



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge v Njeri (Civil Appeal 305 of 2023)
[2024] KEHC 10186 (KLR) (9 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10186 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 305 OF 2023**

**TW OUYA, J
AUGUST 9, 2024**

BETWEEN

SIMON NJOROGE APPELLANT

AND

MARY NJERI RESPONDENT

*(Being an Appeal from the Judgement and Decree of the Honorable
V. A. Ogotu Resident Magistrate delivered on the 8th September
2022 in Thika Small Claims Court Civil Suit No. E086 of 2022)*

JUDGMENT

Background

1. This is an Appeal against the Judgement of the Honorable Resident Magistrate V. A. Ogotu delivered in Thika SCC No. E086 of 2022 on the 8th September, 2022.
2. The suit was initiated by the Respondent in the Lower Court vide statement of claim dated 11th April, 2022 claiming for special damages, general damages, costs of the suit and interest. Upon hearing the case the court awarded:
 - i. Liability 100% in favor of the Respondent
 - ii. General damages Kshs.500,000
 - iii. Costs and interest
3. It is the above decree that gives rise to this Appeal. The Appellant being aggrieved with the above finding of the Lower Court filed a memorandum of appeal citing eight grounds and prays for the Judgement to be set aside.

Grounds:



- i. That the learned trial Magistrate erred in Law and facts by failing to correctly relate the same to the evidence tendered by the Appellants and correctly relate the same to the case law cited in court and thereby failed to arrive at a fair and reasonable assessment on the issue of liability.
- ii. That the learned trial Magistrate erred in law and fact in deciding the case against the weight of the evidence on record and apportioning liability at 100% against the Appellant.
- iii. That the learned trail Magistrate erred in law and fact in by holding the Appellant liable without any proof or evidence of negligence on the part of the Respondent.
- iv. That the learned trial Magistrate erred in law and fact by making an award on liability which was against the weight of the evidence before the court and was without consideration to the submissions of the Appellant.
- v. That the learned trial Magistrate erred in law and fact in failing to appreciate sufficiently or at all the judicial nature of the case that was before her finding the Appellant liable merely because of the occurrence of the accident and the injuries sustained and not on any proved fault or negligence on the part of the Appellant.
- vi. That the learned trial Magistrate erred in law and fact in apportioning liability against the Appellant by failing to take into consideration the documents and exhibits on record that placed culpability on the part of the Third party, who was the owner of Motor vehicle KBV 941A.
- vii. That the learned trial Magistrate erred in law and fact in failing to take cognizance of the fact that the Respondent failed to sue the correct party named in the police Abstract and further the Trial Court erred in this finding that it was the duty of the Appellant to join the correct party to the suit.
- viii. That the learned trial Magistrate erred in law and fact in failing to properly take into account the proper legal principles regarding liability where a motor vehicle is an ambulance in the duty vis-a-viz other road users while considering the judgement awards in cases of similar nature.

Submissions

4. The Appellant contends that the Lower Court erred by apportioning 100% liability against him and failed to take into account the Appellants evidence and submissions on the issue of liability of the Respondent. He demonstrates that the Respondent was responsible for the accident by over speeding and veering off his side of the road to the opposite direction thereby colliding with the Appellant's oncoming vehicle.
5. The Appellant submits that this appeal meets the basis for an appeal interference. He cites authorities for the basis which an appeal court may interfere with the finding of fact by a trial court, one of them being *Selle & Another v Associated Motor Boat Company Ltd & Another* (1968) EA 123 which held:

A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on the wrong principles in reaching the conclusion. The same principle is cited in *Law JA Kneller & Hancox AG JJA IN Mkube v Nyamuro*(1983)Klr
6. The Respondent opposes the Appeal and relies on the evidence adduced in the Lower Court. She argues that the same was not challenged and that the Lower court finding on liability and quantum against the Appellant in her favor should be upheld. She urges the court to take judicial notice of the



fact that court in similar facts and circumstances, entered judgement and awarded damages in favor of the claimants. A case in point is civil claim no. 28 of 2022 at Thika Small Claims Court in favor of Beth Wangari awarded on 21st April, 2022. That the Appellant settled the awards without challenging them.

Issues for Determination

7. I have read and considered the submissions and pleadings by the parties and identified the following issues for determination:
 - i. Whether the Lower Court was justified to award the Respondent 100% liability against the Appellant
 - ii. Who should bear responsibility for having caused and/or contributed to the accident.
8. This being a first appeal, this court is obliged to delve at some length into factual details and revisit the facts as presented in the trial court, analyze the same and arrive at its own independent conclusion, but always remembering that, the trial court had the advantage of seeing the witnesses testify.
9. The subject accident occurred on 12th June 2021 along Ngorongo-Kiriko murrum road. The two vehicles involved in the accident were KCZ 425D belonging to Simon Njoroge (Appellant) who was also the driver on the one hand and, KBV 941A belonging to Gatho Kehenu who was also the driver at the material time. Gatho Kehenu is not a party to this appeal neither was he enjoined the trial.
10. The Respondent, Mary Njeri together with three others namely:

Phrasia Njeri, Regina Gathoni and Beth Wangari, were passengers in KCZ 425D when the accident occurred and were injured. They proceeded and sued the Appellant in the Small Claims Court Thika, judgement was entered and the decretal sums settled. Specifically, Beth Wangari filed Civil Claim No. 28 of 2022 at Thika Small Claims Court and judgement in her favor awarded on 21st April, 2022. The Appellant settled the decretal amount.
11. Phrasier Njeri Muhia and Regina Gathoni alongside the Respondent were witnesses in the Respondent's case in the trial court and testified as CW3, CW4 and CW2 respectively. Both were categorical that KCZ 425D was driven recklessly and was overtaking at high speed when the accident occurred. The police abstract form produced by CW1 in court indicated that the matter was pending under investigation but in cross examination, the witness stated that as per the OB KBV 941A drove into the lane of KCZ 425 D. No one was charged for the Accident.
12. The appellant maintains that the driver of KBV 941A was to blame for the accident for having veered off his side of the road into the right way of the appellants motor vehicle. He also testified as witness RW1 that an oncoming vehicle which he refers to as 'the respondent vehicle', from the opposite direction, which was over speeding drove into the lane of his motor vehicle KCZ 425D thereby causing the accident. Whether or not KBV 941A contributed to or was to blame for the accident is a matter that was not proven in evidence or pursued as a traffic case being that the matter was marked in the police abstract PUI.
13. It is trite law that where it is proven that two motor vehicles are involved in an accident it is only fair that liability is apportioned to both. In the instant case, the Appellant made an effort to get orders for enjoining the third party which orders were granted. It was upon the Appellant to take the next step to bring the third-party on board. This appears not to have been done.



14. In the case of Kenya Commercial Bank vs Suntra Investment Bank Ltd (2015) eKLR, the court stated that;

“In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 rule 15 – 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules.

I have no doubt that the circumstances in the instant case qualified for third-party enjoinder and concur with the Lower Court for allowing the Appellant’s application to enjoin the owner of KBV 941A as third-party. However, it is unfortunate that the Appellant did not pursue his bid and this court cannot correct it.

15. The only legal recourse for the Respondent was to sue the Appellant as the Registered owner of KCZ 425A where she was injured while a lawful passenger. The available legal recourse for the Appellant was to enjoin as a third-party, the owner of KBV 941A so as to secure his indemnity. This he failed to do and cannot therefore blame the Respondent or the trial court.

16. Quantum

The Respondent was awarded Kshs.500,000 as general damages for pain and suffering which this court finds to be reasonable and the same is not contested by the Appellant in this appeal.

Determination

17. The appellant’s main issue is that the Lower Court should have apportioned liability to the owner of KBV 941A whose driver he alleges was negligent and caused the accident and injury to the Respondent and others. He appeals against the Lower Court finding of 100% liability against him. The approach to apportionment of liability is not novel. Our courts have dealt with situations where it was difficult to apportion liability where two vehicles have collided and have apportioned liability equally (see generally Beckley Stewart Ltd and Others v Lewis Kimani Waiyaki [1982-88] 1 KAR 1118, Lakhamshi v. Attorney General [1971] EA 115, Simon v Carlo [1970] EA 284). The same principle was outlined by the Court of Appeal in

Hussein Omar Farah v Lento Agencies CA NAI Civil Appeal 34 of 2005 [2006] eKLR where it observed that:

“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.”

18. Contrary to the above, the Appellant has not only slept on his right by failing to enjoin the third-party but has also not demonstrated any basis for this this court to interfere with the Lower Court finding of 100% liability against him.

19. Findings



- i. The respondent was a lawful passenger in the Appellant's vehicle and was right to sue the Appellant
 - ii. The Respondents claim lies solely against the Appellant and she had no duty to enjoin the third-party
 - iii. The Appellant slept on his rights by failing to enjoin the third-party whom he blames for the accident
 - iv. The Respondent bears no liability and/or contribution for the accident
 - v. The Appellant bears full liability for the accident
20. Disposition
- i. Lower Court Judgement delivered on the 8th September 2022 is upheld.
 - ii. Appeal dismissed
 - iii. Each party to bear their costs

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF AUGUST, 2024

HON. T. W. Ouya

JUDGE

For Appellant Mr. George Gaya

For Respondent Mr. Kelvin Kinyanjui

Court Assistant Martin Korir

