



**Mwau v Mulwa (Civil Appeal E094 of 2022)  
[2024] KEHC 3662 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3662 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E094 OF 2022**

**MW MUIGAI, J  
APRIL 11, 2024**

**BETWEEN**

**AUGUSTINE MWONGELA MWAU ..... APPELLANT**

**AND**

**PETER WAMBUA MULWA ..... RESPONDENT**

*(Being an appeal arising out of the Decree emanating from the judgment of Hon. B.A LUOVA(RM) delivered on 6<sup>th</sup> June, 2022 in Machakos SCCC No.84 of 2022)*

**JUDGMENT**

**Background**

**Proceedings in the Trial court**

**The Statement of Claim**

1. By a Statement of claim dated 4<sup>th</sup> April 2022, the claimant averred that on or about 7/11/2020, he was lawfully riding a motor cycle number KMDN 530 G along Machakos town Bomani area when a Motor vehicle registration number KCU 145 E was negligently, dangerously and /or carelessly controlled by the respondent and/or his driver , servant and /or agent that he permitted the same to loose control veer off the road due to over speeding and hit his motor cycle on his right side thus causing an accident as a result of which the claimant sustained severe bodily injuries. Particulars of the injuries to claimant were:
  - a. Blunt chest injury
  - b. Blunt injury to the abdomen
  - c. Blunt injury to the right shoulder



- d. Blunt injury to the right wrist joint
  - e. Blunt injury right foot
  - f. Blunt injury right knee
2. Claimant sought the following relief against the respondents
    - a. General damages
    - b. Special damages- Kshs. 7,250
    - c. Costs of the suit and interest
    - d. Any other relief that the court may deem fit to grant.

### **The Defence**

3. The Respondent in his response to the statement of claim dated 28<sup>th</sup> April 2022 denied that the accident as alleged in the statement of Claim and that if any such accident occurred, it was wholly caused by the claimant who rode at a high speed without any regard to other road users or the traffic laws and regulations thereby causing the accident.

### **Hearing In The Trial Court**

4. CW1 was Dr. John Mutunga. He testified that he was a doctor at Machakos Level 5 Hospital and that he recalls examining the claimant on 15/3/2022 and that the claimant was involved in an accident and had suffered soft tissue injuries and that he prepared the medical report, ID card , treatment note and a duly filed p3 form and produced them as exhibits. His opinion was that the injuries were soft tissue injuries and will gradually heal and by then he was expected to have healed completely.
5. In cross-examination, he stated that he was the maker of the p3 form which was signed by him and that the claimant did not sustain any fractures and it was his opinion that the claimant should have been healed by then.
6. CW2 was Gideon Kipruto. He testified that they received an accident report on 7/11/22 at around 2020 hours at AIC Bomani church along industrial area road. The driver of the motor vehicle registration number KCU 145E Fredrick Mutuku was from Wote direction heading towards Bomani direction, on reaching the location of the accident, the driver turned right to join the Church and collided with the motor cycle registration number KMDN 530 G which was from opposite direction and as a result, the rider sustained injuries. The motor vehicle KCU 145 E was to blame for the accident. He produced the abstract as exhibit.
7. On cross examination, he stated that he was not the investigating officer and that he had gotten the information from the OB and that the information showed that the driver of the motor cycle was not insured. It was illegal to operate a motor cycle without a valid insurance cover and did not know why the investigating officer did not charge the claimant.
8. CW3 was the claimant who testified that he was a motorcyclist and wished that his witness statement be adopted as evidence in chief. That on 7/11/2020, he was leaving Industrial area in Machakos town and on reaching Bomani gate, a vehicle hit him from the left and he fell down. He went to hospital and produced medical documents. He also produced a motor vehicle search, demand letter to the respondent. He blamed the driver of the motor vehicle KCU 145 E.



9. On cross examination, he stated that the motor vehicle KCU 145 E was being driven at a high speed though he could not see the speedometer. He stated that he could remember which company his insurance cover was from and was not aware if the cover was valid and that at that time he had little income and he knows it was an offence.
10. RW1 was Fredrick Muoki Mutuku who testified that he recorded his statement as evidence in court. He stated that immediately after the accident, he called the respondent who had given him his motor vehicle and after that went to the police station. He has never been summoned to court for a traffic offence.
11. On cross examination he stated that he was the driver of KCU 145 E and collided with a motorcycle, produced his driving license as exhibit before the court.

### **Trial Court Judgment**

12. By a judgment dated 6<sup>th</sup> June 2022, the trial court entered judgement for the claimant as against the respondent with liability at 50:50 The Trial Court went ahead and entered judgment in the following terms:
  1. General damages Kshs 200,000/=
  2. Special damages Kshs 5700
  3. Less 50% contribution kshs 102, 850

### **The Appeal**

13. Dissatisfied with the Judgment, the Appellant filed Memorandum of Appeal dated 1<sup>st</sup> July 2022.
14. The appeal is brought on the grounds that:
  - a. The learned trial Magistrate erred in law and in fact by failing to give concise statement of the case, points of determination, decision thereon and reasons for her judgement.
  - b. The learned trial Magistrate erred in law and in fact in failing to appreciate and consider the pleadings and the evidence adduced in court by the plaintiff and in only relying on the defendant's account of the accident.
  - c. The learned trial Magistrate erred in law and in fact by apportioning liability as between the appellant and the respondent on equal basis not considering the evidence of PW1, PW2 and PW3 which was supported by admissible documentary evidence to support 100% negligence on part of the respondent.
  - d. That the learned trial magistrate in determining liability erred in concluding that the appellant contributed negligently to the accident in the ratio of 50% without any credible evidence to that effect.
  - e. That the learned trial magistrate erred in law and in fact by finding that the appellant contributed to the occasion of the accident whereas the police investigations found as a matter of fact that the respondent was solely liable to the wrong ful conduct.
  - f. That the learned trial magistrate erred in law and in fact by failing to conduct a proper analysis of the evidence before her to come to the conclusions that the critical issues of the duty of care, breach of that duty and resulting damage was due to the contributory negligence.



- g. That the learned trial magistrate erred in law and in facts by applying wrong and in applicable principles of law in civil case and which did not form part of any basis to warrant her determination on liability.
15. The appeal was canvassed by way of written submissions.

## **Submissions**

### **The Appellant's Submissions**

16. The Appellant in his submissions dated 10<sup>th</sup> August 2023 wherein it was submitted that the issue for determination was liability as apportioned between the appellant and the respondent on equal basis of 50%:50 % for and against the appellant.
17. It was submitted that the appellant proved on a balance of probabilities that the accident was caused by the negligence on the part of the respondent hence liability ought to have been wholly decided on the appellant's favour since the respondent did not provide adequate evidence to the contrary.
18. It was submitted that failure by the appellant to have a valid insurance for the motor cycle while on the road cannot be a reason to substantiate negligence on part of the claimant and cannot in any way impute blame on the part of the appellant that he was careless
19. It was submitted that PC Gideon Kipruto testified and blamed motor vehicle registration number KCU 145E for causing the accident, the appellant also blamed the respondent wholly for the accident as the motor vehicle was being carelessly driven and the respondent on the other side did not tender any evidence to challenge the appellant's evidence
20. Reliance was placed in the case of *Nandwa vs Kenya Kazi Ltd* (1988) KLR 488 to buttress the point that in an action of negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant.
21. It was submitted that the appellant was able to demonstrate that the accident occurred and also that the respondent was entirely negligent and failed to exercise due diligence to safe guard the welfare of other road users.
22. Reliance was placed in the case of *Miller vs Minister of Pensions* (1947) to buttress the point on burden of proof in civil cases is on a balance of probabilities.
23. It was submitted that the respondent did not rely upon the contributory negligence as a defence. Reliance was made to the case of *Embu Road Services V Riimi* (1968) and *Mzuri Muhhidin vs Nazzar Bin Seif* (1961) EA.
24. It was submitted that the preponderance of probability had been discharged and that the judgement apportioning equal liability be set aside and revised in favour of the appellant by holding the respondent 100% liable for occasioning the accident.

### **Respondent's Submissions**

25. The Respondent in his submissions dated 16<sup>th</sup> August 2023 wherein counsel for the Respondent submitted that in the instant case the fact that the claimant admitted that he did not have a valid policy insurance at the time was not the reason he sustained injuries but however not having a valid third party insurance while on the road offends the provision of section 103(b) of the [Traffic Act](#) and should be punished.



26. Reliance was made to the case of Isaac Onyango Okumu v James Ayerere & anor [2019]eKLR to buttress the point that if no sketch plans were produced in court, the Court cannot be sure of the circumstances of the case.
27. Reliance was also made to the case of Rentco East Africa Limited V Dominic Nutua Ngonzi[2021] and Khambi and Another vs Mahithi and Another [1968], Isabella Wanjiru Karangu vs Washington Malele Civil Appeal No 50 of 1981, Mahendra M Mande vs George M Angira civil Appeal No 12 Of 1981.
28. It was submitted that the finding of liability by the police is not conclusive evidence of liability in a civil action. Reliance was made to the case of Charles Ocharo Momanyi v United Millers Limited [2017] eKLR and LWK (a minor suing through father and next friend SKD) vs Kirigu Stanley & another [2019], David Kinyanjui & 2 others vs Meshack Omari Monyoro Civil Appeal No 125 of 1993, Calistus Ochieng oyalo & Others vs Mr & Mrs Aoko Civil Appeal No 130 of 1996 and Masembe vs Sugar Corporation and Another [2002]
29. It was submitted that in apportioning liability, the court did in fact consider the evidence on record and was rightly persuaded by the principles of law on negligence. Reliance was placed in the case of Kennedy Nyangoya vs Bash Hauliers [2016] eKLR.
30. The court was urged to dismiss the appeal with costs to the respondent.

#### **Determination/analysis**

31. This Court have considered the Appeal, the lower court record and the submissions of parties.
32. This being a 1st Appeal, in the case of Selle vs. Associated Motor Boat Co. [1968] EA 123 it states that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 the court is not bound 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

#### **Liability**

33. It is undisputed that an accident took place on 7<sup>th</sup> November 2020 where the appellant alleged that he was lawfully riding motorcycle registration number KMDN 530G along Machakos Town when at Bomani Area, motor vehicle registration number KCU 145E was negligently driven by the respondent/ his driver that he permitted it to loose control veer off the road due to over speeding and hit motor cycle registration number KMDN 430G on its right side thus causing the accident where as a result of which the appellant sustained injuries.
34. The burden of proof as per Section 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya is outlines as;  
  
Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.



109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

35. The burden of proof is on the Appellant in this case. The Appellant contends that it was well proved on a balance of probabilities that the accident was caused by the negligence on the part of the respondent hence the issue of liability ought to have been decided wholly in the appellant's favour since the respondent didn't provide adequate evidence to displace that inference to warrant the trial Court to apportion equal blame on the parties. The Appellant reiterated that the Respondent was the author of her own misfortune and he should be found 100% liable.
36. In determining liability and apportionment thereto, if any, the question of who is to blame for the accident is key. It is clear from the claimant's witness testimony that the respondent was to blame for the accident as he drove the motor vehicle carelessly, recklessly and permitted the same to lose control and veer off the road.
37. Apportionment of liability equally in my view would only be plausible if there was some material evidence to show how the appellant contributed to the accident. The Trial magistrate apportioned liability equally on the ground that the appellant was riding an uninsured motorcycle on the road
38. There being no evidence to controvert the appellant's evidence, this Court finds that the Trial Court did err in apportioning liability equally that is 50:50 despite it being clear that the accident was caused by the respondent.
39. The appellant on the other hand cannot just claim that he did not have insurance on his motorcycle due to hard times and poverty yet he is well aware that having third party insurance is mandatory requirement under the Traffic Act and failure to have it is an offence. He cannot also escape a portion of liability for this

### **Disposition**

1. In the upshot, this appeal party succeeds in that the court finds that the liability is apportioned as at 80:20 as against the respondent.
2. The cost shall abide the suit.

**JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 11/4/2024. (VIRTUAL /PHYSICAL CONFERENCE)**

**M.W.MUIGAI**

**JUDGE**

In The Presence/absence Of:

Ms Muya - For The Appellant

Ms Wamuyu - For The Respondent

Geoffrey/patrick - Court Assistant(s)

Ms Muya: We apply for 30 days stay of execution.

Court: Stay of execution 30 days granted.

