



**Mwangangi v Gathogo (Civil Appeal E267 of 2020)  
[2025] KEHC 2764 (KLR) (Civ) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2764 (KLR)

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

**CIVIL**

**CIVIL APPEAL E267 OF 2020**

**TW OUYA, J**

**MARCH 13, 2025**

**BETWEEN**

**BENARD SILA MWANGANGI ..... APPELLANT**

**AND**

**SOLOMON GATHOGO ..... RESPONDENT**

*(Appeal from the judgement and decree of Hon. Gitonga (RM) in CMCC  
No. 7137 Of 2018 at Nairobi delivered on 28th day of November 2019)*

**JUDGMENT**

**Background**

1. This is an Appeal against the judgement and decree of Hon. Gitonga (RM) in CMCC No. 7137 Of 2018 at Nairobi delivered on 28<sup>th</sup> day of November 2019. The suit was initiated by Benard Sila Mwangangi (the appellant herein) against Solomon Gathogo (the respondent herein) arising out of a road traffic accident on 3<sup>rd</sup> April 2018 at Valley Road Nairobi between the plaintiff pedestrian and motor vehicle KAK 895Q driven and owned by the appellant.
2. The matter went for full trial and the trial court dismissed the suit against the respondent on the basis that the appellant had failed to prove beyond a balance of probability that the respondent was responsible for the accident. The appellant being aggrieved and dissatisfied with the judgement appeals on the following grounds;
  - i. That the learned magistrate misdirected herself on the evidence and the applicable law.
  - ii. That the learned magistrate made inference of fact and arrived at wrong conclusions therein not manifest from pertinent facts in evidence.



- iii. That the learned magistrate erred in law and fact by finding that the appellant had failed to prove liability against the Respondent by failing to produce photographs, sketch plans or investigation report while it was evident that an accident had not occurred.
  - iv. That the learned magistrate erred in law and in fact by dismissing the appellant suit and in doing so, deciding that the appellant did not prove his case on a balance of probability as required in civil matters whilst the Appellant produced all the relevant documents and proved his case.
  - v. That the learned magistrate the learned magistrate erred in law and fact in dismissing the appellant's claim without addressing the evidence adduced by the appellant and in view of the fact that the Respondent did not offer any evidence.
  - vi. That the learned magistrate erred in fact and law in failing to consider all the evidence, pleadings, the facts and law before her.
  - vii. That the learned magistrate erred in law in assessment of damages payable and ended up awarding manifestly low damages.
3. The Appellant prays for Orders that: -
- i. This appeal be allowed.
  - ii. This judgement and decree of the lower court be set aside.
  - iii. The costs of this appeal and of the trial court be awarded to the appellant

### **Submissions**

4. This matter was canvassed by way of written submissions by counsel for both parties. Counsel for the Appellant has raised several issues in his submissions: That the respondent accepted liability by allowing documents to be produced by consent. In this regard, the appellant produced police abstract, P3 form, medical treatment form and the first medical report. That the trial magistrate misdirected herself by alluding to non-production of documents which are ordinarily in the possession of traffic police. Such documents pointed out by the court as not having been produced are photographs and sketch maps which according to the appellant, would only be necessary in a criminal trial to prove the case beyond reasonable doubt. That on the contrary, the standard of proof required in civil cases is on a balance of probability and not beyond reasonable doubt. Lastly the appellant argues that the evidence adduced by the appellant was not controverted by the respondent. The appellant.
5. The Respondent on the other hand agrees with the finding of the trial court contends that the appellant failed to prove liability against the respondent beyond a balance of probability. He points out that that the copy of police abstract filed in court indicated that the matter was still pending under investigation the results of which are unknown. It did not show that the respondent was blamed for the accident or that he was charged in court.in effect, the appellant failed adduce evidence to prove that the respondent was liable. He therefore submits that the impugned judgement was arrived at after careful consideration of facts and guided by the law.

### **Analysis**

6. This court has considered the memorandum of appeal, affidavit and annexures by both parties together with the submissions by counsel for both parties. The court notes that the substratum of this appeal is premised on the issue of the threshold of evidence. The Court of Appeal for East Africa set



out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 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 circumstances or probabilities, or if the impression of the demeanor 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.”

7. The court will therefore consider the evidence to establish whether the threshold in civil cases on a balance of probability was achieved. The appellant relied on police abstract form which indicated that the matter was pending under investigation, p3 form and medical reports which indicated that the appellant had suffered injuries to the head and neck and on the upper limbs which had healed, a copy of motor vehicle records showing the respondent as the owner as at the time of the accident. In his testimony, the appellant stated:

“I am the plaintiff. I recorded a written statement dated 7/8/2018. I wish to adopt it. I was injured on my head and left arm. I have not yet healed. My head still hurts and my hand cannot lift anything. I have documentary evidence. List of documents dated 7/8/2018 produced as P exhibit 1-6. My prayers are as per the plaint.

Cross Examination

Accident occurred on 6.00 a.m. I was hit on the left at at the side of the road. I was treated at Kenyatta National Hospital. Witness referred to his medical report. When I went to see the doctor, I was in pain. Its not true what the doctor said that I did not have any pain. His report is inaccurate.

Reexamination

I ask the court to rely on the medical report. That’s all. Close of plaintiff’s case.”

8. The totality of the evidence falls short of proving liability on the part of the respondent. The appellant’s argument that the respondent did not oppose the production of documents cannot stand because it does not in any way impute that the respondent admitted liability. The standard of proof in civil liability claims was discussed by the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not....



This position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280* where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

9. I find that the trial court in its judgement analyzed the evidence in totality and arrived at the conclusion that the appellant herein failed to prove liability against the respondent on a balance of probability hence the case was dismissed. I am satisfied that the trial court took into account all the relevant factors and applied the right principles to the issues at hand to arrive at a fair determination. I therefore find no reason to tamper with the trial court findings.

### **Determination**

10. This appeal is hereby dismissed. The judgement by Hon. Gitonga (RM) in CMCC No. 7137 Of 2018 at Nairobi delivered on 28<sup>th</sup> day of November 2019 is hereby upheld.

Costs of the appeal to the respondent

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF MARCH, 2025.**

ROA 14 days.

**HON. T. W. OUYA**

**JUDGE**

For Appellant.....Kemunto

For Respondent...Ms. Rono

Court Assistant.....Jackline

