Gitau v Mundia (Civil Appeal E137 of 2022)
[2025] KEHC 5887 (KLR) (Civ) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5887 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E137 OF 2022

REA OUGO, J

APRIL 24, 2025

BETWEEN

JANE WANJIRU GITAU ..... APPELLANT

AND

EPHRAIM MUTHEE MUNDIA ..... RESPONDENT

(Being an appeal from the Judgment of the Honourable D.M. Kivuti (PM) delivered on 11/02/2022 at Milimani in CMCC No. 495 of 2018)

JUDGMENT

1. The respondent sued the appellant before the lower court after spending Kshs 247,735/- on motor vehicle repair costs, fees of Kshs 60,000/- and investigation fees of Kshs 21,400/-. According to the respondent, the genesis of the dispute was on1/2/2015, where the respondent claimed to be driving along Limuru Road. The appellant, owner of vehicle registration number KBV 673P, which the respondent claimed to have been driven negligently, thereby causing extensive damage to its vehicle KBV 2X4Y.

2. The appellant denied causing the accident. She averred that if an accident occurred, then the same was substantially caused by the negligence on the part of the respondent.

3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The evidence before the subordinate court was as follows:

4. Francis Mwangi Wambui (Pw1) testified that he is a motor vehicle assessor and works at Kenya Alliance Insurance. He was instructed to assess motor vehicle KBV 2X4Y at Quality Motors Garage.

The assessment report indicates Kshs 332,220/- but because of underinsurance and the element of contribution, the figure was Kshs 247,735/-. On cross-examination, he testified that there were no reasons for valuation. There was no valuation report of the insured vehicle. The sum insured was Kshs 700,000/- and the value of the vehicle was Kshs 1,020,200/-.

5. Ambrose Kamau (Pw2) testified they seek to be compensated, and that the claim is one under subrogation. George Okello (Pw3) of Parklands Police Station produced the police abstract.

6. The appellant testified as DW1. She testified that on the material day, she was travelling in KBV 6X3P along Ruaka-Ruiru Bypass from the direction of Ruaka headed to Ruiru. The road was straight, and the visibility was clear. As they approached Githoro, they noted a stationary canter 200 metres to their right, towards the general direction of Ruaka. She explained that half of the canter's body was on the road while the other half was off the road. As a result, it caused traffic. The respondent's vehicle was overlapping on the right-hand side towards the general direction of Ruaka to avoid traffic. As the respondent's vehicle approached the stationary canter, he rejoined the road abruptly at a very high speed without indication or warning. The vehicle missed a motorcycle that was overtaking the appellant by a whisker, making the motorcycle swerve to the left. Dw1 testified that their vehicle swerved to the right, hooted, and braked to avoid the accident. The respondent's vehicle sought to rejoin its lawful lane, but the distance between it and the appellant's vehicle was so small that the vehicles had a head-on collision. The respondent's vehicle upon impact swerved to the left and its left side rammed to the stationary canter.

7. Dw1 blamed the respondent's driver for driving the said vehicle at an excessive speed and negligently failing to keep to its lane.

8. After the hearing, the subordinate court found the appellant 100% liable and awarded the respondent the damages sought. The appellant has challenged this decision on the following grounds:

    1. The learned Principal Magistrate erred on law and fact in holding the appellant 100% liable when there was evidence tendered by the defence witness on the respondent's negligence.

    2. The learned Principal Magistrate erred and misdirected herself in not considering the evidence of the appellant's witness who testified at length on the respondent's substantial negligence that the respondent's motor vehicle registration number KBV 2X4Y was overlapping and rejoined the road abruptly at a very high speed and without indicating or warning causing the accident.

    3. The learned Principal Magistrate erred and misdirected herself in failing to consider and give due attention to the appellant's evidence and submissions.

    4. The learned Principal Magistrate erred and misdirected herself in failing to consider that none of the respondent's witnesses witnessed the accident or attended the scene of the accident and the plaintiff did not plead the doctrine of res ipsa loquitor.

    5. The learned Principal Magistrate erred and misdirected herself in dismissing the evidence of the appellant and finding the appellant was wholly to blame, contrary to the evidence adduced.

    6. The learned Principal Magistrate erred and misdirected herself in law in awarding special damages that were not strictly proved.

    7. The learned Principal Magistrate erred and misdirected herself in law in awarding Kshs 60,000/- for loss of user contrary to the evidence adduced.

8. The learned Principal Magistrate erred and misdirected herself in failing to consider that the satisfaction note was not signed by the respondent. There was no evidence on record that the plaintiff was indeed compensated for the accident, and as such, the principle of subrogation could not be invoked.

9. The learned Principal Magistrate erred and misdirected herself in finding that the Respondents were entitled to the damages so awarded.

9. In her submissions, the appellant argued that the court did not consider the appellant's evidence and that there was no basis for her decision. Her decision was arbitrary and capricious. It was submitted that the police officer did not produce the police file with the investigation report. Pw3 did not lay a basis for why the police blamed motor vehicle registration number KBV 673P for the accident. Failure by the respondent to present evidence on negligence on the part of the appellant was fatal to the respondent's case. Dw1 was the only eyewitness, and her evidence remained unchallenged. She relied on the case of Alfred Kioko Muteti v Timothy Miheso & Another [2015] eKLR.

10. It was further submitted that the respondent was not called as a witness at the subordinate court and there was no evidence to confirm that the suit was filed with his knowledge and consent. This being a claim under the doctrine of subrogation, the same cannot be filed without the respondent's knowledge. In Oriental Commercial Bank Ltd v Shshikant Chandubhai Patel Civil Appeal No 221 of 2006, the court held that the procedure was introduced in the year 2000 by Legal Notice 36/00 in order to address the mischief prevalent at the time of suits being filed without instructions. In Republic v Public Procurement Administrative Review Board Exparte Giant Forex Bureau De' Change Limited & 2 Other [2017] eKLR, the court held that the rights under a subrogation claim can only be enforced by the insured personally.

11. On quantum, it was submitted that although the respondent claimed Kshs 60,000/- for loss of use, on cross-examination, it emerged that he hired a car for 10 days, paying 3,000/- per day. Therefore, he utilised Kshs 30,000/-.

12. The respondent conceded that he relied on the testimonies of 3 witnesses: the police officer, the motor assessor and a legal representative. Pw3 testified that the appellant caused the accident and produced the police abstract. He cited the case of Jotham Mugalo v Telkom (K) Limited Kisumu HCCC No 166 of 2001, where the court observed that a person disputing the contents of a police abstract must produce the counter-evidence as the standard of proof only requires a balance of probabilities.

13. The respondent noted that the appellant disputes that the respondent, either by himself or by an eyewitness, failed to testify in this case. However, a respondent can prove his case by the evidence of someone else, he does not have to be present at the hearing of the suit (see Court of Appeal in Mombasa *CA 57 of 1996*; Julianne Ulrike Stamm v Tiwi Beach Hotel Ltd [1998] eKLR). According to Order 18 (2) (1) of the Civil Procedure Rules, 2010 it is not mandatory for a plaintiff to testify. The evidence of the police officer was sufficient to place blame on the Appellant.

14. The respondent submits that according to the testimony of Pw2, the respondent's insurance company fully indemnified the respondent. The Insurance Company automatically obtained the right to step into the shoes of the respondent to sue and obtain damages that would otherwise be due to the respondent. In Nairobi HCCC No 1453 of 2005, Thomas Muoka Muthoka & Another v Ernest Jacob Kisaka, the court held as follows:

> " The insurance company is not made a party to the claim in the suit. It is normal practice for the insurance company to engage advocates to represent the insured. A subrogation claim

within a trial would arise in cases of material loss claim whereby the insurance company seeks to have a refund from a defendant for damages caused to their insured/plaintiff's material loss. A claim of subrogation does not mention the insurance company as a party."

15. On damages, the respondent referred the court to the invoice dated 9/3/2015 (page 44 of the Record of Appeal) which indicates that M/s Maxine Tours and Travels leased a courtesy car to the respondent as authorised by the insurer for 20 days at the rate of Kshs 3,000/- per day.

Analysis And Determination.

16. I have considered the appeal, the rival submissions and the main issue raised in the appeal is whether the respondent proved its case on a balance of probabilities. In *Richard v Njeru (Civil Appeal 181 of 2021)* [2022] KEHC 17083 (KLR) (14 October 2022) (Judgment) the court stated:

> The principle of subrogation applies where there is a contract of insurance. It takes effect when the insurer settles the insured's claim, whereby it sets out to diminish the loss suffered by its insured by seeking compensation from the party who caused the loss. The insurer is put in the position of the insured and is entitled to claim compensation from the 3rd party tortfeasor and, the compensation is not more than what has been paid to the insured. The doctrine of subrogation was defined by the Court in the case of Egypt Air Corporation v Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69 as hereunder-
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> "The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment under that contract; the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity, then there is no juristic scope for the operation of the principle of subrogation."

17. The respondent was required to establish through evidence that the appellant was the tortfeasor. In this case, the respondent did not have a direct witness but relied on the police abstract that blamed the appellant for the accident. In Kennedy Nyangoya v Bash Hauliers [2016] eKLR the Court held:

> " In this matter, a police abstract was produced by PW1 to show that DW1 was to blame for the accident. DW1 was however not charged with a traffic offence. PW1 in his evidence informed the court that he was not the Investigating Officer. In my considered view, his evidence did not assist in any way to build the plaintiff's case. PW1 did not visit the scene of the accident or take any sketch plan or map of the area where the accident happened for production in court. Even if the police abstract indicated that DW1 was to blame for the accident, the said abstract was not conclusive proof of liability in the absence of evidence being called to support it. Another shortcoming in the appellant's case was the unexplained failure to call the Driver who was driving the matatu at the time of the accident."

18. The court further explained in Bwire v Wayo & Sailoki [2022] KEHC 7 (KLR) that:

> " 30. "Direct Evidence" is evidence that establishes a particular fact without the need to make an inference in order to connect the evidence to the fact. It supports the truth of an assertion (in criminal law, an assertion of guilt or of innocence) directly, i.e., without the need for an intervening inference. It directly proves or disproves the fact. So Direct Evidence is real, tangible, or clear evidence of a

fact, happening, or thing that requires no thinking or consideration to prove its existence. It does not require any type of reasoning or inference to arrive at the conclusion.

31. The evidence tendered by the Respondent in the lower court is not direct evidence. It has no probative value and in absence of further evidence connecting it with what happened at the scene, the court could not properly draw an inference or make a reasonable conclusion as to how the accident occurred. This being the quality of the evidence tendered, there was no basis at all upon which the Magistrate court reasonably make a finding that liability had been established on 100% basis as against the appellant. In fact, the Magistrate other than saying the appellant never adduced evidence, he never explained whether the evidence before him discharged the evidential burden of prove. Had the trial Magistrate appreciated that the initial evidential burden rests upon the Plaintiff, and had he carefully applied his mind to the law, he would have held that there was nothing for the appellant to rebut since the Respondent had not discharged the legal burden of prove."

19. The respondent did not adduce direct evidence regarding how the accident occurred. The police abstract was not conclusive proof of liability in the absence of evidence being called to support it. Pw3 was from Parklands Police Station and was not at the scene at the time of the accident. The only direct evidence was that of Dw1 who witnessed the accident. She testified that the respondent's driver was to blame for the accident as he drove at an excessive speed and negligently failed to keep to its lane. The finding by the trial magistrate that the appellant was 100% to blame therefore had no basis.

20. There was no basis for the trial magistrate to make an award of damages. Be as it may, the respondent sought investigation fees of Kshs 21,400/- however, it failed to provide a receipt that the said sum had been paid to Windscope Loss Assessors Ltd. The respondent merely produced a proforma fee note, which in itself does not constitute proof of payment. The respondent in the plaint sought Kshs 60,000/- used for towing fees however, according to his evidence the amount was for loss of user. The evidence and his pleadings were therefore contradictory. The repair costs were Kshs 247,735/-. Therefore, if this court were to award damages, it would have awarded Kshs 247,735/-.

21. In the foregoing circumstances, I am satisfied that this appeal has merit and hereby set aside the judgment of the subordinate court. The appellant shall have the costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE AT BUNGOMA THIS 24TH DAY OF APRIL 2025

R.E. OUGO

JUDGE