



**Kimani v Kabao & another (Civil Appeal E021 of 2020)
[2022] KEHC 14301 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E021 OF 2020
DAS MAJANJA, J
OCTOBER 27, 2022**

BETWEEN

CATHERINE GAKENYE KIMANI APPELLANT

AND

JACOB KANYI KABAO 1ST RESPONDENT

JOSEPH KAMAU KABAO 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. T. B. Nyangena, SPM dated 25th May 2020 at the Kiambu Magistrates Court in Civil Case No. 618 of 2018)

JUDGMENT

1. This is an appeal against the judgment and decree of the Subordinate Court apportioning liability in the ratio at 70:30 against the Appellant as a result of an accident that took place on 20th October 2017 involving the Appellant and the 1st Respondent (“the Respondent”) as the driver and owner of motor vehicle registration number KAX 055E.
2. In the Amended Memorandum of Appeal dated 16th April 2022, the Appellant assails the judgment on the basis that the trial magistrate erred in attributing contributory negligence to her. She complains that the trial magistrate erred in finding contributory negligence without any evidence to support the finding and that the trial magistrate erred in failing to infer that the Respondent was entirely liable for the accident. The Respondent opposes the appeal and urges the court to dismiss it.
3. Both sides filed written submissions in support of their respective positions. The issue for resolution in this appeal is whether the trial court erred in apportioning contributory negligence. This is a question of fact that falls squarely within the jurisdiction of this court as a first appellate court which is enjoined to reconsider the facts on record, reach its own independent conclusion bearing in mind that it never saw or heard the witnesses in order to make a judgment on their demeanour (see *Selle v Associates Motor*



Boat & Co. [1968] EA 123. In order to complete this task, it is necessary to set out the evidence that emerged before the trial court.

4. According to the Plaintiff, the Appellant alleged the Respondent drove the motor vehicle without due care and attention and while attempting to overtake other motor vehicles veered off the road and knocked her causing her to suffer severe injuries. Paul Njariba Muia (PW 1) recalled that on the material day, he was standing opposite Oil Libya Petrol Station in Kiambu when he heard a woman screaming. He saw a crowd gathering and when he rushed there he assisted her and took her to hospital. In cross-examination, PW 1 admitted that he did not see how the accident occurred. The Appellant (PW 2) told the court that she was from Ndumberi heading to Kiambu market when she alighted and started walking on the pedestrian path off the main road, the Respondent's vehicle came from the opposite side, veered off the road and knocked her causing her to fall and fracture her right leg. The vehicle then sped off.
5. The Respondent (DW 1) testified that on the material day at about 5.00am, he was driving to pick up his brother. At around Oil Libya Petrol Station there were many vehicles on the road so he slowed down, overtook them and drove on. He stated that he only heard a loud bang. When he slowed down and saw a crowd rushing towards him, he drove off. He denied that he hit a human being and that he was not speeding as he was driving at about 40kph. When cross-examined, DW 1 recalled that he did not see what or who he hit but only heard the impact. DW 1 also produced an Inspection Report stating that the impact on the vehicle was the result of impact with a motor cycle and could not have been caused by a human being.
6. After considering the evidence and submissions, the trial magistrate concluded as follows on the issue of liability:

In analysing this it is clear that it was dark and the driver was rushing to pick the brother for a journey he hit the woman and threw her off the road. In my view, the woman must have been walking on the roadside but not completely off the road but had she been on the road, then the motor vehicle would not have thrown her into the ditch but crushed her head on. The driver was reckless, for he never saw her, he never hooted, he never swerved and he does not even know what he hit but knows he hit something.

Doing the best I can I apportion liability at 70:30 in favour of the plaintiff against the defendant.

7. I have considered the submissions by the parties. There is no dispute that an accident took place on the material day between the Appellant and Respondent. At any rate, the Respondents have not cross-appealed against the judgment despite their contention that the impact on their motor vehicle could have been caused by impact of a motor cycle and not a human being. That being the position, this leaves the question under what circumstances did the accident take place.
8. The Appellant's case is that she was hit while walking on the pedestrian path. PW 1, who was an independent witness admitted that in cross-examination that, "I did not see how the accident occurred." He was however clear that the driver of the motor vehicle never stopped but only slowed down on the foot path before driving off. DW 1 accepted that he only heard a bang but drove off because he feared for his life.
9. Based on the evidence available, I do not accept the finding that the Appellant should shoulder 70% liability. In any case, the trial magistrate never explained why the Appellant shoulder substantial liability. I accept the Appellant's testimony that she was walking on the pedestrian walkway when she was hit. In cross-examination, DW 1 told the court that he was driving slowly as many motor vehicles



were obstructing his lane whereupon he overtook and moved on. It is likely that when he overtook or tried to avoid the other motor vehicles on the road at Oil Libya Petrol Station, he knocked the Appellant. Since he feared for his life he drove off.

10. From my independent analysis of the totality of the evidence on record, I hold that the Respondent failed keep a careful look out for pedestrians or other road users in the circumstance and he was therefore liable for the accident. On the other hand, I do not see how the Appellant, a pedestrian could have avoided the accident yet she was walking on the foot path. I therefore find the Respondent 100% liable for the accident.
11. I therefore allow the appeal, set aside the judgment of the trial court on liability and substitute it with a judgment on full liability against the Respondents. The Respondent shall pay costs of this appeal assessed at Kshs. 40,000.00 only.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER 2022.

M. KASANGO

JUDGE

instructed by Njoroge Baiya and Company Advocates for the Appellant.

instructed by Mugo Githinji and Company Advocates for the Respondents.

