



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wesonga v Bhudia & another (Civil Appeal E069 of 2022)  
[2024] KEHC 10592 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10592 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E069 OF 2022  
CJ KENDAGOR, J  
JULY 23, 2024**

**BETWEEN**

**CATHERINE ANYIMI WESONGA ..... APPELLANT**

**AND**

**SHANTI RAMJI BHUDIA ..... 1<sup>ST</sup> RESPONDENT**

**RAMAN ENTERPRISES ..... 2<sup>ND</sup> RESPONDENT**

*((Being an Appeal from the Judgment of the Resident Magistrate's Court at Kiambu by the Honourable S.K. Motari delivered on the 25th day of May 2022 in CMCC NO. 474 OF 2020))*

**JUDGMENT**

1. The Appellant filed Civil Suit CMCC 47A of 2020 before the Chief Magistrate's Court at Kiambu seeking damages for injuries sustained when the motor vehicle KAU 675X, in which she was traveling, was involved in an accident with motor vehicle KBY 516Q on 23<sup>rd</sup> September, 2017 along Ruaka - Kahawa West road.
2. The Appellant sued the 1<sup>st</sup> Respondent, the driver of motor vehicle KAU 675X on the date of the accident, and the 2<sup>nd</sup> Respondent, the registered owner of the motor vehicle. The Respondents did not enter an appearance nor file a defence, and the case proceeded through formal proof.
3. In the judgment delivered on 25<sup>th</sup> March, 2022, the trial Court held that the Appellant had not discharged the burden of proof on the issue of liability against the Respondents and dismissed the suit.
4. The Appellant being aggrieved with the decision, preferred this Appeal on the following grounds: -
  - i. That the Honourable Magistrate erred in law and fact by failing to have due regard, take into account and appreciate the substantive issues of law and facts raised by the Appellant during the hearing and in the submissions, authorities and other documents on record.



- ii. That Honourable Court Magistrate erred in law and fact by finding that the Appellant failed to prove her case even after she produced a police abstract in her evidence showing who was to blame for the accident forming the substratum of the lower court's suit.
  - iii. That this Honourable Court Magistrate erred in law and fact by failing to uphold the best interests of the minors while writing and pronouncing her judgment.
  - iv. That in all circumstances of the case, the Honourable Magistrate erred in dismissing the Appellant's reply to Respondent's application.
  - v. That the Honourable Magistrate erred in law and fact by dismissing the Plaintiff's case, which was unchallenged by the Defendants.
5. The Appellant prayed for the following orders: -
- (a) That the Judgment and Order in Kiambu Chief Magistrate's Court No. 474 of 2020; Catherin Anyimi Wesonga Versus Shamji Ramji Bhudia & Raman Enterprises delivered on 25<sup>th</sup> day of March, 2022 be set aside.
  - (b) That the Honourable Court award the Plaintiff the prayers sought in Kiambu Chief Magistrate's Court Case No. 474 of 2020; Catherine Anyimi Wesonga Versus Shamji Ramji Bhudia & Raman Enterprises.
  - (c) Cost of this Appeal be awarded to the Appellant.
6. The Respondents were served but did not participate in the Appeal. The Appeal was canvassed by way of written submissions.

DIVISION -- Analysis and determination:

PARA 7.

Being a first Appeal, this Court is bound to re-evaluate the evidence on record and come up with its own findings.

Justice C.W. Githua in *Suluenta Kennedy Sita & Another Vs. Jeremiah Ruto* (suing as legal representative of the Estate of Joyce Jepkemboi) [2017] Eklr stated as follows: -

“A first appellant court is enjoined to re-evaluate all the evidence adduced before the lower court in order to reach its own independent conclusions but in doing so, it should give due allowance to the fact that it did not have the opportunity of seeing or hearing the witnesses.”

PARA 8.

The Appellant blamed the Respondents for the accident at the formal proof hearing. She adopted her witness statement as her evidence. She stated that on 23<sup>rd</sup> September 2017 at around 1600 hours, she was traveling as a passenger in motor vehicle KAU 675X, which was being driven along Ruaka-Kahawa West road or thereabouts when an accident occurred involving the motor vehicle she was traveling in and motor vehicle KBY 516Q.

PARA 9.

The appellant said that the motor vehicle KBY 516Q was being driven along the road at high speed when it veered off and caused the accident. The Appellant blamed the 1<sup>st</sup> Respondent for speeding, as a result of which he lost control of the said motor vehicle. She accused the 1<sup>st</sup> Respondent of driving carelessly and causing the accident.



PARA 10.

In the submissions before this Court, the Appellant has urged the Court to find that she discharged the burden of proof and invited the Court to hold that the doctrine of res ipsa loquitor was applicable in her favour.

PARA 11.

The issues for determination are as follows: -

SUBPARA (i)

Whether the Appellant discharged the burden of proof that the Respondents were liable for the occurrence of the accident wherein the Appellant was injured.

SUBPARA (ii)

Question of quantum.

**Burden of Proof:**

12. The Appellant testified and produced exhibits in Court in support of her claim against the Respondents. That included the following: -

- 1) Copy of the Police abstract
- 2) Copy of Statutory notice
- 3) Demand letter
- 4) Motor vehicle search of KBY 516Q
- 5) Medical summaries and medical report
- 6) P3 Form.

13. There is proof from the exhibits that an accident occurred on the 23<sup>rd</sup> of September, 2017, and that the Appellant was injured as a result of the accident. The accident involved motor vehicle KAU 675X and motor vehicle KBY 516Q. The Police abstract captures the 1<sup>st</sup> Respondent as the driver of the motor vehicle KBY 516Q on the date of the accident. The copy of motor vehicle search records shows that the car is registered in the name of the 2<sup>nd</sup> Respondent.

14. The trial Court, in the judgment, indicated that the Appellant had not pleaded particulars of negligence against the Respondents in her pleadings. I have read the plaint dated 28th September 2020, and the particulars of negligence have been pleaded in paragraph 5.

“That on or about the 23<sup>rd</sup> September 2017, the plaintiff was lawfully traveling in motor vehicle registration No. KAU 675X along Ruaka-Kahawa West road or thereabout when the defendant or defendant’s driver/agent and /or servant so negligently drove managed and/or controlled the said motor vehicle registration No. KBY 516Q Tata lorry, that he caused and/or permitted the same to cause the accident, thereby causing the Plaintiff serious injuries.

Particulars of negligence of the Defendants, their driver, servant, employee, and/or agent:

- a) Driving at an excessive speed in the circumstances;
- b) Causing or permitting the said motor vehicle registration number KBY 516Q to cause injuries;



- c) Failing to stop, slow down, swerve, or in any way manage or control the said motor vehicle to avoid the accident;
- d) Failing to maintain any or any proper care and control of the said motor vehicle
- e) Causing the accident.
- f) The Plaintiff will rely on the doctrine of res ipsa loquitor.

15. The doctrine of res ipsa loquitor is pleaded in paragraph 5.

16. The Appellant was traveling as a passenger in motor vehicle KAU 675X. In her testimony, she did not explain how the accident happened. The trial Court observed that the circumstances relating to the accident were not explained and that the burden of proof on the issue of liability against the Respondents had not been discharged.

17. Section 107 of the [Evidence Act](#) provides as follows: -

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

18. The police abstract dated 16<sup>th</sup> April, 2017 indicated that the accident was pending investigation. This is contrary to what the Appellant submits: that the accident is attributed to the 1<sup>st</sup> Respondent in the police abstract.

19. The burden of proof lies on the party asserting the truth of an issue in dispute. This burden doesn't change even in formal proof hearings, as the party has to adduce evidence sufficient to sustain the suit. Besides, the rules of evidence and procedure must always be observed.

The entry of interlocutory judgment against the Respondents did not absolve the Appellant from the requisite of proving liability. The Appellant's claim was on negligence and needed to discharge the burden of proof on liability for the claim to succeed. This is as anticipated by Order 10, Rule 9 of the Civil Procedure Rules. It was not enough to merely plead the particulars of negligence. The Appellant particularised the allegations of negligence in the Plaint but did not lead evidence on the same.

20. Can the doctrine of res ipsa loquitor come to the rescue of the Appellant?

Res ipsa loquitor does not fully reverse the burden of proof and does not have a blanket application on all negligence claims. It is not obvious from the evidence before the Court that the Respondents were liable for the accident. The facts of the accident could have been proved through additional evidence.

21. The present case was not a single-vehicle accident, and it is not more probable that one driver other than the other was negligent. The Appellant was traveling in another vehicle; negligence cannot be inferred from the Respondents without proof in the evidence that the other was negligent. Based on the set facts presented, the doctrine of res ipsa loquitor cannot come to the rescue of the Appellant in this case.

22. Whereas this case proceeded through formal proof, the onus of adducing and producing evidence that must satisfy the Court rested on the Appellant. The Appellant treated the matter casually because of the interlocutory judgment entered against the Respondents.



23. The learned magistrate had due regard to issues of law and fact as presented by the appellant. I find no reason to disturb the trial court's finding on liability.

**Quantum:**

24. On quantum, the Appellant submitted that an award of Kshs.200,000/= would be adequate compensation for the injuries outlined as;

- a) Blunt injuries (tender chest anteriorly)
- b) Bruises – both legs

25. As a general principle, assessing damages for personal bodily injuries requires exercising court discretion. Still, the said discretion must be exercised judiciously, considering the facts of each case, particularly the injuries sustained and comparable awards previously made for similar injuries.

26. In assessing damages, the court made reference to two authorities:

FM (Minor suing through Mother and next friend MWM) v JNM & another [2020] eKLR where the appellant sustained blunt object injury to the head, neck, thorax, abdomen, and limbs. The court awarded an award of Kshs.100,000/= for general damages.

Caroline Chepkemoi Chelule v John Kung & another [2022] eKLR: The Appellant sustained soft tissue injuries, including tenderness in the neck, back, and both hands. The High Court assessed general damages at Kshs. 100,000/=.

27. I have read the authorities relied on by the Appellant in the submissions before the lower Court, and I find that the injuries outlined in them are more severe than those outlined by the Appellant. The authorities referred to by the trial Court are more persuasive, and I uphold the assessment of general damages at Kshs.120,000/=. Special damages pleaded and proved were correct to the tune of KES. 5,070/=. Had the appellant successfully proven liability, the damages awarded by the trial court would be in order.

28. This Appeal lacks merit and is dismissed with no order as to costs.

It is so ordered.

**DELIVERED, DATED, AND SIGNED AT NAIROBI ON THIS 23RD DAY OF JULY 2024.**

**C. KENDAGOR**

**JUDGE**

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

In the presence of:

Court Assistant - Ahmed

Advocate for the Appellant – Absent

Advocates for the Respondents – Absent

