.

20. It is trite that unless a witness is called to court to adopt the filed statement and subjected to cross examination by the adverse party, the filed statement has little no probative value. The Respondent's



statement dated 15.06.2017 was filed together with other documents including the “investigation” report from Gaskins Insurance Investigators but the respondent never turned up at the trial as a witness or called any witness to tender the documents. The trial court also did not formally mark the documents as defence exhibits and it was erroneous for the trial court to go ahead and place reliance on them in its when they said documents had no or little probative value in law.

21. The makers or authors of those documents were required to come or alternatively the documents needed to have been produced by consent meaning that the contents in the documents were uncontested. That way the trial court could have rightfully relied on them to determine the case. But in the absence of the authors of the documents or the respondent himself coming to court to adopt his statement and open himself up for cross examination or interrogations on the veracity on the contents of his statement the trial court erred by placing premium or probative value on the evidence where none existed.
22. This court had noted from the record of proceedings that the respondent opted not to call any witness to rebut the plaintiff’s allegations. It is true that it is always the plaintiff who has the burden of prove which burden must be discharged on a balance of probabilities which is the standard of proof applicable in civil matters.
23. I have re-evaluated the evidence tendered which is a duty of 1st appellate court and I have noted that there is only one issue which the appellant could not explain satisfactorily when pressed under cross examination by the respondent and that is the fact that she was being carried together with another pillion passenger. In my view, a person who knowingly breaks the law by allowing himself or herself to be carried as an extra passenger assumes some voluntary risk and should an accident arise, then she/he must be ready to shoulder part of the blame because the extent of liability even if attribute to a third party is increased. I do find that the appellant for that reason should shoulder 40% liability.
24. I am not persuaded that the fact that the appellant had no helmet caused or aggravated the injuries suffered. The appellant suffered a fracture of right femure and soft tissue injuries to the limb. A helmet could not have prevented her from suffering those sort of injuries. If, however she had suffered head injuries, the finding of this court certainly would have been different.
25. On quantum, though the parties in this appeal have not addressed it, this court finds that the award of Kshs. 800,000 in view of the injuries suffered was a bit high. In my considered view, an award in the region of Kshs. 500,000 is fair. I am satisfied that special damages were pleaded specifically and proved. The appellant is entitled to Kshs. 144,444 in special damages.
26. In summary, for the reasons aforesaid, this appeal is allowed. The judgement of the lower court delivered on 17th December, 2020 is set aside. In its place judgement is entered against the Respondent at the ratio of 60:40 in favour of the appellant.

The appellant is awarded as follows: -

- a. General damages Kshs 500,000
- b. Special damages Kshs 144,444
Sub-total Kshs. 644,444
Less 40% liability Kshs. 257,778
Total Kshs 386,666



She will have 60% costs of this appeal and 60% costs in the lower court. In addition, she will have interest of the sum awarded at court rates from the date of judgement in the lower court but from date of filing suit in respect to special damages.

DATED, SIGNED AND DELIVERED AT KITUI THIS 28TH DAY OF SEPTEMBER, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

