



**Njeri v Chuchu & another (Civil Appeal E045 of 2023)
[2024] KEHC 10877 (KLR) (2 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10877 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E045 OF 2023
BK NJOROGE, J
AUGUST 2, 2024**

BETWEEN

MAUREEN WANGUI NJERI APPELLANT

AND

MARGARET MUTHONI CHUCHU 1ST RESPONDENT

SAMUEL CHUCHU 2ND RESPONDENT

JUDGMENT

1. This is an Appeal against the Judgement of Hon. V. Asiyo (SRM) in Githunguri MCCC No.93 of 2019. The decision was rendered on 23/1/2023. This is a personal injury claim. The Appellant is the unsuccessful Plaintiff in the original Suit. The Respondents are the Defendants.

Background Facts

2. The Appellant sued the Respondents at the Githunguri Law Courts, in respect of a Road Traffic Accident that occurred on 15th February 2018. This was along the Githunguri-Githiga Road near Wanjo Academy. The Appellant blamed the 2nd Respondent as the driver of the motor vehicle KBU 638U. This is for driving too fast and veering off the road, thus crashing into a ditch. The Appellant received serious injuries. A passenger one Joseph Mwai Kamau received fatal injuries and succumbed on his way to the hospital. The Defendants filed a joint defence. They denied any liability. That if the accident occurred, it was due to a latent defect to the vehicle that could not be discovered by a reasonable examination. They also blamed the Appellant for substantially contributing to the accident due to her conduct.
3. At the trial, the Appellant testified and called two witnesses, a Police Officer who produced the Police Abstract. Thereafter an employee of Aga Khan University Hospital's Finance Department who produced the medical expenses records.



4. The 1st Respondent testified and called one witness. The Court Administrator from Githunguri Law Courts who produced the Inquest File NO. 2 of 2019; In the Matter of Joseph Mwai Kamau – Deceased.
5. In its Judgement, the trial Court found that liability had not been proved against the Respondents by the Appellant. That for the 1st Respondent, no vicarious liability was sought against her and hence she could not be held liable for the acts and or omissions of the 2nd Respondent.
6. On quantum, general damages for pain and suffering were assessed at Kshs.1,200,000/-. Special damages were awarded at Kshs.49,550/- as paid to the hospital and Kshs.4,786,954.13/- as invoiced by the hospital.
7. Having failed to prove liability, the Appellant’s Suit was dismissed with costs, which has in turn triggered this Appeal.
8. This matter was flagged down for the Rapid Results Initiative (RRI) for the month of June 2024. Parties agreed to dispose of the same by way of written submissions. The Court has had sight of the Appellant’s submissions dated 15th September 2023 and the authorities cited. Also the Respondents’ submissions dated 19th October, 2023 with authorities. The Court has taken note of the submissions.

Issues for Determination

9. This Appeal rests on a single key question, whether liability was proved?
10. The Court has looked at the Memorandum of Appeal filed which contains 9 grounds. The court frames two issues for determination in this Appeal as follows:
 - a. Whether the Appellant proved liability before the trial Court to the required standards?
 - b. What reliefs lie in this Appeal?

Analysis

11. This is a first Appeal. This Court reminds itself that it has a duty to re-consider, re-analyse and re-evaluate the evidence and draw its own conclusions. All this while, the Court must warn itself that it neither heard nor saw the witnesses and make an allowance for this. See *Selle & another –vs- Associated Motor Boat Co. Ltd & others* (1968) E.A. 123.
12. The Court proceeds to consider the two issues framed in seriatim as follows.

Whether the Appellant proved liability before the trial Court to the required standards.

13. As earlier stated this was a personal injury claim arising out of a traffic accident. The case succeeds or fails on the basis of the pleadings and evidence presented before the trial Court.
14. The duty to prove liability fell upon the Appellant. He who alleges must prove. Section 107(1) of the *Evidence Act* Cap 80 of the Laws of Kenya lays the burden of proof upon the Appellant. As to the standard of proof, the same is on a balance of probabilities.
15. The Appellant was a passenger in the 1st Respondent’s motor vehicle which was being driven by the 2nd Respondent. At the trial she stated that the 2nd Respondent drove the motor vehicle at high speed as he was rushing somewhere. He was at high speed that is why he lost control. He drove at 100km/h. The driver lost control of the motor vehicle and he landed at the ditch. This sums up the averments in the Plaintiff’s witness statement.



16. During cross examination, the Appellant spoke of another vehicle that came from a corner with full lights. It encroached on to the 2nd Respondent's Lane. It was a big motor vehicle with full lights on. The 2nd Respondent swerved off the road to avoid a collision. That the road was narrow and on the verge there is a ditch. That the swerving is what led the motor vehicle to enter into the ditch, leading to the injuries sustained by the Appellant.
17. The Appellant further confirmed that she participated in the inquest. No one saw the number plates of the other vehicle and it did not stop.
18. The Plaintiff Witness No. 2 Police Corporal Jackson Samwegi produced the Police Abstract as Plaintiff's Exhibit No. 2. After the initial investigations the Traffic file was forwarded to the Office of the Director of Public Prosecution (ODPP) office for recommendations. The recommended action was that an inquest file be opened at Githunguri Law Courts. That such a file was opened. The inquest was heard. There was no recommendation that the 2nd Respondent be charged.
19. The Inquest File No. 2 of 2019 was produced as Plaintiff's Exhibit No. 1. In the ruling by Honourable B. Oloo (SPM), he ruled out foul play on the part of the driver of the motor vehicle the deceased was travelling in. This happens to be the 2nd Respondent. The Honourable Magistrate noted that the vehicle that would have been blamed is unknown as at the date of that Ruling. The Inquest File was closed and the family of the deceased directed to pursue a remedy from the insurers of the 1st Respondent.
20. The Court has perused the testimony on oath of the Appellant during the Inquest, where she testified as Inquest Witness No. 3. She blamed a lorry that came from the opposite directions with full lights on. That this lorry crossed its lane to that one occupied by motor vehicle KBU 638U. The driver of motor vehicle KBU 638U swerved and landed into a ditch.
21. The Court has analyzed this evidence and is unable to apportion any blame upon the 2nd Respondent. Had he not swerved to the left, a head on collision was imminent. The unknown lorry had crossed over on to his lane. To this Court, the action he took was a reasonable evasive action in the circumstances, though it landed his motor vehicle into a ditch. From the evidence presented before the Court, it is apparent that the cause of the accident was the lorry that crossed its lane. It did not stop and its details remain unknown. So, should the Respondent's bear the responsibility for the accident?
22. There can be no liability without fault in the Kenyan legal system, as far as it relates to personal injuries arising out of running down claims. See *Kiema Mutuku v Kenya Cargo Handling Services Ltd* (1991) 2 KAR 258, a Plaintiff must prove some negligence against the Defendant where the claim is based on negligence. To this Court the Appellant did not prove that the 2nd Respondent was the cause of the accident. He was a victim of the unknown lorry in the same manner as the Appellant.
23. The Appellant did not plead any vicarious liability against the 1st Respondent. The trial Court found that failure to plead means no liability will attach. The decision in *Vyas Industries v Diocese of Meru* [1976] eKLR states otherwise. Had the Appellant been able to prove negligence with regard to the manner in which a vehicle is driven, the owner of such a vehicle would be held liable.
24. The Appellant argues that the trial Court relied heavily on the Inquest file. This Court notes that the Inquest File No. 2 was produced before the Court as an exhibit. The Appellant confirmed that she testified on oath during the inquest. Her evidence during cross examination mirrors what she testified during the inquest. The Ruling on the Inquest may not be binding on the trial Court. It is however persuasive, in absence of any other evidence to counter it.



25. The upshot is that this Court is not persuaded that liability was proved to the required standard. The Respondents ably disapproved that they were liable in negligence.

What Relief's lie in this Appeal?

26. The Appeal fails for failure to prove liability. There is no challenge on the issue of the quantum as assessed by the trial Court. The Court notes that the award is comparable to the current awards.

Determination

27. The Appeal is hereby dismissed with costs to the Respondents.

28. It is so ordered.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
2ND DAY OF AUGUST, 2024.**

NJOROGE BENJAMIN K.

JUDGE

In the presence of:

No appearance for the Appellant

Mr. Ngechu for the Respondent

Court Assistant: Luyai

