



REPUBLIC OF KENYA



KENYA LAW
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**Mutie v Munyili (Civil Appeal 07 of 2020)
[2022] KEHC 15669 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15669 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 07 OF 2020
GMA DULU, J
NOVEMBER 23, 2022**

BETWEEN

MIKE MUTUKU MUTIE APPELLANT

AND

JEREMIAH MBANDI MUNYILI RESPONDENT

(Being an Appeal from the judgment of Hon. M.K. Mutegi (SRM) in Tawa Senior Resident Magistrate's Court Civil Case No.14 of 2018, delivered on 29th January, 2020)

JUDGMENT

1. In a judgment delivered on January 29, 2020, the trial magistrate dismissed the plaintiff's (appellant's) case and concluded as follows -

' In the end, I find that the plaintiff has failed to prove negligence on the part of the driver of motor vehicle Reg No K XXXX and as such has failed to prove his case on the balance of probabilities against the defendant and I dismiss the case in its entirety with costs to the defendant.'

2. Dissatisfied with the decision of the trial court, the appellant who was the plaintiff, has come to this court on appeal on the following grounds –
 1. That the learned magistrate erred in law and in fact in dismissing the suit when there was sufficient and overwhelming evidence on record to the contrary thereby arriving at an erroneous conclusion.
 2. That the learned magistrate erred in law and fact in holding that the plaintiff had not proved his case yet the defendant admitted occurrence of the subject accident thereby arriving at an erroneous conclusion.



3. The learned trial magistrate erred in law and fact in applying the wrong principles of law thus arriving at an erroneous conclusion.
3. The appeal, which was filed through counsel M/s Tombe & Company, was canvassed through filing of written submissions. In this regard, I have considered the submissions filed by Tombe & Company advocates for the appellant and the submissions filed by AM Mbindyo & Company for the respondent.
4. This being a first appeal, I am required to examine the evidence on record afresh and come to my own independent conclusions – see *Selle –vs- Associated Motor Boat Co Ltd (1968) EA 123*.
5. This being an appeal against the trial court’s finding that the appellant did not prove negligence, I have to bear in mind the provisions of section 107 of the *Evidence Act* (Cap 80), that he who alleges has the burden to prove the allegation. This being a civil case, the standard of proof is on the balance of probabilities, which standard was explained in the old English case of *Miller –vs- Minister of Pension (1947) ALL ER 373* that –

‘ If the evidence is such that the tribunal can say; we think it more probable than not, then the burden is discharged, but if the probabilities are equal, it is not’.
6. In the present case, the appellant called 2 witnesses. Pw1 was himself and stated that he was a passenger or a loader seated at the back of the motor vehicle, when the accident occurred and he was injured. Though he did not have evidence to show that the driver was negligent, because the accident occurred he blamed the driver for negligence as well as injuries suffered. He said that he was medically examined at Machakos and had never gone to Nakuru.
7. Pw2 was Dr O Omuyoma from Nakuru who stated that he examined the appellant in December 2017 on the basis of a discharge summary from Mbooni Sub-County hospital. In cross – examination he said he examined the appellant on December 1, 2018. According to him the patient suffered soft tissue injuries on the left leg.
8. The respondent, who was the defendant did not bring any witness to court, but parties’ counsel agreed to file written submissions which they did. In their submissions counsel for the appellant asked for general damages of Kshs 250,000/= and special damages of 50,000/=.
9. Counsel for the respondent denied liability on the ground that negligence had not been proved, and did not suggest a figure for general damages, but stated that the appellant had stated that he had never been to Nakuru where the medical report was allegedly prepared.
10. Having considered the evidence on record, I am of the view that negligence of the respondent’s driver was proved by the appellant on the balance of probabilities, because the appellant alleged so in the plaint, and came and testified in court on the same.
11. The respondent having chosen not to bring any witness to testify and explain how the accident occurred cannot say through submissions that negligence was not proved. Taking into account the evidence of the police on the accident tendered in a related case Appeal No 6 of 2020 wherein one of the workers in the same vehicle died, that the vehicle was stationary when the accident occurred, I hold like in that related case that the respondent was vicariously negligent to the extent of 60% for his driver parking the vehicle in a dangerous manner, and find the appellant 40% negligent for choosing to load logs of timber into a vehicle that was dangerously parked.
12. With regard to injuries suffered by the appellant, in my view the appellant only proved injuries recorded in the treatment notes at Mbooni hospital. These were described in the treatment notes. There was



no visible bruise or injury recorded in the outpatient card. He said he did not go to Nakuru- so the evidence of Dr O Omuyoma from Nakuru does not help him.

13. In my view, therefore, the appellant did not suffer any physical injuries though he might have suffered anxiety, which is also a presupposition, as there is no evidence tendered by him to that effect.
14. Thus, though I find that negligence was proved against the respondent, to the tune of 60% I find that the appellant did not prove on the balance of probabilities that he suffered injuries, thus he cannot be awarded damages.
15. I thus vary the trial magistrate's judgment and make the following orders –
 1. That the appellant proved that the respondent was 60% liable in negligence.
 2. That the appellant did not prove on the balance of probabilities that he suffered injuries.
 3. That the court will thus not award the appellant any damages.
4. That the parties will bear their respective costs of appeal as well as the respective costs of the trial court.

DELIVERED, SIGNED & DATED THIS 23RD DAY OF NOVEMBER, 2022, VIRTUALLY AT MAKUENI.

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GEORGE DULU

JUDGE

