



**Kasendi v Mailu (Civil Appeal E131 of 2023)  
[2024] KEHC 7738 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7738 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL E131 OF 2023**

**M THANDE, J  
JUNE 21, 2024**

**BETWEEN**

**DANIEL DAVID KASENDI ..... APPELLANT**

**AND**

**HENRY SOMBA MAILU ..... RESPONDENT**

*(An Appeal from the Judgment of Hon. Olivia Koranje Resident  
Magistrate delivered on 10.8.23 in Mariakani Civil Suit No. E107 of 2021)*

**JUDGMENT**

1. The Appellant has filed the Appeal herein, challenging the decision of trial court in respect of a suit he instituted against the Respondent, claiming both general and special damages arising from a road traffic accident which occurred on 3.11.2020. In his plaint dated 14.7.21, the Appellant averred that he was driving motor vehicle registration number KBW 237J ZE 5357 from Nairobi to Mombasa when the Respondent or his driver or agent carelessly, negligently and recklessly drove motor vehicle registration number KCW 182 H and while overtaking at high speed caused its body to hit the door of the Appellant's vehicle, while forcing re-entry into his lane. This resulted in the cabin of motor vehicle registration number KBW 237 detaching from ZE 5357 and rolled severally, causing the Appellant severe physical injuries.
2. Following a hearing, the trial Magistrate found that the Appellant had not proved his case against the Respondent. The trial court then proceeded to assess the damages that would have been awarded to the Appellant had liability been proved as follows:

General damages for pain and suffering Kshs 1,800,000/=

Loss of future earning capacity Kshs 500,000/=

Future medical expenses Kshs 360,000/=



Special damages Kshs 46,010/=

Total Kshs 2,706,010/=

The suit was dismissed with costs to the Respondent.

3. The Appellant is aggrieved by the finding on liability and his summarized grounds of appeal are that the trial Magistrate erred in fact and in law in:
  1. finding that the Appellant was solely to blame for the accident which finding is not supported by the available evidence.
  2. Relying on photographs which were not served upon the Appellant and which were not filed or produced during trial.
  3. Finding that the Respondent had produced photos of damaged vehicles as Dexh1 and Dexh2 when the Respondent had only 1 photograph of an undamaged vehicle which was produced as Dexh3
  4. Failing to consider or comment on the manner in which investigations were conducted, yet the Appellant had indicated that he was not involved in the police investigations and was denied a chance to record a statement with the police.
4. I have re-examined the entire record and given due consideration to the submissions by the parties' respective counsel. This being a first appeal, the Court is under a duty to reconsider and re-evaluate the evidence and draw its own conclusion. However the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in *Selle and another v Associated Motor Boat Company Ltd. & others* (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

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 made 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 demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).
5. Directions were given that parties file written submissions. However, only the Appellant complied. I have duly considered the Appellant's submissions together with the authorities cited. The only issue for determination is whether the Appellant was wholly liable for the accident.
6. It is the Appellant's case that he and the Respondent's driver blamed each other for the accident. It was submitted that the Appellant blamed the Respondent's driver for failure to join its lane in time hitting the Appellant's vehicle and causing the cabin to detach and roll, while the Respondent's driver stated that it was the Appellant who joined its lane. There were no eyewitnesses apart from the 2 drivers and the investigating officer did not testify in the trial court. As such, as has been stated in various court decisions, in the absence of clear evidence that one of the drivers was to blame for the accident, liability ought to have been apportioned equally.



7. I have looked at the record. The testimony of the Appellant in the trial court is that the accident took place at Manyani between 8.00-9.00 pm. He stated that the Respondent's driver, while overtaking at high speed knocked the driver's door of Appellant's vehicle. He noted that the police did not record his statement. He rejects the police abstract that blamed him for the accident and stated that he was never charged in court for causing the accident. He further stated that no one else witnessed the accident.
8. Inspector Michael Mbugua testified that the accident was caused by the Appellant who failed to keep to his lane and collided with the Respondent's vehicle which was coming from the direction of Mombasa. He stated that the vehicles collided head-on, on the lane of the vehicle heading towards Nairobi from Mombasa and the Respondent's vehicle "fell" on the left side facing Nairobi. Notably, Inspector Michael Mbugua stated that he was not the investigating officer, he did not witness the accident and did not have the police file or sketch map. He also stated that he did not record the Appellant's statement. He stated that the accident was reported by the motorists who were at the scene of the accident and that officers visited the scene. He however stated that he could not ascertain the damage to the vehicles.
9. In his testimony, DW1 David Musembi Mutiso the driver of the Respondent's vehicle blamed the Appellant for the accident who drove on to his lane and hit his vehicle which "fell down". The Appellant's vehicle was found on DW1's lane and in the abstract, the police blamed the Appellant for the accident. DW1 stated that there was no head-on collision but that his vehicle was hit on the driver's side from the front lights to the door and that the front part of the vehicle was intact. The police gave him an abstract on 6.11.2020 after he recorded his statement. He denied that he was overtaking at high speed.
10. The record shows that the accident took place at around Manyani on the Mombasa-Nairobi Road at night between 8.00-9.00 pm. There were no eye witnesses. The Appellant and the Respondent blame each other for the accident while in the abstract, the police blamed the Appellant which he denies.
11. In such a situation, it would be expected that police investigations would shed light on the matter. In the present case however, the investigation officer did not testify. Inspector Michael Mbugua stated that the Appellant was to blame for the Accident and this was indicated in the police abstract. Notably the abstract was issued after the Respondent recorded his statement. The Appellant who was seriously injured was admitted in hospital for 8 days and the police did not interrogate him or record his statement. This is borne out by the testimony of Inspector Michael Mbugua who stated that he could not confirm if the Appellant recorded a statement. It would appear that to the Court that the conclusion of the police that the Appellant was to blame for the accident was solely based on the statement of DW1, who for obvious reasons, would blame the Appellant.
12. The Court notes that Inspector Michael Mbugua did state that they took statements from officers who visited the scene and a passenger who was in the accident and that he had the police file and occurrence book with him. He however did not produce the said statements as he did not have the police file in court. He did not also have the sketch plan showing the point of collision and position of the vehicles after impact. It is also not lost on the Court that he stated that the vehicles collided head-on. This is contrary to the testimony of both the Appellant and DW1 who stated that the vehicles were hit on the right side.
13. After considering the testimony of Inspector Michael Mbugua the Court cannot help but wonder how this witness who was not even the investigating officer expected to assist in the matter without bringing to Court, the police file containing statements and sketch plan. The Court thus finds that his testimony was not very helpful. More so given that both the Appellant and Respondent blame each other for the accident.



14. It is evident that there are 2 conflicting versions as to how the accident in question occurred. Each party insists that the other is to blame. None was however able to establish the fault of the other to the satisfaction of the Court. The police investigations have not shed any light on the matter. Indeed, in the judgment, the trial Magistrate stated:

The photo taken at night does not indicate where the Plaintiff's vehicle was after the accident. Seeing that the photos were not accompanied by a sketch map or legends and measurements it is difficult to ascertain where the impact was and also difficult to ascertain where all the vehicles landed after the accident.

15. The trial Magistrate went on to state that she could not resolve "all manner of doubt in this case" but proceeded to doubt the Appellant's account of events. She further faulted the police on how they presented their evidence.

16. In spite of the foregoing, it is indeed curious that the trial Magistrate went on to state:

The evidence of both the Defendant's driver and the police officer in terms of how the accident occurred are very clear that the Plaintiff driver was the one who went to the Defendant's lane and caused the accident.

17. The fact of the accident occurring as a result of which the Appellant was injured is not disputed. As to who was responsible for the accident, cannot be determined from the evidence on record. Our courts have held that in a case where liability is not clear, both parties are to bear liability equally. In this regard I am duly guided by the holding in the case of *Hussein Omar Farah v Lento Agencies* [2006] eKLR, where the Court of Appeal stated:

In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. In the case of *Barclay – Steward Limited & another v Waiyaki* [1982-88] 1 KAR 1118, this Court said:-

"The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it."

The Court went on to state:

The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame.

18. My analysis of the evidence on record leads me to conclude that it is not clear who was liable for the accident. Accordingly, I apportion liability to each party equally.

19. The upshot is that the Appeal succeeds. The learned Magistrate's finding on liability is hereby set aside and, in its place, and the Court apportions liability between the parties at 50:50. I also award damages to the Appellant in the sum of Kshs 1,353,005/= made up as follows:

General damages for pain and suffering Kshs 1,800,000/=



Loss of future earning capacity Kshs 500,000/=

Future medical expenses Kshs 360,000/=

Special damages Kshs 46,010/=

Total Kshs 2,706,010/=

Less 50% Kshs 1,353,005/=

Total Kshs 1,353,005/=

The Appellant shall have costs of this Appeal.

**DATED SIGNED AND DELIVERED IN VIA MS TEAMS THIS 21<sup>ST</sup> DAY OF JUNE 2024**

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**M. THANDE**

**JUDGE**

