



REPUBLIC OF KENYA



Njami v Kagia (Civil Appeal E054 of 2022) [2024] KEHC 5498 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5498 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA**

CIVIL APPEAL E054 OF 2022

GL NZIOKA, J

MAY 6, 2024

BETWEEN

SAMUEL NJUGUNA NJAMI APPELLANT

AND

JOSEPH MUTHAMA KAGIA RESPONDENT

(Being an appeal against the decision by Hon. H. O. Barasa Senior Principal Magistrate (SPM) dated on 28th June 2022, delivered vide Civil Case No. 37 of 2021 at the Senior Principal Magistrate's Court at Engineer)

JUDGMENT

1. By a plaint dated 21st March 2021, and amended on 23rd April 2021 the plaintiff sued the defendant seeking for judgment against the defendant for: -
 - a. General damages for pain, suffering and loss of amenities
 - b. Special damages as pleaded in paragraph 5 of the plain
 - c. Costs of the suit
 - d. Interest on (a) (b) and c above at court's rates
2. The plaintiff averred that on or about the 6th day of December 2020, he was lawfully walking within Njabini township towards the bus stage when the defendant drove the motor vehicle registration No. KCS 124T negligently and/or at an excessive speed, accelerating to the pavement, while it was defective and without due regard to the safety of pedestrian and other road user and failed to slow, stop swerve in anyway to avoid an accident with the plaintiff and other road users, and as a result it veered off the parking and knocked the plaintiff down.
3. That as a result of the collision the plaintiff was injured and sustained injuries as follows:-



- a. Blunt injury to the lower back leading to soft tissue injury.
 - b. Blunt injury to the abdominal wall leading to soft tissue injuries.
 - c. Soft tissue injuries to the head Hence the suit herein.
4. However, the defendant filed a statement of defence dated 6th April 2021 and denied liability. He denied being the registered owner of the motor vehicle KCS 124T at the material time of the accident, and that the same was under his control, management and/or of his agent or driver. He further denied the averment as to the occurrence of the accident and the particulars of negligence attributed to him. The injuries allegedly suffered by the plaintiff were also denied.
 5. However, the defendant pleaded in the alternative that, if the accident occurred, it was caused or substantially contributed to by the negligence of the plaintiff, in that, he crossed and/or dashed to the road while it was unsafe to do so, and failed to heed the horn or warning given by the driver of the motor vehicle registration No. KCS 124T. Further he walked too close to the road and exposed himself.
 6. The plaintiff filed a reply to the statement of defence in which he reiterated the defendant was the registered owner of motor vehicle registration No. KCS 124T. He maintained that, the accident occurred and that he did not cause the accident in any way.
 7. The case proceeded to full hearing and after considering the evidence and submission tendered by the parties, the trial court delivered a judgment dated 28th June 2022 and dismissed the suit.
 8. The plaintiff is aggrieved by the decision of the trial court and has appealed against it on the following grounds:
 - a. The Learned Magistrate erred in failing to appreciate that the accident occurred as a result of negligence on the part of the Respondent for failure to maintain proper and/or effective control of Motor Vehicle KCS 124T thereby causing it to veer off the parking and onto the side walk and knocked down the Appellant.
 - b. The Learned Magistrate erred in fact and in law in failing to find liability against the Respondent which decision was unjust, against the weight of evidence and was based on points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - c. The Learned Magistrate erred in fact and in law in dismissing the Appellant's case in the absence of any evidence disputing liability by the Respondent.
 - d. The Learned Magistrate erred in failing to adequately consider all the evidence and submissions both on liability and quantum of damages with the resultant miscarriage of justice to the Appellant.
 9. The appeal was disposed off vide filing of submissions. The appellant in submissions dated 6th February 2023 argued that, the trial Magistrate erred in failing to find the respondent liable for causing the injuries to the appellant. That, the evidence adduced at the trial court demonstrated that, the respondent failed to use the side mirrors or reversing alarm while reversing the subject vehicle and hit the appellant.
 10. He relied on the case of; Bush Hauliers Limited vs Anastacia Ndinda Kimonye [2020] eKLR where the court stated that, a driver cannot assume there is no one behind the vehicle while reversing as it connotes a level of negligence particularly where the vehicle does not have a reverse signal.



11. Further, the respondent had control of the subject vehicle and therefore ought to have exercised due care while reversing, and relied on the case of; *Augustine Muriungi Mukindia v Moffat Mwandiki* [2019] eKLR where the court stated that the appellant had control of the vehicle and therefore had an obligation to check all was clear before reversing.
12. The appellant submitted that, the respondent did not produce any evidence to support his assertions that the appellant was to blame for the accident. He relied on the case of; *Rosemary Wanjiru Kungu vs Elijah Macharia Gitthinji & another* [2014] eKLR where the court held that there was no evidence to the contrary and found that, the accident occurred when the driver of the suit vehicle was reversing.
13. The appellant further submitted that, the trial Magistrate failed to exercise his discretion judiciously and, in the circumstances, the appellate court ought to re-evaluate the evidence afresh and interfere with the decision. He relied on the case of; *Stephen Obure Onkanga v Njuca Consolidated Limited* [2013] eKLR where the Court of Appeal stated that, apportionment of liability is an exercise of discretion by the judge and the appellate court would only interfere where it is satisfied such apportionment was based on no evidence or on wrong principles.
14. However, the respondent in submissions dated 2nd February 2023, argued that, the appellant had the duty to prove negligence against the respondent. He relied on the case of; *Eunice Wayua Munyao v Mutilu Beatrice & 3 other* [2017] eKLR where the court cited with approval the case of; *East Produce (K) Limited vs Christopher Astiado Osiro* Civil Appeal No. 43 of 2001 where the court stated that, there is no liability without fault and therefore a plaintiff must prove some negligence against the defendant.
15. Further, he relied on the case of; *Stanley Oguti Attai vs Peter Chege Mbugua* [2019] eKLR where the court cited with approval the case of; *Grace Kanini Muthini vs Kenya Bus Services & Another* where it was held that, where a plaintiff does not prove negligence against the defendant on a balance of probabilities, the court cannot find fault or adopt a probability without supporting evidence.
16. The respondent submitted that, PW2 the Investigating Officer in his evidence testified that, there was no sufficient evidence to indicate who was to blame from the accident. Further, the trial court held that, the investigating officer did not produce the OB to support the plaintiff's allegation that the defendant was to blame for the accident. He relied on the case of; *Lochab Brothers Ltd & Another vs Johana Kipkosgei Yegon* [2017] eKLR where the court concluded that, the failure to produce the investigating report and police file meant no sufficient evidence was tendered to connect the driver to the accident on a balance of probability.
17. The respondent cited section 107 of the *Evidence Act* (Cap 80) Laws of Kenya, on the burden of proof and submitted that, the appellant had the burden to prove his case on a balance of probabilities, which is the standard of proof in civil cases. He relied on the case of; *Twin River 1 Estate v Teresia Muthen Nzui* [2018] eKLR where the court in explaining what entails a balance of probabilities relied on the case of; *Re H (minors)* [1996] A.C. 563 where Lord Nicholls stated that, the balance of probability means the court is satisfied an event occurred if after considered the evidence it found that, the occurrence of the event was more likely than not. Further, that the court will have in mind that, the more serious the allegation the less likely the event occurred hence the evidence should be stronger before the court concludes the allegation was established on a balance of probabilities.
18. The respondent argued that, in an adversarial system the court can only rely on the evidence before it and should not carry out an investigation. He placed reliance on the decision of the court of Malawi in the case of; *Malawi Railways Ltd v Nyasulu* [1988] MWSC 3, and the Court of Appeal of Uganda in; *Libyan Arab Uganda For Foreign Trade and Development & Another v Adam Vassiliadis* [1986] where the both courts stated that it is not the duty of the court to enter into inquiry in the case before it



or to conduct an investigation or examination but to determine issues raised by the parties themselves in their pleadings.

19. Further, he relied on the case of; *Independent Electoral and Bounderies Commisssion & Another bs Stephen Mutinda Mule & 3 Others* [2014] eKLR where the Court of Appeal in allowing the appeal before it held that, the trial Judge erred when she went beyond the grounds raised by the petitioners and answered by the respondent, and determined the petition based on matters not properly before the court.
20. The respondent submitted that, no evidence was tendered to show the respondent was liable. He relied on the case of; *Afro Apin Limited v George Mangaa Maganya* [2005] (unreported) where it was stated that negligence is a question of fact to be proved by evidence.
21. Furthermore, the appellant had a duty to establish a causal link the between the injuries he suffered, and the negligence of the respondent but failed to do. That, in the case of; *Statpack Industries v James Mbithi Munyao* C.A. No. 152 of 2003 as cited in *Agnes Mutinda Ndolo & Another v Mboya Wambua & 2 others* [2017] eKLR the court held that, injury pe se is not sufficient to hold someone liable for the same that, the plaintiff must adduce evidence by which a connection may be drawn on a balance of probability.
22. The respondent submitted the learned trial Magistrate adequately considered the evidence and submissions before him and found that, there was no documentary evidence to prove the respondent was negligent in any way and dismissed the suit.
23. I have considered the arguments on the appeal. I note that, the role of the appellate court as held by the Court of Appeal in the case of; *Selle & Another v Associated Motor Boat Co. Ltd. & Others* [1968] EA 123, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.
24. The Court of Appeal thus observed: -

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular, this court is not bound necessarily 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.”
25. As regards liability I note that, it was the evidence of the plaintiff that, the defendant’s motor vehicle hit him while reversing and threw him into a ditch, and that he did not see the vehicle before it hit him.
26. On the part, the defendant evidence was that, he parked his motor vehicle at Njabini township and returned thereto, looked at his side mirrors to ensure it was safe to reverse. That unfortunately he saw an old man lying three (3) metres behind his motor vehicle. That he alighted from the motor vehicle and with the assistance of good Samaritans and on his request took the man to a hotel to rest. That, the man told him that, he thought he was hit by his motor vehicle. That he was genuine concerned as he had not heard a bang when reversing the motor vehicle. That he recorded a statement at Kinangop Police Station. The motor vehicle was then inspected and had no pre-accident defects. That he was



never charged over the offence. In cross-examination he said he could not say there was an accident but an issue.

27. In dismissing the plaintiff's case on liability, the trial court stated that:-

“There is also not evidence on record upon which this court can rely on to make a finding that, the alleged accident occurred as a result of the defendant's negligence. According to PW2, when he went to the scene, the same had been tampered with and that is why he did not come up with anything tangible that would help in establishing who was liable for the alleged accident. No one was charged and as the evidence stands, this court cannot safely conclude that the defendant herein knocked down the plaintiff as alleged.

Having said the above, it is my conclusion that the plaintiff has failed to prove the issue of liability on a balance of probabilities and this suit must therefore fail. The same is hereby dismissed with costs.”

28. Having analysed the evidence afresh I find that, it is not on dispute that, the defendant had parked his motor vehicle and was in the process of reversing his motor vehicle at the time the accident is alleged to have occurred. In his own words, he states that, “I saw an old man lying around three (3) metres behind my motor vehicle”. This clearly indicates the motor vehicle and the plaintiff were not far from each other, and it is possible as stated by the plaintiff that he was behind the motor vehicle when the accident occurred. Furthermore, it is only the plaintiff and the defendant who testified as to the circumstances prevailing at the time of the alleged evidence. As such an independent witness's evidence was necessary to reconcile the conflicting evidence as to whether the accident occurred or not.
29. The evidence of PW2 No. 71985 Corporal George Odhiambo from Kinangop Police Station who produced the police abstract stated that the driver of motor KCS 124T Toyota Pro Box reported to him that “he had parked his motor vehicle outside Labanon Hotel, Njabini and that in the process of reversing the vehicle, he knocked one make adult by the name of Samuel Njuguna”.
30. As can be deduced from the afore report, the defendant reported his motor vehicle was involved in the accident with the victim. It is therefore not tenable for him to have denied in his statement and evidence in defence that, his motor vehicle was never involved in the accident. Further, it was the evidence of PW2 that, both parties tampered with the scene, obviously this occurred when the victim was moved away and the defendant drove off his motor vehicle to go and report the incident. Furthermore, in the absence of establishing the point of impact and an independent witness, the police did not blame any of the parties that is, the plaintiff or defendant.
31. It is my finding that failure to charge the defendant does not fully exonerate him from blame. In that case, the trial courts' finding that, there was no evidence on which the trial court could rely to dismiss the defendant's account as to what actually happened on the material date, was not proper. The court had the evidence of the plaintiff as well as that of PW2 and had to considered both. There is little indication in the judgment on liability that, the plaintiff's and/or PW2's evidence was adequately considered or analysed leading to the erroneous finding that, the defendant was not to blame for the accident.
32. However taking into account, the circumstances of this case, and in particular the plaintiff's evidence that, he did not see the vehicle before he was knocked down and the defendant's evidence that, he did not see the victim before he was knocked down, I hold the view and find that both parties contributed to the accident. In that regard, I set aside the judgment of the trial court dismissing the plaintiff's case and substitute it with judgment on liability in the ratio of 50:50% in favour of and as against the plaintiff.



33. As regards quantum I note that, the trial court assessed the same at Kshs. 120,000. I have considered the injuries on the plaintiff. Unfortunately, the P3 form in the record of appeal at page 22 thereof is incomplete. Only one front page was availed. The page indicating the findings of the doctor is missing. However, the medical document by Dr. Omuyoma dated 10th March 2021 indicates that, the plaintiff was experiencing lower back pains (backache). The evidence reveals the plaintiff is elderly aged about 80 years old. Therefore, any slight injury to his body would have grave consequences. The healing process would be slow. He is alleged to have had healed bruises on the occipital region of the scalp. That there was tenderness on the lumbar cervical region of the back. The doctor classified the injuries as harm.
34. Taking into account the inflation factors and the number of years the case has been in court of about three (3) years and the general damages for soft tissue injuries, I make an award as follows:
- a. General damages-----Kshs. 250,000
 - b. Special damages-----Kshs. 39,425
 - c. Less 50% contributory negligence
 - d. Total amount payable-----Kshs 144,712.50
 - e. Interest from the date of this judgment
 - f. Each party to bear his own costs.
35. It is so ordered

Dated, delivered and signed this 6th day of May, 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Githae H/B for Mr. Wanjohi for the appellant

Ms. Mbugua H/B for Mr. Muturi for the respondent

Ms. Ogutu: Court Assistant

