



REPUBLIC OF KENYA



**Onditi v Mwangi (Civil Appeal 275 of 2019)
[2024] KEHC 3276 (KLR) (Civ) (5 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3276 (KLR)

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

CIVIL

CIVIL APPEAL 275 OF 2019

AN ONGERI, J

APRIL 5, 2024

BETWEEN

JAMES ONDITI APPELLANT

AND

ALEX WAINAINA MWANGI RESPONDENT

*(Being an appeal from the judgment and decree of Hon. S. G. Gitonga
(RM) in Milimani CMCC No. 6850 of 2018 delivered on 26/4/2019)*

JUDGMENT

1. The appellant filed Milimani CMCC No 6850 of 2018 seeking general damages for pain and suffering and special damages of Kshs 700 for injuries the appellant sustained on or about 27/4/2018 at 7.00am along Twiga road Karen road when the appellant who was a cyclist was knocked down by the respondent's motor vehicle registration No KBD 689M Toyota.
2. The trial court found that the appellant did not prove his case to the required standard and dismissed it with costs.
3. The appellant has appealed against the dismissal on the following grounds;
 - i. That the learned trial magistrate erred in law and fact by dismissing the appellant's suit when she misapprehended the acts and arrived at a wrong decision.
 - ii. That the learned trial magistrate erred in law and fact in holding that the plaintiff had not proved his case on a balance of probability.



- iii. That the learned trial magistrate erred in law and fact in failing to note that the collision occurred at a cross-road with no obstruction and the plaintiff testified that the defendant drove recklessly and at a speed and his car collided with him thereby causing him serious injuries.
 - iv. That the learned trial magistrate erred in law and fact when she found the appellant was the cause of the collision yet the defendant/respondent herein admitted that he failed to yield at a stop sign.
 - v. That the learned trial magistrate erred in law and fact when she blamed the appellant for the accident when evidence on record indicates that the respondent failed and or neglected to look out for oncoming traffic when joining a road contrary to the highway codes.
 - vi. That the learned trial magistrate erred in law and fact in holding that the plaintiff was the author of his own misfortunes.
4. The parties filed written submissions as follows; the appellant submitted that the respondent gave contradictory evidence in his witness statement. He admitted on oath that he was indeed the one who reported the accident and was thereafter issued with a police abstract that narrated the accident as per his version of events.
5. It was the appellants argument that it is clear that no investigations were done and there is no motor vehicle inspection report attached to the defendant's documents as he alleges.
6. The appellant submitted that the respondent only produced documents as exhibits such as his driver license which is of law probative value as whether he was a driver or not is not in dispute. It is not farfetched that after parting ways with the appellants, the Respondent concocted a version of event which favoured him when reporting the matter to the police.
7. Based on the above the appellant urged the court to allow the appeal herein and set aside the whole judgement of the lower court.
8. The appellant further prayed that judgment be entered in his favor in the sum of Kshs. 120,000 for pain and damages suffered.
9. The respondent did not file any submissions
10. The issues for determination are as follows;
 - i. Whether the appellant proved his case to the required standard in civil cases.
 - ii. Whether the appellant was entitled to remedies he was seeking against the respondent.
11. I find that it is not in dispute that the accident did occurred on 27/4/2018 at 7.00am along Twiga road junction with Karen road involving the appellant who was a cyclist and the respondent's motor vehicle registration No KBD 689M Toyota.
12. The appellant said the driver of motor vehicle registration No KBD 689M flashed at him signaling that he had allowed him to turn at the junction but instead accelerated and hit him.
13. The respondent in his evidence said that while he was approaching the junction of Twiga road he stopped at a stop sign and checked both sides to see if the road was clear and he proceeded after confirming the road was clear.



14. He then saw the cyclist coming very fast along Twiga road and the cyclist lost control and hit his vehicle on the driver's side.
15. I find that both the cyclist and the driver of motor vehicle registration No KBD 689M were to blame for the accident in the circumstances.
16. In the case of *Peter Okello Omedi v Clement Ochieng* [2006] eKLR, the court held that;

“The failure by both parties to observe their respective obligations to each other might have caused the accident and in the absence of clear and uncontroverted evidence, I set aside the apportionment of liability by the trial court and substitute with 50/50 against each party”
17. In the current case it is not clear who was to blame for the accident and the trial court should have apportioned liability equally between the parties.
18. I find that both parties failed to observe their obligations and they both contributed to the occurrence of the accident.
19. I set aside the judgment of the trial court dismissing the suit and I substitute it with liability at 50:50% between the appellant and the respondent.
20. On the issue as to whether the appellant is entitled to the remedies he is seeking, I find that the answer is in the affirmative subject to 50% contributory negligence.
21. The award by the trial court of Kshs 120,000 for general damages for pain and suffering is reasonable plus special damages of Kshs 650.
22. The total is 120,650 less 50% contributory negligence =60,325/=.
23. Judgment be and is hereby entered in favor of the appellant against the respondent in the sum of Kshs 60,325 plus costs and interest at court rates from the date of the trial court's judgment until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 5TH DAY OF APRIL, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

