



**Ndanu v Peter & another (Civil Appeal E60 of 2021)
[2024] KEHC 294 (KLR) (12 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 294 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E60 OF 2021
GMA DULU, J
JANUARY 12, 2024**

BETWEEN

ELIZABETH NDANU APPELLANT

AND

DAVID NDAMBURUI PETER 1ST RESPONDENT

BENSON MUNYAO MWANTHI 2ND RESPONDENT

*(Being an appeal from the judgement and decree of Hon. Sagero (SRM)
Makueni delivered on 3rd August 2021 in CMCC No. 57 of 2020)*

JUDGMENT

1. In a judgment delivered on 3rd August 2021, the Senior Resident Magistrate entered judgment in favour of the appellant herein who was the plaintiff in the trial court and awarded damages. The trial court also found that the appellant, a pillion passenger was 30% contributory negligent.
2. Dissatisfied with the decision of the trial court, the appellant has now come to this court on appeal through counsel Mutuku Wambua & Company Advocates on the following grounds:-
 1. The Magistrate erred in law and fact by failing to factor the fact that the appellant was a pillion passenger and not the rider of the motor cycle registration number KMDH 809C.
 2. The Magistrate erred in failing to consider the fact that the appellant did not contribute to the accident subject matter in any way.
 3. The Magistrate erred in law and fact in failing to consider the aspect that the rider of the motor cycle registration number KMDH 809C was not a party in this suit.
 4. The learned trial Magistrate erred in law and fact in apportioning liability at the ratio 70:30 between the appellant as against the respondent.



5. The learned Magistrate erred in law and fact by failing to hold the defendant 100% liable and/or wholly to blame for the accident.
 6. The learned trial Magistrate erred in law and fact by failing to consider the appellant submissions and similar judicial authorities on liability.
 7. The learned Magistrate erred in law and facts by failing to consider the appellants submissions and similar authorities on quantum of damages.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Mutuku Wambua & Associates for the appellant, as well as the submissions filed by Mwangangi Nzisa & Associates for the Respondents. Both sides relied upon decided court cases.
 4. This is an appeal against liability and quantum of damages. As a first appellate court I have to be guided by the principle consistently followed by courts, as restated in the case of *Selle =Versus= Associated Motor Boat Company Ltd* (1968) EA 123 – that the appellate court is justified in setting aside the decision or findings of the trial court only when the decision or finding is not based on evidence, or is based on a misrepresentation or misinterpretation of evidence, or based on a wrong legal principle.
 5. In the present case, the facts are clear. The appellant was a pillion passenger of a motor cycle rider, when the accident occurred. The other side (defendants) was a motor vehicle owner and driver, the respondents herein. The accident did occur in Wote town, and the appellant was injured and was treated in hospital.
 6. In those circumstances in my view, it could not be said that the appellant was contributory negligent regarding that accident. I thus find that the trial court was wrong in apportioning liability at 70:30. I make a finding that the motor vehicle driver was 100% liable for the accident.
 7. With regard to the amount or quantum of damages awarded, I find no mistake or error committed by the Magistrate. Though the injuries suffered by the appellant were classified as grievous harm, the actual nature of injuries listed in the medical report in my view were of the nature of soft tissue injuries, and with proper medical attention will sufficiently heal.
 8. To conclude, I set aside the finding of the Magistrate apportioning liability at 70:30, and instead make a finding that the motor vehicle driver was 100% liable for the accident in which the appellant was injured. With regard to the quantum of damages, I uphold the quantum of damages assessed by the trial court against both respondents jointly and severally, on 100% liability basis. I award the appellant the costs of appeal against both respondents jointly and severally.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JANUARY 2024 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Ms. Nusura – Court Assistant

Ms. Mutuku for appellant

