



REPUBLIC OF KENYA



KENYA LAW
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**Wang'ombe v Macharia (Civil Appeal E007 of 2022)
[2024] KEHC 9847 (KLR) (6 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9847 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E007 OF 2022
S MBUNGI, J
AUGUST 6, 2024**

BETWEEN

JOHN GAHU WANG'OMBE APPELLANT

AND

JOHN MWANGI MACHARIA RESPONDENT

(Being an appeal from Judgment of Honourable M.N Munyendo (Principal Magistrate) delivered on 7th, January, 2022 in the Principal Magistrate Court Othaya)

JUDGMENT

Introduction

1. This appeal arises from the judgment of Hon. M.N Munyendo (PM) delivered on 7th January, 2022 in Othaya Principal Magistrate's Court.
2. The appellant having been dissatisfied with the judgment filed an appeal seeking the following orders: -
 - a. That the judgment on liability of the suit of the subordinate court in Othaya PMCC No. 44 of 2019 be set aside.
 - b. That the judgment on liability be assessed a fresh.
 - c. That the costs of the suit of the subordinate court in Othaya PMCC No. 44 of 2019 be awarded to the Plaintiff/Appellant.
 - d. That the appeal be allowed with costs to the Appellant both in lower court and on appeal.
3. The Appellants six (6) grounds as stated in the Memorandum of Appeal dated 3rd February, 2022 are as follows: -



- i. That the learned Magistrate erred in law and in fact in finding the rider of the motor cycle 50% and the motor vehicle driver 50% liable for the occurrence of the accident without any basis in law or fact.
 - ii. 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 rider of the motor cycle 50% and the motor vehicle driver 50% liable for the accident.
 - iii. 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.
 - iv. 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 rider of the motor cycle 50% and the motor vehicle driver 50% liable for the accident.
 - v. That the learned Magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.
 - vi. That the learned Magistrate erred in fact and in law in failing to award costs of the suit to the Plaintiff.
4. The court directed the parties to file their written submissions. Both parties complied.
5. The appellant addressed the following issues in his submissions: -
Issues For Determination
 - a. Whether the learned Magistrate erred in law and in fact in finding the rider of the motor cycle 50% and the motor vehicle driver 50% liable for the occurrence of the accident without any basis in law or fact.
 - b. Whether 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 rider of the motor cycle 50% and the motor vehicle driver 50% liable for the accident.
 - c. Whether 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.
 - d. Whether the learned Magistrate erred in law and in fact by not taking into account the Appellant's submissions on liability, thereby erroneously finding the rider of the motor cycle 50% and the motor vehicle driver 50% liable for the accident.
 - e. Whether the learned Magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.
 - f. Whether the learned Magistrate erred in fact and in law in failing to award costs of the suit to the Plaintiff.
6. The court directed that the appeal be disposed off by way of written submissions. The appellant filed, the respondent did not file.



The Appellants Case As Per Submissions

7. The Appellant submitted that the 1st and 2nd Defendants were the registered owners and /or beneficial owners and /or insured and/or owners in possession of motor vehicle registration No. KCG 023 K which was lawfully being driven by the 1st Defendant himself on his own behalf and/or as the 2nd Defendant's employee, servant, agent and/or authorized driver in the course of employment.
8. The Appellant submits that he was lawfully travelling as a pillion passenger on motor cycle registration No. KMEK 080V along Othaya – Nyeri road, when the 1st Defendant carelessly and negligently driver, managed and/or controlled motor vehicle registration no. KCG 023 K that caused and/or permitted same to violently collide onto motor cycle registration number KMEK 080V in consequence whereof he sustained severe personal injuries.
9. After the hearing of the case of the trial court apportioned liability equally.
10. The trail court further ordered each party to bear its own costs.
11. Basically, the appeal is against the lower court's judgment on liability and costs. Therefore, these are the only two issues for determination

Determination

1. Being a first appeal, the court relies on a number of Principles as set out in *Selle and another vs. Associated Motor Boat Company Ltd & others* (1968) 1 EA 123: "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 witness and should make 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 into account particular circumstances or probabilities materially to estimate the evidence."
12. I have looked at the pleadings, the evidence and the submissions filed by the appellant
13. In the lower court the Appellant and the 1st respondent testified as follows: -
14. The Appellant adopted his witness statement as his evidence in chief. at page 14020 the Appellant narrated how the accident occurred as follows: -

“On reaching near Gachatha factory a motor vehicle registration number KCG 023K which was also travelling towards the general directions of Gacatha at a very high speed the driver of motor vehicle KCG 023K started overtaking and suddenly cut into the path of the motor cycle registration number KMEK o80 v because there was an oncoming motor vehicle from the opposite direction. The driver of motor vehicle KCG 023k applied brakes and swerved but since motor vehicle KCG 023 was being driven at a high speed the driver of motor vehicle violently collided on to motor cycle KMEK 080V. the driver of motor vehicle KCG 023k wanted to drive away but was stopped by the public and was ordered to take us to hospital.



Respondent Case

15. At page 24 of the record of appeal is the 1st Respondents witness statement which was admitted as evidence in chief. At paragraph 19 to 22 the 1st Respondent stated as follows;

“I was driving on my rightful lane at a speed of about 20 km/h because the road was dilapidated and has many potholes hence I couldn’t speed. When I got near Gacatha Centre, one of my passengers told me to stop and when we stopped we noticed that there was a motor cycle which was lying on the ground”

16. I have looked at the witness statement of the 1st Respondent, in his statement denied any knowledge of the accident and further denied that he was charged with the offence of careless driving. At page 81 paragraph 21 of the records of appeal the respondent on cross examination stated, “I did not see the motor cycle. There was no motor cycle. I found the people on board the motor cycle were injured and decided to assist.”

17. The trial court at paragraph 91-94 of the judgment at page 20 stated as follows; _

“I am faced with two contradicting theories by the plaintiff and DW1 how the accident occurred and who should be blamed for the accident. The Plaintiff details that the 1st defendant dangerously overtook a bridge and cut into the lane of the rider causing the collision. The 1st defendant says he did not see the motor cycle; he was only alerted by a passenger on board his motor vehicle that there was a bang at the back of the motor vehicle. He confirms that there was a dent at the bank of his motor vehicle. In my view this confirms that he (the 1st defendant) was involved in an accident on the material night”.

18. At paragraph 16 of page 92 of the record of appeal, the honorable court indicated as follow: -

“similarly, I cannot entirely believe in the defence theory as the 1st defendant blew hot and cold during trial. Admitting there was a collision that led to a dent on the back of his car and at the same time totally denying that he was involved in an accident. I am left at a cross – road.”

19. From the above, the trial court clearly stated that it doubted the evidence of the 1st Respondent for at time he denied that he was involved in the accident and again at other times he admitted he Was. Therefore the 1st Respondents’ evidence cannot be relied on. He is not a credible witness.

20. At pate 77 of the record of appeal the Honorable court at paragraph 2 has the testimony of the investigating officer who testified as follows: -

“The accident occurred at Thiriki river bridge along Othaya- Nyeri road it involved a motor cycle KMEK O80V make tiger ridden by Stephen Murunga Kinoti and the driver of motor cycle KCG 023 K Toyota fielder driven by john Mwangi Macharia. Both were being driven from Nyeri to Othaya direction. The river was being trailed by the driver of motor vehicle. At the bridge the driver of motor vehicle overtook the motor cycle in the process there was an-coming vehicle being driven towards Nyeri. It forced the driver of the motor vehicle to cut into his lane of the motor cycle in the process the rear left part of the motor cycle crushed right hand of motor vehicle where the rider and his three-pillion passenger John Ngahu, Alice Kirigi and a child Esther Wamucii Ngao...”



21. At paragraph 20 of 77 of the proceedings, the investigating officer further testified as follows: -

“We found the driver overtook improperly at a bridge where there is a corner. The driver of motor vehicle was blamed and charged in court, he was later acquitted as the rider of motor cycle was not traced.
22. The moment the trial court doubted the evidence of the 1st respondent in absence of any other independent evidence the court had no basis of relying on such evidence to arrive to its decision as how the accident occurred.
23. The court was only left with evidence of the appellant and the investigating officer.
24. I have looked at the evidence of the investigating officer which I have produced elsewhere in this judgment, the evidence corroborates the evidence of the appellant as to how the accident occurred.
25. The 1st Respondent though at first denied that the accident occurred, the dent at the back of the motor vehicle it shows that the accident actually occurred. The investigating officer also confirmed the occurrence.
26. I have re-evaluated the evidence of the Appellant and the investigating officer and the contradicting evidence of the 1st respondent. I am convinced that the 1st respondent was to wholly blame for causing the accident. I therefore set aside the finding of the trial court that the appellant and the 1st respondent were equally to blame and substitute it with a finding that the 1st respondent was to blame 100%.
27. On the issue of costs, the trial court stated, “albert costs follow the event they are in the discretion of the court. In this case, considering all circumstances of the case, I order that each party bear their own costs.”
28. Section 27 of the Civil Procedure Act provides that,

“Provided that the costs of any action, cause or other matter issue shall follows the event unless the court of judge shall for good reason otherwise order.”
29. It appears that the trial court ordered the parties to bear their own costs because it had found that parties were equally to blame for causing the accident. Since I have found that the 1st respondent wholly to blame for causing the accident, I order that the respondents to bear the costs of the appeal and also the costs at the lower court.
30. The appeal succeeds. Right of appeal within 30 days.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF AUGUST, 2024 IN KAKAMEGA HIGH COURT.

HON MR. JUSTICE S. MBUNGI

JUDGE OF THE HIGH COURT.

In the presence of;

The Appellant/Advocate- Absent

1st Respondent/Advocate- Absent

2nd Respondent/Advocate- Absent

Court assistant -Absent

