



REPUBLIC OF KENYA



KENYA LAW
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**Mogaka v Thurania (Civil Appeal 18 of 2021)
[2025] KEHC 10816 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10816 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL APPEAL 18 OF 2021
AK NDUNG'U, J
JULY 23, 2025**

BETWEEN

JUDY NYABOKE MOGAKA APPELLANT

AND

SIMON THURANIRA RESPONDENT

*(Appeal from the judgment passed on 25/11/2021 in
Nanyuki CM Civil Case No. 15 of 2015-V. Masivo (RM))*

JUDGMENT

1. By a plaint dated 10/02/2015 the Appellant sued the Respondent seeking general and special damages. It was averred that the Appellant was lawfully walking as a pedestrian along Nanyuki-Meru Road when the Respondent negligently drove, managed and/or controlled the motor vehicle registration number KBA xxx, left the road and knocked her down as a result of which she sustained serious injuries. She listed the particular of negligence and particulars of injuries that she sustained.
2. The Respondent filed a defence dated 03/03/2016 whereby he admitted the occurrence of the accident but denied that the Appellant was the one who was hit or knocked and that if indeed she got injured by his vehicle, he averred that she was wholly and/or substantially contributed to the occurrence of the subject accident.
3. The matter proceeded for hearing with each party testifying and the trial court apportioned liability on the Appellant and the Respondent in the ratio of 50:50.
4. Being aggrieved by the trial court judgement, the Appellant appealed to this court vide a memorandum of appeal dated 15/12/2021 raising the following grounds of appeal;
 - i. The learned magistrate erred by failing to appreciate the evidence tendered with regard to liability of the Respondent.



- ii. The learned magistrate erred by disregarding the evidence by the Appellant and the evidence on record on the issue of negligence against the Respondent.
 - iii. The learned magistrate erred by failing to appreciate that the plaintiff had proved his case on a balance of probabilities which was uncontroverted by the Defendant.
5. The appeal was canvassed by way of written submissions. The Appellant’s counsel submitted that there was no evidence tendered by the Respondent to substantiate his claim on Plaintiff’s negligence hence his defence remained uncorroborated and reliance was placed on the case of *Netah Njoki Kamau & another v Eliud Mburu Mwaniki* (2021) eKLR and *North End Trading Company Ltd (Carrying on the Business under the registered name of) Kenya Refuse Handlers Ltd v City Council of Nairobi* (2019) eKLR where the case of *Edward Muriga through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 was quoted where the court observed that where the defence does not adduce any evidence, the allegation by the plaintiff is to be believed.
 6. That the Plaintiff’s testimony that she was standing by the pedestrian side when she was hit by the Respondent was corroborated by the Respondent’s testimony that he hit the Plaintiff who was standing by the roadside on the pedestrian side as he veered off the road trying to avoid a head on collision with an incoming vehicle. Additionally, her pleadings became evidence as they were expressly admitted by the Respondent. Further, the sketch plans and witness statements by the Respondent confirmed that the Appellant was hit while she was standing on the pedestrian lane which was off the road. Hence the Appellant proved her case that the Respondent was wholly to blame for the accident which was admitted by the Respondent. Reliance was placed on the case of *Stella Nasimiyu Wangila & another v Raphael Wanyamah* (2016) eKLR where the court stated that there is no better prove of negligence than admission by the Defendant in his evidence that he veered off the road. The Respondent did not blame the Appellant for the accident but blamed the lorry allegedly driving on the wrong side of the road and he did not mention the effort he made to avoid hitting the Appellant.
 7. He submitted that the trial court relied on the case of *Farah v Lento Agencies* CA No. 34 of 2005 (2006) KLR 123 which was distinguishable from the facts of this case as the case of Farah concerned an accident involving two vehicles in which both drivers gave different testimonies as to the occurrence of the accident whereas in this case, the accident involved a driver and a pedestrian. That the only difference in the parties’ narration was whether the respondent was overspeeding or not which was neither here nor there. He submitted that no evidence was called to prove that the Appellant did anything or omitted to do anything to contribute to the occurrence of the accident. Reliance was placed on the case of *Kimani v Kabao & another* (2022) KLR and *Raphael Oduor Wanyama v Lawrence Baraza Sasyendet* (2018) eKLR where the courts held the driver liable for hitting pedestrians and in the latter case, the court stated that it could not see how a pedestrian could have contributed to the accident. Therefore, the trial court reached into a wrong conclusion when it held that both parties were equally to blame for the accident.
 8. In rejoinder, the Respondent’s counsel submitted that the Appellant failed to prove negligence on the part of the Respondent as the police abstract produced did not indicate who was to blame for the accident. The Appellant did not also mention the measures she took to avert the accident after seeing that the vehicle had veered off the road. That the Respondent pleaded the doctrine of res ipsa loquitor and voluntary assumption of risk as the same were applicable to the facts of this case. That no evidence was tendered to show that the Respondent was wholly liable for the accident hence the Appellant was the author of her own misfortune. Reliance was placed on the case of *Afro Apin limited v George Mangaa Maganya* (2005) (Unreported) where the court observed that negligence is a question of fact, which must be proved by evidence.



9. She maintained that there was no evidence that the Respondent was to blame for the accident as no traffic charges were preferred against him. Additionally, the Appellant testified that she saw the vehicle veer off the road to avoid a head on collision in ample time but she did not testify on the measures she took to avert being hit. She submitted that causal link must be established and that injuries suffered without proof of negligence cannot suffice. He urged the court not to alter the trial court's finding that there was no police officer called to give evidence and establish the point of impact and therefore there was no clear evidence that the defendant was entirely to blame for the accident. That the Appellant as a pedestrian had a duty to care for herself while walking on the road or crossing the road as was held in the case of *Patrick Mutie & another v Judy Wambui Ndurumo* (1997) eKLR.
10. This is a first appeal and therefore the duty of this court is to consider and evaluate the evidence afresh and reach its own findings thereon. This is as established in *Selle & Another v Associated Motor Boat & Co. Ltd. & Others* (1968) EX 123, where this principle was well explained in the following manner;

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”
11. The case before the trial court was as follows. The Appellant testified afresh on 05/08/2021 and adopted her witness statement and produced the Plaintiff's documents. She testified that she was by the road side and that she was not drunk.
12. On cross examination, she testified that it was 7:00am and she was able to see the road well. That the vehicle was over speeding and was overtaking when the driver met another vehicle hence swerved outside. She was on the left side towards Meru.
13. On re-examination, she testified that she was on the left side and the vehicle was on the right side. The said vehicle was overtaking at high speed when it met another vehicle head on and to avoid it, it swerved to her knocking her while on pedestrian part.
14. DW1 adopted his witness statement and testified that it was around 6:00am. He denied that he was overtaking. That he was avoiding head on collision with a lorry that was on his lane.
15. On cross examination, he testified that the lorry did not stop for him to capture the registration number. The pedestrian was well off the road. He confirmed that he knocked the plaintiff. That he swerved his vehicle off the road to avoid the accident knocking her.
16. He testified on re-examination that he knocked her as he was avoiding head on collision and it was not his intention. That he noticed that he hit a pole and people nearby informed him that he hit a pedestrian.
17. As seen earlier, the trial court apportioned liability on both parties and while doing so, the court stated that there was contradiction in the plaintiff's evidence as she testified during exam in chief that the defendant was avoiding a head on collision with another vehicle on his lane hence swerving to the pedestrian path and knocking her. In cross examination, she testified that the defendant was overtaking when he met another vehicle hence being forced to swerve on the pedestrian path where he knocked her. That the defendant case was that he was driving on his lawful lane when he met with a lorry driven in the opposite hence being forced to swerve outside and knocking the plaintiff. That the police abstract did not indicate the results of investigation and that no police was called to establish the point



of impact. Therefore, there was no clear evidence whether the defendant was entirely to blame for the accident. He also found that there was no evasive action to avoid hitting the plaintiff like slowing, alerting the other driver, hooting to avoid hitting the plaintiff or swerving to the right if it was safe. He apportioned liability in terms of 50% on account of different version on occurrence of the accident.

18. There is no doubt about the occurrence of the accident. There is also no doubt that the Respondent veered off the road and hit the Appellant who was standing off the road. The Respondent admitted to these facts when he was testifying.
19. The trial court apportioned liability on part of the Appellant on account that she testified during exam in chief that the defendant was avoiding a head on collision with another vehicle on his lane hence swerving to the pedestrian path and knocking her. In cross examination, she testified that the defendant was overtaking when he met another vehicle hence being forced to swerve on the pedestrian path. He further faulted the Appellant for not calling the police to testify on the point of impact.
20. It is to be noted from the evidence before the trial court that the Appellant did not testify in examination in chief that the defendant was avoiding a head on collision with another vehicle while on his lane. She outlined how the accident occurred in cross examination and during re-examination where she mentioned that the Respondent was overtaking and since there was an oncoming vehicle, he veered off the road. Furthermore, the point of impact was clear from parties' evidence that he knocked her while off the road. Clearly, the finding of the trial court was contrary to the evidence on record.
21. As to who was to blame for the accident, the uncontested fact is that the Respondent veered off the road and hit the Appellant. He testified on cross examination that the Appellant was well off the road and he hit her as he was trying to avoid a head on collision with an oncoming vehicle. He did not explain the measures he took to avoid hitting the Appellant. He did not explain whether he hooted or he warned her before hitting her. There was no explanation how sudden the accident was. The court in *Ngugi v Muriithi & another (Suing as the Personal Representatives of the Estate of Job Mukwima Njoroge)* (Civil Appeal E001 of 2021) [2023] KEHC 3009 (KLR observed that:-

“The Respondent’s evidence as to how the accident occurred was not controverted at all. It squarely put the blame on the Defendant’s driver. He was driving at high speed, failed to control the vehicle as he tried to enter a junction and veered off the road knocking down the deceased who was walking by the roadside. With or without the sketch map; there is ample evidence to demonstrate that the Appellant was solely responsible for the accident. The driver did not testify to indicate whether he made any efforts to prevent or avoid the accident and that cannot be assumed in the absence of the evidence. I find that the Appellant was to blame for the accident. There was no evidence or basis provided to hold that the deceased liable in the light of the evidence on record. I find that the trial court erred in apportioning liability in absence of any evidence. I set aside that finding and hold that the Appellant was 100% liable. He knocked the appellant to death as a result of high speed, failing to control the vehicle and veering off the road onto where the deceased was by the roadside. This evidence was uncontroverted. There was no evidence of any contribution for the accident made by the deceased tendered at the trial.”

22. There was no evidence on negligence on part of the Appellant that was tendered before the trial court hence it is my view that the trial court erred apportioning liability the way he did.
23. There was a clear misapprehension of the evidence by the trial court. On a balance of probability, the Appellant proved that she was hit by the subject vehicle off the road and the Respondent confirms hitting her of the road in which case no contribution to the occurrence of the incident can be inferred



on the part of the Appellant. Even going by the defence evidence, it is clear that if there was any contribution to the occurrence of the collision if at all, this was by the driver of the lorry mentioned by the Respondent in defence and in which case it was the duty of the Respondent to join such a driver as a 3rd party.

24. With the result that the appeal herein has merit and is allowed. The judgement and orders of the trial court are set aside and substituted thereof with a judgement on liability against the Respondent at 100%. Damages remain undisturbed. The Appellant shall have the costs of this appeal.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF JULY 2025.

A.K. NDUNG'U

JUDGE

