



**Osamba v Lucas & another (Civil Appeal E572 of 2021)  
[2024] KEHC 2831 (KLR) (Civ) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2831 (KLR)

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

**CIVIL**

**CIVIL APPEAL E572 OF 2021**

**DAS MAJANJA, J**

**MARCH 15, 2024**

**BETWEEN**

**PETERLIS OSAMBA ..... APPELLANT**

**AND**

**PETER MUNYI LUCAS ..... 1<sup>ST</sup> RESPONDENT**

**ROBERT LWANGALE KHISA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. E. Wanjala dated 27<sup>th</sup> August 2021 at Nairobi Magistrates Court at Milimani in Nairobi CMCC No. 789 of 2020)*

**JUDGMENT**

1. By the memorandum of appeal dated 03.09.2021, the Appellant challenges the judgment and decree of the Subordinate Court dated 27.08.2021. The 1<sup>st</sup> Respondent sued the Appellant for damages for injuries suffered in a road accident that occurred on 17.7.2019 involving motor vehicles KBC---Z and KBR ---A alleged to belong to the Appellant and 2<sup>nd</sup> Respondent. The trial court heard the case and found the Appellant 100% liable and awarded damages of ksh 133,550.00 to the 1<sup>st</sup> Respondent.
2. The Appellant's appeal is limited to the issue of liability. The gravamen of his case is that since the motor vehicle KBC ---Z was not indicated in the police abstract, the 1<sup>st</sup> Respondent had no evidence to prove that the alleged accident occurred. He avers that a police abstract is proof that an accident occurred and it ought to contain the particulars of subject motor vehicles that were involved in the accident.
3. The trial court indicated in its judgment that the Appellant and 2<sup>nd</sup> Respondent's statement of defence was not on record at the time of drafting the judgment. That means that the court did not consider the Appellant's statement of defence at all. I note that the trial court record contains a reply to the Appellant's defence dated 22.6.2020 and filed on 24.6.2020 which means that the defence was actually



filed. The record of appeal contains a copy of the Appellant's statement of defence dated 19.3.2020 and duly stamped by the court on even date and served on the 1<sup>st</sup> Respondent on 19.6.2020 as indicated on the copy. This points to a conclusion that the 1<sup>st</sup> Respondent filed and served its defence before hearing of the case and before judgment was drafted. Having noted that the defence was not on record, the trial court ought to have called for it from the party. The record does not indicate that the court requested for the defence. This court has been provided with the defence as part of the record of appeal. The 1<sup>st</sup> Respondent was served with it and he filed a response thereto. As such, it is only fair that I consider the defence in rendering this judgment.

4. This is a first appeal and I am guided by the case of *Selle v Associated Motor Boat co* [1968] EA 123 that as the 1<sup>st</sup> appellate court, I am required to re-evaluate and re-assess the evidence produced before the court of first instance and at the same time making an allowance for the fact that the trial court interacted first hand with the parties. Moreover, this is an appeal against the finding on liability. In *Khambi and Another v Mabithi and Another* [1968] EA 70, it was held that:

It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

5. The trial court observed that the oral evidence of the 1<sup>st</sup> Respondent narrating how the accident occurred was not controverted. The court further noted that the Appellant did not deny the occurrence of the accident and did not provide any other version as to how the accident occurred. The Appellant only denied involvement of the 1<sup>st</sup> Respondent's motor vehicle KBC ---Z because it was not indicated in the police abstract.
6. In his statement of defence at paragraph 2, the Appellant expressly admitted occurrence of the accident on 17.7.2019 involving motor vehicles KBR ---A, KCQ ---Z and KBC ---Z. The Appellant further blamed the driver of motor vehicle KCQ ---Z but did join him in the proceedings for him to be held liable. As a rule, parties are bound by their pleadings. Having admitted that the accident involved motor vehicle KBC ---Z, the Appellant cannot again be allowed to deny its involvement simply because it was not included in the police abstract.
7. The purpose of a police abstract is to show that an accident occurred and that it was reported. It does not help much in apportioning liability unless it is accompanied by more evidence to support it (see *Kennedy Nyangoya v Bash Hauliers* [2016] eKLR). The trial court was right in observing that the evidence of the 1<sup>st</sup> Respondent as to how the accident occurred was not controverted.
8. Based on the admission in the defence and the evidence before the court, I come to the conclusion that the trial magistrate did not err in finding the Appellant 100% liable for the accident.
9. I dismiss the appeal with costs to the 1<sup>st</sup> Respondent assessed at ksh 30,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MARCH 2024.**

**D. S. MAJANJA**

**JUDGE**

Ms Luchemo instructed Mbai Waweru and Company Advocates for the Appellant.

Mr Kiptanui instructed by Waiganjo Wachira and Company Advocates for the Respondent.

