



**Kiwariru Sacco & another v Onyweri (Civil Appeal E240 of 2023)
[2024] KEHC 11788 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11788 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E240 OF 2023
TW OUYA, J
SEPTEMBER 23, 2024**

BETWEEN

KIWARIRU SACCO 1ST APPELLANT

ZABLON KARIUKI NJUGUNA 2ND APPELLANT

AND

CHRISTOPHER ODHIAMBO ONYWERI RESPONDENT

*(Being an Appeal from the part of the Judgement of the Honourable Magistrate
S.K. Motari Resident Magistrate (RM) delivered on 16th June 2023)*

JUDGMENT

Background

1. This Appeal was lodged by the Appellant pursuant to the judgement delivered by Hon. S.K Motari in Kiambu CMCC E240 of 2023. The Appeal is against the entire judgement that was delivered on 16th October 2023. The Respondent had filed a plaint dated 24th February 2020 seeking general and special damages for injuries arising from a road traffic accident which occurred on 2nd October 2019 along the northern bypass at Githongo area. The accident involved the plaintiff/Respondent, a pedestrian and MV registration KBU 843X belonging to the Respondent. The motor vehicle lost control and veered off the road thereby resulting into the accident as a result of which the Respondent sustained severe injuries which were tabulated in the plaint.
2. The matter proceeded to a full hearing and the magistrate found in favor of the plaintiff /Respondent awarding:
 - a. Liability 100%
 - b. General Damages Kshs 700,000



- c. Special Damages Kshs 18,720
 - d. The plaintiff shall also have cost of this suit and interest at court rates.
3. Grounds of Appeal
- i. That the Learned Magistrate erred in law and fact when he failed to consider the Appellant's evidence on points of law and facts on finding the Appellants fully liable for the accident which is the subject matter of this suit.
 - ii. That the Learned Trial Magistrate misdirected himself and erred both in law and in fact in failing to consider the Appellant's overwhelming evidence on record and hence arrived at an erroneous finding on liability.
 - iii. That the learned trial magistrate erred in law and in fact in finding that the Defendants were liable at 100%.
 - iv. That the learned trial magistrate erred in law and in fact in holding that the Defendant were vicariously liable without vicarious liability having been pleaded in the plaint or even proven by evidence.
 - v. That the learned trial magistrate erred in law and fact finding that the Respondent failed to prove liability on the part of the Appellant.
 - vi. That the learned trial magistrate erred in law and fact misdirected himself in holding that the Appellants have not proved their case on a balance of probability as required by law but nevertheless proceeded to apportion 100% liability in favor of the Appellant and entered Judgement accordingly when there was no evidence on record to warrant such apportionment.
 - vii. That the learned trial magistrate erred in law and in fact in giving a lot of reliance to the Respondent's submissions in the matter the accident might have happened which submissions dwelt on presumptions as opposed to evidence and facts on record.
 - viii. That the learned trial magistrate erred in law and in disregarding the Appellant's submissions in liability and the applicable laws thereby arriving into wrong decision and judgment.
 - ix. That the learned trial magistrate proceeded on wrong principles when assessing the liability. (To apply precepts and tenets of law applicable).
 - x. That the learned trial magistrate erred in law and in fact in arriving at his said decision.
 - xi. That the learned trial magistrate erred in law and in fact in failing to consider conventional awards in case of similar nature.
 - xii. That the learned trial magistrate erred in law by totally failing to consider submissions filed by the Appellants advocates and authorities cited therein.
4. The Appellant prays for orders:
- a. That this Appeal be allowed
 - b. That the Judgement of the Honourable Senior Magistrate S. K. Motari Resident Magistrate (RM) on liability be set aside the same be assessed afresh.
 - c. That the costs of this Appeal and that of the trial court be awarded to the Appellant.
 - d. That such further orders may be made by this Honourable court may deem fit to grant.



5. From the grounds of Appeal, the Appellant raises issues which can be summarized as:
 - a. Liability
 - b. Quantum
6. Considering that the appellant has not made any submissions, the court is left with the option of considering the evidence before the trial court visa vis the submissions by the Respondent.
7. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. Whereas, it is well trodden that the same is on a balance of probabilities meaning that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. See Court of Appeal decision in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR. Hence, the duty of proving the averments contained in the plaint lay squarely on the Appellant vice versa with respect to the averments contained in the Respondent's statement of defence. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)
8. Further, this Court has repeatedly observed that the mere occurrence, of an accident, without more, cannot be proof of negligence. As the Court of Appeal stated in *Eastern Produce (K) Ltd V. Christopher Atiado Osiro* [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant. The Court in that case cited the famous decision of *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing stated that:
9. At the hearing of this matter, the plaintiff testified that he did not contribute to the occurrence of the accident as the subject vehicle hit him while he was on the right side of the road waiting to cross the road. He adopted his witness statement that he was a pedestrian awaiting to cross the Githongoro Road when motor vehicle registration No. KBU 843X that was being driven recklessly and/or carelessly without due regard to other road users veered off the road and hit him. The Police Abstract dated 16/12/2019 (P. Exh – 3) indicates an accident occurred on 2/10/2019 involving pedestrian and the subject motor vehicle belonging to Kiwaliru Sacco (1st Defendant herein) and driven by David Monjo Ngatho. The plaintiff herein is listed as person who was injured due to the accident. The result of investigation as per the said Police Abstract is that the matter was referred to insurance and KBU 843X was blamed. Zablon Kariuki Njuguna is listed as the registered owner of motor vehicle registration No KBU 843X.
10. The Defendants failed to call any witness or produce any document to controvert the plaintiff's evidence on liability and to prove the defence of contributory negligence. The testimony of the plaintiff witnesses on liability is thus un rebutted.



11. I find that the plaintiff has discharged his burden of proof on the issue of liability on balance of probability against the Defendants/. Thus the 1st and 2nd Defendants are held 100% liable for the accident.
12. The respondent has submitted that the court must have a basis for interfering with a lower court finding and cited the case of Butt vs Khan where the court held that:

“An appellate Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that judge/magistrate proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”
13. This court has evaluated the evidence adduced before the trial court and noted that the respondent discharged his duty of the burden of proof under sections 107 and 108 of the Evidence Act and adduced oral evidence in court and produced relevant documents.
14. The appellant on the other hand failed to call any witness or produce any document to controvert the plaintiff’s evidence on liability or to prove the defence of contributory negligence. The testimony of the plaintiff witnesses on liability is thus unrebutted.
15. The respondent proved liability against the appellant beyond a balance of probability and thus the court found the appellants 100% liable.
16. On quantum, the respondent adduced medical evidence in support of the injuries sustained and the court was satisfied and awarded the general and special damages as was prayed.
17. On the issue of special damages, reference is made to the case cited above where Kneller, Nyarangi and Chesoni stated:

“Special damages must not only be specifically claimed but also strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
18. From the foregoing, the Appellant has not demonstrated any ground or legal basis for this court to interfere with the lower court findings and this court is persuaded by the Respondents submission to uphold the lower court findings and to dismiss the appeal in its entirety.

Determination

- i. This appeal is hereby dismissed
- ii. The lower court Judgment/ Decree delivered in CMCC E240 of 2023 on 16th June 2023 is hereby upheld
- iii. Cost of this appeal is awarded to the Respondent

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF SEPTEMBER, 2024.

ROA 14 days.

HON. T. W. OUYA

JUDGE



For Appellant Kabita
For Respondent Ms Gathoni
Court Assistant Martin Korir

