Muthusi v Wanjiku & another (Civil Case E201 of 2021)
[2024] KEHC 10686 (KLR) (16 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10686 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL CASE E201 OF 2021

FR OLEL, J

SEPTEMBER 16, 2024

BETWEEN

MICHAEL MUTUKU MUTHUSI ..... APPELLANT

AND

MURIMI RAHAB WANJIKU ..... 1ST RESPONDENT

MARY NYAMBIRA ..... 2ND RESPONDENT

(Being an appeal from the judgment of the Honourable D. Orimba, Senior Principal Magistrate delivered on 15th March 2021 in Kangundo CMCC No.233 of 2018)

JUDGMENT

A. Introduction

1. The Appellant in this case was the Plaintiff before the Trial Court where he had sued the respondents for general damages, special damages, costs and interest at court rates. The cause of action is said to have arisen on 13.01.2018 when the Appellant alleged that he was lawfully traveling as a paying passenger aboard motor vehicle registration number KCH 704V Toyota Senta (hereinafter referred to as the suit motor vehicle) that the same was negligently, carelessly and recklessly managed by the 2nd Respondent who is an agent of the 1st Respondent, and he allowed the said suit motor vehicle to lost control, veered of the road and overturned causing him to sustain severe bodily injuries, loss and damage.

2. The Respondent upon service, jointly filed a statement of defence on 16.04.2019 wherein they denied the all the contents of the plaint and alleged that if indeed an accident did occur, then it was caused solely by the negligence of the Appellant, and particularized the same. The respondent's urged the court to dismiss the appellants claim with costs.

B. Evidence at Trial

3. The Appellant and the Respondents all called one witness each.PW}}1 Michael Mutuku Muthusi, the appellant adopted his witness statement and further stated that on 29.07.2019, he was on board the suit motor vehicle as a passenger and the same was recklessly driven by the 2nd Respondent, that he failed to control the said suit motor vehicle and as a result it veered off the road and overturned resulting in him sustain severe bodily injuries including; ; fracture of the right distal radius and ulna, bruises and lacerations on the scalp, recurrent headaches, pain on the right wrist, inability to perform heavy duties, distal radius and ulna were tender on palpation and movements.

4. After the accident, he was taken to Mwala Hospital but they could not treat him and was taken to private hospital in Matuu before being further referred to Kangundo sub county Hospital where he was treated and discharged. The accident was reported to the police on the same day and he blamed the driver of the suit motor vehicle for being reckless and causing the accident.PW1 produced his claim supporting documents and prayed to be compensated for the injuries sustained.

5. Upon cross examination, he stated that they were three passengers in the suit motor vehicle; Mary Nyambura, the driver, Robinson Kioko and himself. As a result of the said accident, the said Mary Nyambura had died but he had not sue the representatives of her estate. He further testified that the treatment notes which he produced before court were as Exhibit 5 were dated 08.02.2018 and did not have the treatment notes to show that he was treated on the accident date 13.01.2018. His injuries were classified as harm. The police abstract had indicated that the late Mary Nyambura as the owner of the suit motor vehicle, the accident was pending under investigation. PW1 further confirmed that he sued the 1st respondent because her name is on the copy of records. In Re-examination the appellant did state that the registration Number suit motor vehicle in question was not KCH 406V as indicated in his witness statement, as the motor vehicle involved in the said accident was Toyota Sienta KCH 704V. Further his treatment notes from Yatta Health centre indicated the accident occurred on 13.01.2018 and he had been treated on the same day.

6. DW1, Murimi Rahab Wanjiku (the 1st respondent herein) stated that she was not the registered owner of the suit motor vehicle as at 13.01.2018, when the said accident occurred. The suit motor vehicle was registered in the name of Mary Nyambura Ngaruiya, her late aunty, who had purchased the said suit motor vehicle from Resma Motors, Nakuru and when she was was unable to fully pay off the purchase price, she had lent her Kshs.300,000/= to enable her settle the said debt. To secure her interest and ensure she was refunded her money, they had agreed to transfer the suit motor vehicle to her name to hold as security and that is why her name was registered as the owner thereof, but immediately her Aunty paid her back her money, she transferred the suit motor vehicle back to her in December 2017. It was her further evidence that she knew nothing anything about the accident, was not in possession of the suit motor vehicle as at the time of the accident, and was not the legal representative of the estate of the late Mary Nyambura.Upon cross examination, she stated that she transferred cash directly to Rasma Motors from her account and that the sale agreement was between Rasma motors and her late Aunty Mary Nyambura. She was not the owner of the suit motor vehicle nor had she control of the said motor vehicle.

7. The Trial court after hearing the parties found that the Appellant had not on a balance of probability proved his case to the required standard and proceeded to dismissed the suit with costs to the defendant.

C. The Appeal

8. Being dissatisfied and aggrieved by this judgment, the appellant filed his memorandum of appeal dated 14.11.2021 and raised the following grounds of Appeal;

    a. The learned Trial Magistrate erred in law and in fact by finding that the Appellant had failed to prove his case on a balance of probability.

    b. The learned Trial Magistrate erred in law and in fact by failing to assess the quantum of damages awardable.

    c. The learned Trial Magistrate erred in law and in fact by dismissing the Appellants suit in its entirety and against the weight of the evidence adduced at the trial.

    d. The learned Trial Magistrate erred in law and in fact by misdirecting himself and wrongly exercising his discretion of the evidence tabled before him.

    e. The learned Trial Magistrate erred in law and in fact by considering irrelevant factors not before the court.

9. The Appellant sought to have the judgment of the trial court set aside and be substituted with an order allowing the Appellants case and he be awarded damages. The appellant also prayed for costs of the Appeal.The Appeal was canvassed by way of written submissions.

D. Parties Submissions

(i) The Appellant's Submissions

10. The Appellant submitted that the Appellant did prove that he was aboard the suit motor vehicle and they were involved in an accident on 13th January 2018, as a result of which he had sustained serious bodily injuries and the suit motor vehicle driver Mary Nyambura had died. The 1st respondent on the other had denied ownership of the suit motor vehicle and testified that she had only lent her Aunty Mary Nyambura Kshs.300,000/= to pay off part of the purchase price and her name was placed in the logbook to secure her interest. After her Aunty had paid her back her money, the suit motor vehicle had been transferred back to her. She had no document to substantiate the loan Agreement between her and her Aunty and it was to be noted that they had produced a copy of motor vehicle records showing that the suit motor vehicle was registered under the 1st respondent's name.

11. The Appellant further submitted that the trial magistrate had erred in relying on the sale agreement dated 6th October 2016 (Exhibit D1) produced by the 1st respondent to show that the deceased Mary Nyambura had bought the suit motor vehicle, as this agreement had been superseded by the copy of records showing that as at the date of the accident, it was the 1st respondent who was the registered owner of the said motor vehicle. The second logbook produced into evidence by the 1st respondent too was of no help as it showed that the suit motor vehicle had been retransferred back to the deceased on 23.04.2018, by which time she had died and was not capable of re transferring the suit motor vehicle back to herself.

12. The 1st respondent further did not prove that indeed she had given her aunty a loan, for which the logbook would act as security and the trial courts finding on this aspect was contrary to the evidence presented and had to be corrected. Reliance was placed on *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 , *Rose Makombo Masanju v Night Flora alias Nightie Flora & Another*

[2016] Civil Appeal No 2 of 2015 & *Mary Njeri Murigi v Peter Macharia & Another* [2016] Civil case No 318 of 2012.

13. Regarding damages suffered, the appellant had proved that as a result of the said accident, he had suffered a fractured right distal radius and right ulna, bruises and lacerations on the scalp, had recurrent headaches and pain on the wrist. For these injuries, the appellant urged the court to find that an award of Kshs.1,000,000/= would be adequate compensation. Reliance was placed on *Kirui Tea Factory & Another v Peterson Watheka Wanjohi* [2008] Civil Appeal No 1045 of 2004, *Kweri Peter & 2 others v Ann Wanjiku Maina* [2017] eklr, Civil Appeal 95 of 2015, *Francis Nzivo Munguti & Another v Jotham Wanyonyi Nakasana & Another* [2020]Eklr, Civil Appeal No 74 of 2016 & *Joseph Njuguna Gachie v Jacinta Kavuu Kyengo* [2019] eklr Civil Appeal No 31 of 2017, where awards were given in the range of Kshs.600,000/= to Kshs.1,000,000/=.

14. The Appellant also urged this court to award him special damages of Kshs.3,930/= which was proved.

(ii) The Respondent's Submissions

15. The 1st Respondent filed submissions on 01.02.2024 and submitted that during the trial, the Appellant had admitted that he knew that the suit motor vehicle belonged to Mary Nyambura (Deceased) and he had not sued her estate and thus the suit itself is a nullity. The court could therefore not be faulted for exercising its discretion diligently and for following the correct principle's in determining the issue of liability. Reliance was placed on the case of *Re H and others (Minors)*[1996] AC563, *Viktar Maina Ngunjiru & 4 others v Attorney General & 6 others* [2018] e KLR and *Nancy Ayiemba Ngaira va Abdi Ali* [2010] eklr.

16. The respondent further submitted that certificate of search procured from the registrar of motor vehicle too was not final proof that the sole owner is the person whose name is shown therein. Section B of the *Traffic Act* was fully cognizant of the fact that a different person maybe the defacto owner of the said motor vehicle. Judicial practise, and concepts had arisen to describe such alternative forms of ownership as beneficial ownership or possessory ownership and allowed evidence to be led to prove the same. Reliance was placed in the case of *Nancy Ayiemba Ngaira v Abdi Ali* C.A No 107/2008 [2010] eKLR . The appellant had failed to lead cogent evidence to prove liability as against the 1st respondent and she prayed that this suit be dismissed with costs.

D. Analysis And Determination

17. This court has considered the grounds raised in the Memorandum of Appeal, the Trial Court record and the submissions that have been filed and finds the following as the issues for determination;

    a. Whether the Appellant proved his case on a balance of probability?

    b. And if yes, Whether the Appellant is entitled to be awarded damages?

    c. Who should be awarded costs of the Appeal

18. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision made was well-founded. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 witnesses and should make due allowance in this respect..."

19. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties shall a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko v Varkey Ouseph* AIR 1969 Keral 316.

i. Burden of Proof

20. Section 107(1) of the *Evidence Act* provides that;

> " 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."
>
> Section 108 of the *Evidence Act* further provides that ;
>
> "The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side."

21. In the case of *Evans Nyakwana v Cleophas Rwana ongaro* [2015] eKLR it was held that

> " As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of section 107(i) of the *Evidence Act*, Chapter 80 laws of Kenya. Furthermore, the evidential burden..... is cast upon any party, the burden of proving any particular fact which he desired the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person..... The appellant discharged that burden and as section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

22. Analysis of the evidence adduced did prove that an accident occurred on 13.01.2018 at Mbuni involving the suit motor vehicle and as a result the suit motor vehicle driver – Mary Nyambura passed on and the appellant and other passengers therein were injured. The appellant produced treatment notes and the doctors report to prove his injuries; which included fracture of the right-hand distal radius and ulna, and soft tissue injuries all over the body. As regards ownership of the suit motor vehicle, the appellant produced the copy of records to show that it belonged to the 1st respondent, though the police abstract indicated that it was owned by the deceased Mary Nyambura. On a balance of probability, the appellant therefore did prove his case and the evidential burden shifted upon the 1st respondent to prove that she did not own the suit motor vehicle and/or was not vicariously liable for the accident which occurred.

23. The 1st respondent on her part testified and stated that the deceased driver Mary Nyambura was her Aunty and she was the owner of the suit motor vehicle. The said Mary Nyambura had bought the suit motor vehicle from Resma Motors in 2016 and later had difficulty in settling the purchase price. She therefore lent her Kshs.300,000/= and had the motor vehicle registered under her name to secure the money lent. By December 2017, her Aunty had cleared the loan and signed off the transfer back in her favour. She denied that the deceased was her servant, agent or driver and therefore she was not vicariously liable for the accident.

24. Ownership of a motor vehicle can be proved by certificate of ownership but that is not final proof that the person registered thereon is the defacto owner of the said motor vehicle. Evidence can be led to prove otherwise. See the case of *Nancy Ayiemba Ngaira v Abdi Ali* C.A No 107 of 2008 [2010] eKLR, where Justice J.B Ojwang (as he was then) stated that;

> " There is no doubt that registration certificate obtained from the registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the *traffic Act* is fully cognizant of the fact that a different person or different other persons, maybe the defacto owners of the motor vehicle- and so the Act has an opening for any evidence in proof of such different ownership to be given. And in judicial practise, concepts have arisen to describe such alternative forms of ownership; actual ownership, beneficial ownership, possessory ownership. A person who enjoys any of such other categories of ownership, may for the practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it has bene pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the police abstract, showed on a balance of probabilities, that the 1st defendant was one of the owners of the matatu in question."

25. The court of Appeal also in the case of *Jared Magwaro Bundi & Another v Primarose Flowers limited* [2018] eklr , held that;

> " It was therefore held in Muhambi Koja (*supra*) that section 8 of the *Traffic Act* recognizes registration book or the registrar's extract of the record as prima facie evidence of title to a vehicle and the persons in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered to a de facto owner, a beneficial owner or a possessory owner. Such a owner though not registered for the practical purpose maybe more relevant than in whose name the vehicle is registered."
>
> The position taken by this court in Joel Muga opija (supra) and Muhambi Koja (supra) appears to us to accord with modern thinking and jurisprudence where the law is encouraging courts to interpret the law governed more by substance that the technical chains of form, the latter which does not ordinarily look at the justice of a case."

26. The Appellant did plead at paragraph 3 of the plaint that "At all material times to the suit, the 1st defendant was the registered owner of the motor vehicle registration number KCH 704V, while the 2nd defendant was the driver and/or either the actual but unregistered owner of the same vehicle or otherwise had beneficial or insurable interest therein." While testifying he produced the motor vehicle search certificate, which confirmed that indeed the 1st respondent was the registered owner of the suit motor vehicle, but at the same time confirmed in cross examination that, "I knew Mary owned the vehicle." The respondent on the other hand produced a sale agreement which the deceased used to buy the motor vehicle, and explained that it was subsequently registered in her name as she had loaned her aunty Kshs.300, 000/= and the loaned amount helped her aunty clear paying off the purchase price of the suit motor vehicle. Subsequently in December 2017 after she had been refunded her money, she signed off the transfers back to her Aunty. She never had possession or control of the suit motor vehicle and was therefore not vicariously liable for the said accident.

27. A deduction and analysis from the above evidence shows that, while it was proved that the 1st respondent was the registered owner of the suit motor vehicle as at the time of the accident, the appellant knew, pleaded and testified that he knew the suit motor vehicle owner was Mary Nyambura (deceased) and this too was confirmed by the evidence of the 1st respondent, who provided proof that the deceased had bought the said car and had exclusive possession of the same.

28. Even if this analysis were to be incorrect, the appellant had to further prove that as at the time of the accident the deceased was driving the said suit motor vehicle as the 1st respondent's agent, servant, employee and with her express authority to make her liable under the principal of vicarious liability. In the case of *Jane Wairimu Turanta v Githae John Vickery and Equity Bank Limited & Munene Don*, [2012] eKLR , this principal was discussed and it was held as follows:

> " The respondent raised the issue of vicariously liable since the logbook was jointly owned by the Bank and Munene Don. The doctrine of vicarious liability was expounded in the case of *Morgan v Launchbury* [1972] 2 ALL ER 606 which stated that to establish agency relationship it was necessary to show that the driver was using the car at the owner's request express or implied or in his instruction and was doing so in performance of the tasks or duty thereby delegated to him by the owner. Moreover, the fact that the applicant was the owner of the vehicle by way of the log book being in its name.
>
> Such ownership was not sufficient to create vicarious liability for the negligence of anyone happened to drive it.
>
> It is common ground now that the Munene Don was not the servant of the applicant within the normally accepted meaning of vicarious liability from the facts Munene Don and the Bank would not ordinarily be vicariously liable for the tort of Munene Don since it was not an agent. The case of *HCM Anyanzwa & 2 Others v Lugi De Casper & Anor* (1980) KLR 10 stated that "vicarious liability depends not on ownership but on the delegation of tasks or duty."

29. To establish agency relationship, it was necessary to show that the deceased was using the car at the 1st respondents request express or implied or based on her instruction and was doing so in performance of the tasks or duty thereby delegated to her by the 1st respondent. No evidence was led to prove the same and the trial magistrate rightly held that the appellant had not proved his case on a balance of probability that the 1st respondent was vicariously liable for the accident which occurred and arrived at the right conclusion to dismiss his case. It should also be noted that the appellant made a fatal erred by suing a deceased person (*Mary Nyambura*) as the 2nd defendant/respondent without enjoining the administrators to her estate and no cause of action could be sustained as against the said *Mary Nyambura* (Deceased).

30. Since the appeal on liability has failed, that should be enough to dispose off this appeal, but the court notes that the trial magistrate did err in failing to assess damages. That is mandatory even where the party claiming is unsuccessful in a claim for general damages. In *Lei Masaku v Kalpama Builders Ltd*. Civil Appeal No. 40 of 2007[2014] EKLR where Mabeya J. held that:

> There is the issue of failure to assess damages. It has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established. To have casually dismissed the suit and fail to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions

are appealable and the Appellate Court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behoves this court to assess quantum.

31. The appellant did suffer a fracture injury of the right hand distal and ulna bones, bruises and lacerations to the scalp, recurrent headache, pain on the wrist and was unable to carry heavy loads. The appellant urged the court to find that an award of Kshs.1,000,000/= would be adequate compensation for the injuries suffered and relied on *Kirui Tea Factory & Another v Peterson Watheka Wanjohi* [2008] Civil Appeal No 1045 of 2004, *Kweri Peter & 2 others v Ann Wanjiku Maina* [2017] eklr, Civil Appeal 95 of 2015, *Francis Nzivo Munguti & Another v Jotham Wanyonyi Nakasana & Another* [2020] eklr, Civil Appeal No 74 of 2016 & *Joseph Njuguna Gachie Vrs Jacinta Kavuu Kyengo* (2019) Eklr Civil Appeal No 31 of 2017.

32. The 1st respondent on the other hand did submit before the trial court that the P3 form from Kangundo Hospital filled on the basis of the initial treatment notes classified the appellants injury as harm and therefore the medical report of Dr. Cyprian Okere, dated 4th April 2018 did not present an accurate description of the injuries suffered by the appellant. The classification of his injuries as grievous harm was therefore misleading and the assessment so made to justify his assessment of permanent disability at 20%. Placing reliance on the case of *Margaret Wanjiku Njoki v Broadways Bakery Limited* [2020] eklr and P*atrisia Adhiambo Omolo v Emily Mandala* [2020] eKLR, the 1st respondent averred that a sum of Kshs.180,000/= would be reasonable compensation for injuries suffered.

33. It is also a principle of law that an award of damages must be reasonable and comparable to awards in similar cases. In the case of *Tayab v Kinanu* [1983] eKLR, where the court stated as follows:

> " I would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of *West (H) & Son Ltd v Shephard* [1964] AC 326 at 345:"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

34. Also In the case of *Mohamed Mahmoud Jabane v High shine Butty Tongoi* CA No 2 of [1986] KLR Vol1 The court of Appeal stated as follows; The correct Approach in award of damages are ;

1. Each case depends on its own facts.
2. Awards should not be excessive for the sake of those who have to pay premiums, medical fees or taxes (the body politic).
3. Comparable injuries should attract comparable awards.
4. Inflation should be taken into account.
5. Loss of future earnings has to be pleaded.
6. Loss of earning power is part of the general damages

35. I do agree with the 1st Respondent's assertion that the initial treatment notes and P3 form captured accurately the injuries suffered by the Appellant, which were basically minor lacerations on the head and neck, laceration injury on the left scalp and fracture of the right-hand distal radius and ulna. In my view the most relevant authority in so far as the award of damages is concerned is the decision in *Peris Mwikali Mutua v Peter Munyao Kimata* [2008] KLR in which the plaintiff sustained marked pain and tenderness on the left hip joint marked swelling and severe tenderness of the left forearm, bruises on the left forearm and fracture of the ulna of the left distal forearm. The said injuries left the plaintiff with significant permanent disability. Lenaola, J (as he then was) on 17th December, 2008 confirmed the award of Kshs.450,000.00. Consideration the time lapse between the time when the said decision was handed down as well as the inflation, it is my view that an award of Kshs.600,000.00/= would be reasonable and the appellant ought to have been awarded the same. Special damages was specially pleaded and proved by production of the receipts totalling to Kshs.3,930.00/=.

E. Disposition

36. The upshot having made the above analysis on the evidence adduced, I do find that this appeal lacks merit and the same is dismissed.

37. Each party to bear their own costs.

38. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF SEPTEMBER 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 16th day of September, 2024

In the presence of: -

No appearance for Appellant

No appearance for Respondent

Susan/Sam Court Assistant