



REPUBLIC OF KENYA



KENYA LAW
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Wachira v Munge (Civil Appeal 7 of 2021) [2024] KEHC 4969 (KLR) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4969 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 7 OF 2021**

MA ODERO, J

MAY 13, 2024

BETWEEN

ISAAC KIRURI WACHIRA APPELLANT

AND

PATRICK MAINA MUNGE RESPONDENT

JUDGMENT

1. Before this court for determination is the Memorandum of Appeal dated 22nd March, 2021 by which the Appellant Isaac Kiruri Wachira seeks the following orders:-
 - a. That the judgment on liability and Quantum of the Subordinate court in Nyeri Civil No. 214 of 2019 be set aside.
 - b. That the judgment on liability and General Damages to be assessed afresh.
 - c. That the Appeal be allowed with costs to the Appellant both in the lower court and on Appeal”
2. The Respondent Patrick Maina Munge opposed the appeal.
3. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 27th November, 2023 whilst the Respondent relied upon his written submissions dated 22nd January, 2024.

Background

4. Vide a plaint dated 29th July, 2019 the Appellant prayed for judgment against the Defendant for
 - “(a) Special Damages of Kshs. 7,950/=
 - (b) General Damages for pain and suffering, and loss of amenities.



- (c) Costs of this suit.
- (d) Interest on (a), (b) and (c) above at Court rates and
- (e) Any other or further relief that this Honourable Court may deem just to grant”

5. The Respondent opposed the suit through his statement of Defence dated 9th September, 2019.
6. The suit arose from a Road Traffic Accident which occurred on 3rd February, 2019 along Temple Kenyatta Junction Road in Nyeri County.
7. The Appellant told the court that on the material day he was riding a motor cycle Registration KMDH 4322 heading from the Nyeri Police Line to Othaya direction.
8. That upon reaching Temple Kenyatta Junction, a motor vehicle Registration KBQ 164E being driven by the Respondent came from the opposite direction (i.e from Othaya direction).
9. That the said motor vehicle was travelling at a very high speed and swerved suddenly into the junction without indicating, stopping or giving way to the Appellants motor cycle. The Appellant states that he applied his brakes and swerved in an attempt to avoid a collision but to no avail. The vehicle violently collided with the Appellants motorcycle, resulting in grievous injury to the Appellants right leg.
10. After the accident the Appellant was rushed by Good Samaritans to Nyeri Provincial General Hospital for treatment.
11. The Appellant reported the accident to Police and was issued with a police abstract and a P3 form.
12. The Appellant asserts that the driver of the motor vehicle was entirely to blame for the accident due to his failure to indicate, failure to stop and/or give way to the motorcycle and due to driving at a high speed, when approaching a junction. He then filed this suit in the lower court being Civil Case No. 214 of 2019 seeking general and special damages.
13. The Respondent as stated earlier filed a statement of Defence denying any negligence or wrong doing. In the said defence the Respondent blamed the Appellant for causing the accident by failing to exercise due care in riding his motor cycle and by absent-mindedly entering the junction in the face of the oncoming vehicle.
14. However, the Respondent did not himself call any evidence in support of this defence during the trial.
15. PW2 Sergeant Stephen Nzioki attached to Nyeri Traffic Base confirmed that a report of the accident was made to police. He stated that the scene was visited by Sergeant Ruth and PC James. The officer stated that a police abstract was issued to both the Appellant and the Respondent.
16. On 19th March, 2021 Hon. M. Okuche, Principal Magistrate delivered his judgement, in which he apportioned liability at 50:50. The court awarded the Appellant a sum of Kshs. 200,000 as general damages (less 50% contributory liability) and awarded special damages of Kshs. 7,950/=.
17. Finally the trial court entered judgment in favour of the Appellant and against the Respondent in the amount of Kshs. 103,975.00 plus costs of the suit and interest.
18. Being aggrieved by this judgment the Appellant filed this Memorandum of Appeal which was premised upon the following grounds:-

- “ 1. That the Learned Magistrate erred in law and in fact in finding the Appellant 50% liable for the occurrence of the accident without any basis in law or fact.



2. That the Learned Magistrate erred in law and in fact by failing to take into account all material and relevant facts as to the causation of the accident and as a result reached a wrong decision by holding the Appellant 50% and the Respondent 50% liable for the accident.
3. That the Learned Magistrate erred in law and in fact by failing to find that the accident was wholly or substantially contributed to by the Respondents' negligence, in light of the evidence before the Trial Magistrate's Court.
4. That the Learned Magistrate erred in law and in fact by not taking into account the Appellant's submissions on liability, thereby erroneously finding the Appellant 50% liable for the accident.
5. That the Learned Magistrate erred in law and in fact by awarding Kshs. 200,000/= as General Damages in view of the injuries suffered by the Appellant.
6. That the Learned Magistrate proceeded on wrong principles when assessing damages to be awarded to the Appellant and failed to apply precedents and tenets of the law applicable.
7. That the Learned Magistrate erred in law and in fact in awarding a sum in respect of damages which was inordinately low in the circumstances occasioning a miscarriage of justice.
8. That the Learned Magistrate grossly misdirected himself in ignoring the relevant authorities on General Damages cited in the written submissions presented filed by the Appellant.
9. That the Learned Magistrate erred in law and in fact in failing to consider the Appellant's submissions and thereby ignoring relevant guiding facts to reach a factual and reasoned determination.
10. That the Learned Magistrate failed to adequately evaluate the evidence and exhibit and thereby arrived at a decision unsustainable in law."

19. As stated earlier the appeal was opposed.

Analysis and Determination

20. This is a first appeal, thus it is the duty of this court to re-evaluate and review the evidence adduced in the lower court and to draw its own conclusions on the same. In *Selle & Another -vs- Associated Motor Boat Company Limited & Others* [1968] E.A 123, the court of Appeal held that:-

“An appeal to this court from 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 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 or 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



of if the impression based on the demeanour or a witness is inconsistent with the evidence in the case generally.....”

21. Similarly the same court in the case of Kiruga -vs- Kiruga & Another [1998] KLR 3h 8 observed that;-
“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.”
22. Therefore an appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.
23. The Appellant has challenged the findings of the trial court both on liability and quantum. I propose to deal with each issue separately.
(1) Liability
24. In the judgment the trial court apportioned liability at 50:50. In so doing the learned trial magistrate in his judgment at Page 9h line 8 stated as follows:-
“.....Though PW2 states that it’s the driver to blame, there is no supportive evidence to that effect. It is therefore my view that liability should be apportioned at 50%:50% as between the plaintiff and the defendant”
25. With respect I do not agree that there existed no evidence to enable the court determine which party was to blame for the accident. In determining the question of ‘liability’ the court must consider the facts of the case and decide which party bore the greater responsibility for the accident.
26. PW2 told the court that he did not visit the scene. No sketch map and/or measurements were produced in courts and the officers who did visit the scene were not called to testify.
27. Nevertheless this was not a case where it was not possible to tell who was to blame for the accident. In the case of Mary Njeri Murigi -vs- Peter Macharia & Another [2016] eKLR the court held that
“.....A person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof”
28. Therefore the driver of a motor vehicle is required to exercise due care at all times in his manner of driving and control of his vehicle.
29. The Appellant testified that he was driving towards Othaya and the Respondent was coming in the opposite direction.
30. That the Respondents whilst at a high speed and without indicating abruptly turned into the junction into the path of the oncoming motor cycle thereby causing the collision to occur.
31. The Appellant gave clear and concise evidence. He remained unshaken under cross-examination and reiterated that the vehicle was speeding.
32. As stated earlier the Respondent did not testify during the trial in the lower court. In the circumstances the evidence of the Appellant regarding how the accident occurred remained uncontroverted.
33. In North End Trading Company Ltd (Carrying on the



Business under the registration name of Kenya Refuse Handles Limited) v City Council of Nairobi (2019) the court held as follows;

“It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case the Party’s pleading are not to be taken as evidence, but the same remain unsubstantiated pleading which have not been subjected to the required test cross examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff’s case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the Plaintiff is taken to have proved its case on a balance of probability in absence of the defendant’s evidence. [own emphasis]

34. PW2 confirmed to the court that the accident was reported to the police.
Although PW2 did not visit the scene of the accident, he did produce the police abstract which was issued in respect of that accident. The police Abstract which appears at Page 14 of the record indicates that the motor vehicle Registration KBQ 164E was found to blame for the accident.
35. I therefore find that there did exist supportive evidence to show that the accident was caused by the negligence of the Respondent. In failing to indicate before turning into the junction, failing to reduce speed and failing to give way by turning into the junction in the face of the oncoming motorbike the Respondent drove recklessly.
36. In his statement of defence the Respondent blamed the Appellant for causing the accident. However no evidence was called to support this allegation. In fact the Appellant in his evidence stated that he braked and swerved in an attempt to avoid a collision with the Respondents vehicle but this was not successful.
37. In the case of William Kabongo Gitau v George Thuo & 2 Others (2010) IKLE256 the court cited with approval in the case of Joseph Muthuri v Nicholas Kinoti Kibera [2022] eKLR where it was held that:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
38. On the basis of the evidence adduced during the trial I am satisfied that the Appellant proved his case on liability on a balance of probability. Therefore I find and hold that the Respondent bore 100% liability for the accident.

QUANTUM

39. The Appellant told the court that after the accident he was rushed to hospital where it was found that he had sustained a fracture of the right fibula.
40. The injuries which the Appellant sustained after the accident were proved by the medical records produced as exhibits being
- Patient File from Nyeri Provincial General Hospital (Pages 12-13 of the record) dated 13th March, 2019.



- P3 form filled and signed by the Government Doctor. (See pages 15-16 of the record)
 - Medical report dated 14th May, 2019 prepared by Dr. Muchai Mbugua consultant surgeon and urologist (Pages 17-18) of the record.
41. The medical records all confirm that the Appellant sustained a fracture on his right leg. The Respondent attempted to have the medical report expunged as the maker had not been called to testify.
 42. I do agree with the trial magistrate that having failed to raise any objection to the production of this medical report by the Appellant during his evidence the Respondents cannot be heard to complain after the fact. Neither the Respondent nor his Advocate had raised any objection to the production of this medical report, during the hearing.
 43. I note from the medical report that the Doctor indicated that the Appellant was expected to make a full recovery with time. I have considered the relevant authorities where similar injuries were sustained by road accident victims.
 44. The Respondent herein in his Submission dated 2nd November, 2020 at the Trial Court relied on the cases of Lucy Nyakinyi Macharia v Elijah Karanja Muiru & Another (2019) eKLR where the Plaintiff suffered multiple bruises on the face and fracture right tibia 10% permanent incapacity, the Court awarded Kshs. 350,000/=. Additionally, the Respondent relied on the case of Ramadhan Kamora Dhadho V John Kariuki & Another (2017) eKLR where the Plaintiff suffered fracture on the 1/3 fibula bone with soft tissue injuries to the head and face with no indication of permanent incapacity, the Court awarded Kshs. 150,000/=
 45. In the case of Sammy Mugo Kinyanjui & another v Kairo Thuo [2017] eKLR, the Plaintiff had slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs fracture of the right; tibia; fracture of the left tibia and fibula. On appeal, the High Court set aside the trial court's award of Kshs. 1,000,000/- and substituted it with a sum Kshs. 600,000/-.
 46. Additionally, in the case of Pauline Gesare Onami v Samuel Changamure & Another [2017] eKLR, the plaintiff sustained fractures of the tibia and fibula bones of both legs in addition to laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid shaft. Omondi J. (as she then was) upheld an award of Kshs. 600,000/=.
 47. The Court of Appeal in the case of Kenfro Africa Ltd T.A as Meru Express Service, Gathogo Kamini versus A.M Lu'bia & (1987) eKLR 30 stated as follows:-

“An appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case in the first instance.”
 48. In my view taking into account the nature of the injuries suffered by the Appellant and the fact that he was expected to make a full recovery, I find that the award of Kshs. 200,000 as General Damages was appropriate. As such I am not inclined to interfere with quantum.
 49. Finally the award of Special Damages of Kshs. 7,950/= which was proved by receipts and was not challenged at all is upheld.
 50. Therefore this appeal succeeds. I set aside the findings of the lower court and enter judgment on liability at 100% in favour of the Appellant and against the Respondent. The award of Kshs. 200,0000 on General Damages and Kshs. 7,950 Special Damages are both upheld.



51. Finally judgment is entered in favour of the Appellant in the sum of Kshs. 207,950 plus costs of the suit and interest at court rates.

52. Costs of this Appeal are awarded to the Appellant.

DATED IN NYERI THIS 13TH DAY OF MAY, 2024.

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MAUREEN A. ODERO

JUDGE

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