



**Tonui v Kuber Agency (Civil Appeal E015 of 2023)
[2024] KEHC 11084 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11084 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E015 OF 2023
RL KORIR, J
SEPTEMBER 23, 2024**

BETWEEN

GILBERT TONU I APPELLANT

AND

KUBER AGENCY RESPONDENT

*(Being an Appeal from the Judgment of Resident Magistrate, Wamae
M. at the Magistrate's Court at Bomet, Civil Suit Number 54 of 2020)*

JUDGMENT

1. The Appellant (then Plaintiff) sued the Respondent (then Defendant) for general and special damages that arose when the Appellant was allegedly involved in a road traffic accident on 21st December 2019 along Bomet-Narok road.
2. The trial court conducted a hearing where the Appellant had four witnesses while the Respondent had one witness.
3. In its Judgment delivered on 23rd March 2023, the trial court dismissed the Appellant's/Plaintiff's case stating that the Appellant had not discharged its burden of proof.
4. Being aggrieved with the Judgment of the trial court, the Appellant filed his Memorandum of Appeal dated 30th March 2023 appealing against the whole Judgement. He relied on the following grounds:-
 - i. That the learned trial Magistrate erred in law and fact in finding the Appellant 100% liable for the accident.
 - ii. That the learned trial Magistrate erred in law and fact when she failed to reach a verdict that the Respondent did not establish negligence against the Appellant hence dismissed the Plaintiff's suit.



- iii. That the learned trial Magistrate erred by failing to appreciate that no factual evidence was tendered by the Respondent to prove any negligence against the Appellant.
 - iv. That the learned trial Magistrate erred in law and fact by taking into consideration extraneous matters thereby arriving at an erroneous decision to the prejudice of the Appellant.
 - v. That the learned trial Magistrate grossly erred in law and in fact by failing to find that the balance of convenience tilted in favour of the Appellant.
 - vi. In a nutshell, the Judgement and Decree of the trial Magistrate is contrary to the weight of submissions, law and material on record.
5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions. See *Peters v Sunday Post Ltd* (1958) EA 424.

The Plaintiffs'/Appellant's case.

6. Through his Complaint dated 10th August 2020, the Appellant stated that he was aboard motorcycle registration number KMEX 335N when motor vehicle registration number KCU 393P collided with the motorcycle. It was his case that the Respondent was the registered or beneficial owner of motor vehicle registration number KCU 393P.
7. It was the Appellant's case that the Respondent was negligent in causing the accident. The particulars of the negligence were stated in paragraph 4 of the Complaint.
8. That as a result of the accident, the Appellant suffered the following injuries:-
 - i. Severe head injury with loss of consciousness.
 - ii. Frontal contusion with oedema.
 - iii. Chest contusion.
 - iv. Blunt trauma to the lower back.
9. The Appellant prayed for special and general damages against the Respondent.

The Defendant's/Respondent's Case.

10. Through its Statement of Defence dated 1st September 2020, the Appellant denied the occurrence of the accident and further denied the particulars of negligence as raised in the Complaint. The Respondent also denied being the registered owner of Motor Vehicle Registration Number KCU 393P.
11. It was the Respondent's case that if the accident occurred then it was caused by the negligence and recklessness of the rider of the motorcycle, Benard Tonui (now deceased). The particulars of negligence were contained in paragraph 10 of the Defence. The Respondent further stated that the Appellant was also negligent in causing the accident and the particulars of such negligence were contained in paragraph 11 of the Defence.
12. The Respondent stated that the documents that the Appellant relied on were unauthentic and falsified and were meant to mislead the court.
13. It was the Respondent's case that its driver reported the accident immediately at Bomet Police Station and the subject motor vehicle was subjected to inspection and thereafter an official report was drawn.



14. The Respondent denied liability and stated that any claim arising out of the accident should be directed towards a third party i.e. the estate of the deceased's rider of the motor cycle registration number KMEX 335N through his personal representatives Everline Cheron and Richard Kiptanui Martim.
15. On 12th June 2024, I directed that this Appeal be canvassed by way of written submissions.

The Appellant's submissions.

16. Through his submissions dated 1st July 2024, the Appellant submitted that he pleaded the doctrine of res ipsa loquitor and the burden of proof shifted to the Respondent to demonstrate that it was not negligent in the accident. He relied on Susan Kanin Mwangangi & another vs Patrick Mbithi Kavita (2019) eKLR and Uchumi Supermarket Limited and another vs Boniface Ouma Were (2021) eKLR.
17. The Appellant submitted that he was a pillion passenger on the motorcycle and he could not contribute to causing the accident. That there was nothing he could do to stop the accident. He relied on Janet Kathambi vs Charity Kanja Njiru (2021) eKLR.
18. It was the Appellant's submission that the trial court's award of Kshs 200,000/= as general damages was inordinately low. That considering the injuries sustained by the Appellant, an award of Kshs 2,000,000/= would be sufficient. He relied on John Maseno Ngala and another vs Dan Nyanamba Omare (2006) eKLR.

The Respondent's submissions

19. Through his submissions dated 2nd July 2024, the Respondent submitted that the Appellant was not hit by their lorry but by another vehicle (Make Toyota Probox) and that evidence was corroborated by the Appellant's witness and the police officer. That the police officer who investigated the accident established upon visiting the scene that the motorcycle which the Appellant was on was hit from behind by motor vehicle registration number KBS 962Q causing the motorcycle to hit its motor vehicle registration number KCU 393P from behind.
20. The Appellant submitted that the findings of the trial Magistrate were sound and based on the evidence before her. That its driver did not commit any act that connected him with the occurrence of the accident as he was lawfully driving on his designated lane and was hit from behind by the motorcycle.
21. It was the Appellant's submission that the Appellant had to prove his case and establish negligence against the Respondent. That the Appellant did not discharge the burden of proof. It relied on Eastern Produce (K) Limited vs Christopher Atiado Osiro (2006) eKLR, Hellen Wangari Wangechi vs Carumera Muthoni Gathua (2015) eKLR and Stanley Maira Kaguongo vs Isaac Kahuthia (2022) eKLR.
22. The Appellant filed supplementary submissions dated 8th July 2024 and submitted that there was no ground of appeal challenging the award of general damages and the law did not permit the Appellant to introduce such through submissions. That the trial Magistrate properly considered the medical evidence before her and was guided by the law when she assessed and awarded the damages for the injuries sustained and that there was no basis for interfering with her award.
23. I have perused and considered the Memorandum of Appeal dated 17th November 2021, the Appellant's written submissions filed on 15th May 2023 and the Respondent's written submissions dated 12th July 2023. The only issue for my determination was liability and quantum payable.
24. It is trite law that the burden of proof lay on the person who alleges. Section 107 of the *Evidence Act* describes the burden of proof as follows:-



- (1) 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.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
25. The standard of proof in civil cases is on the balance of probabilities. In *James Muniu Mucheru vs National Bank of Kenya Ltd* (2019) eKLR, the Court of Appeal stated as follows: -
- “Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party’s version of the story is more believable.”
26. In terms of production of evidence during the trial, the Court of Appeal in *Mbuthia Macharia vs Annah Mutua Ndwiga & Another* (2017) eKLR held:-
- “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.”

Liability

27. The Appellant (PW1) stated that he got injured when motorcycle registration number KMEX 335N which he was aboard was involved in a road traffic accident with motor vehicle registration number KCU 393P along Bomet-Narok road. The ownership of motor vehicle registration number KCU 393P was not disputed by the Respondent who stated that the said motor vehicle belonged to them and was being driven by their employee on the material day. I am therefore satisfied that the Respondent was the owner of motor vehicle registration number KCU 393P.
28. The Appellant stated that on the material day, motor vehicle registration number KCU 393P was recklessly driven and it lost control thereby colliding with the motorcycle he was aboard and as a result, he suffered injuries. He blamed the driver of motor vehicle registration number KCU 393P for his negligence in causing the accident. When the Appellant was cross –examined, he stated that they (he and the rider of motorcycle registration number KMEX 335N) hit the lorry (motor vehicle registration number KCU 393P) from behind. That a Toyota Probox hit them then they hit the lorry.
29. No. 72792 PC Reyland Nzai (PW2) explained the circumstances of the accident. He stated that the road traffic accident involved motor cycle registration number KMEX 335N, motor vehicle registration number KCU 393P (lorry) and motor vehicle registration number KBS 962Q (Nissan saloon car). That the lorry and the motorcycle were headed in the same direction when the motorcycle ran into the lorry and was hit by an oncoming car from the opposite direction. He produced a Police Abstract as P.Exh 2. I have looked at the Police Abstract and other than indicating the time, place and date of the accident, did not help this court as it stated that the matter was pending under investigations. PW2’s testimony remained unshaken after cross examination.
30. In his defence, the Respondent through Hesbon Muhajji (DW1) stated that the information that he gathered from their investigators and the police was that the motorcycle rammed into their lorry from behind. That the accident resulted in one fatality (Benard Tonui). Upon cross examination, he stated that he did not witness the accident and that their lorry was not damaged. I however note that DW1’s testimony was hearsay as his testimony was not first-hand information.



31. From my analysis of the evidence, PW2 who was the police officer stated that motorcycle registration number KMEX 335N rammed into the lorry (motor vehicle registration number KCY 393P). This was confirmed by the Respondent's witness, DW1 and further by the Appellant himself during cross examination. I agree with the trial court's finding that the Appellant's pleadings and his evidence were at variance. In his pleadings, the Appellant blamed the driver of the lorry for being negligent in causing the accident by driving the lorry recklessly and negligently thereby colliding with the motorcycle while from the his evidence and that of PW2 and DW1, it was clear that the motorcycle rammed the lorry from behind.

32. The Appellant stated that he had pleaded the doctrine of *res ipsa loquitur* and as a result, the burden of proof shifted to the Respondent to prove that it was not negligent in causing the accident. In *Susan Kanini Mwangangi & another vs Patrick Mbithi Kavita (2019) eKLR, Odunga J. (as he then was) held:-*

“Therefore, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the appellant chose to remain silent. The exception to this rule however is where the doctrine of *res ipsa loquitur* applies. In *Embu Public Road Services Ltd. vs. Riimi [1968] EA 22*, the East African Court of Appeal held that:

“The doctrine of *res ipsa loquitur* is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant. The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control. The mere showing that the accident occurred by reason of a skid is not sufficient since a skid is something which may occur by reason of negligence or without negligence, and in the absence of evidence showing that the skid did not arise through negligence the explanation that the accident was caused by a skid does not rebut the inference of negligence drawn from the circumstances of the accident... Where the circumstances of the accident give rise to the inference of negligence the defendant in order to escape liability has to show “that there was a probable cause of the accident which does not connote negligence” or “that the explanation for the accident was consistent only with an absence of negligence.”

33. Similarly, the Court of Appeal in *Margaret Waithera Maina vs. Michael K. Kimaru (2017) eKLR held:-*

“Firstly, it is doubtful whether it is a doctrine, a maxim or a principle of law. Its literal meaning is that “the thing speaks for itself”. It is said to be a mechanism whereby the claimant can be relieved of the burden of proving the negligence, and the court can infer negligence in those situations where the factual circumstances of the case would make proving it almost



impossible. In the text book Charles worth & Percy on Negligence, 12th edition, appears this passage:

‘Although use of the maxim is periodically discouraged, it is so well entrenched that it may take some time to dislodge entirely. However, it has never been correct to describe it in terms of doctrine:

I think that it is no more than an exotic although convenient, phrase to describe what is in essence no more than a common-sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances.

The question whether to apply the maxim has usually arisen where the claimant is able to prove the happening of an accident but little else. He might well be unable to prove the precise act or omission of the defendant which caused an accident to occur, but if on the evidence it is more likely than not that its effective cause was some act or omission of the defendant, which would constitute a failure to take reasonable care for his safety, then in the absence of some plausible explanation consistent with an absence of negligence, the claim would succeed.”

34. Additionally, the Court of Appeal in *Keziab & another (Personal Representatives of the Late Isaac Macharia Mutunga) v Lochab Transport Limited (Civil Appeal 82 of 2018)* [2022] KECA 477 (KLR) (18 March 2022) (Judgment) held:-

“.....Hobhouse L.J. in the case of *Ratcliffe vs. Plymouth & Tobay HA* 1998 PIQR 170 as hereunder:-

“.....the expression *res ipsa loquitur* should be dropped from the litigator’s vocabulary and replaced by the phrase ‘a prima facie case’. *Res ipsa loquitur* is not a principle of law: it does not relate to or raise any presumption. It is merely a guide to help to identify when a prima facie case has been made out. Secondly, it does not have to be pleaded, as erroneously held by the High Court in this case. This Court so stated in the case of *Nandwa Vs. Kenya Kazi Ltd, Civil Appeal No. 91 of 1987* for the reason that evidence is not to be pleaded. Also see *Bennet Vs. Chemical Construction (GB) Ltd* 3 All ER 822 where the Court emphasized that:

“It is not necessary to plead the doctrine; it is enough to prove the facts which make it applicable”

35. Flowing from the above, it is clear to me that the Appellant had the burden of proving his case. The doctrine of *res ipsa loquitur* would only be viable in this case if the Respondent failed to give an explanation as to how it was not negligent in causing the accident. From my earlier analysis, the Respondent stated that the accident was caused by the motor cycle which the Appellant was aboard as they hit its lorry from behind.
36. As earlier stated, DW1’s testimony was hearsay and had no evidentiary value. However, his (DW1) testimony about the lorry being rammed from behind by the motorcycle was corroborated by the Appellant himself and PW2 which leads me to the conclusion that the Respondent was not negligent in the causation of the accident. It is therefore clear that the doctrine of *res ipsa loquitur* does not apply in this case.



37. Let me add that it was unnecessary for the Appellant to plead the doctrine of res ipsa loquitur but rather focus on proving his case as explained by the case Keziah & another (Personal Representatives of the Late Isaac Macharia Mutunga) (supra) above.

38. In terms of apportioning liability, I find it difficult to hold the driver of the lorry liable for the accident since he was hit from behind by the motorcycle. I find consonance with P.J. Otieno J. in Multiple Hauliers (E.A) Ltd vs Justus Mutua Malundu & 2 others (2017) eKLR where he held:-

“Every driver on a public road is duty bound to be on the lookout at all times to avoid possible injury and losses to other road users. Where a collision occurs between two motor vehicles it is in many a situation possible to establish, with evidence of eye witnesses, who between the two contributed to what extent in the collision.

The equitable doctrine that first in time is stronger in law is indeed applicable in the Highway Code and traffic regulation. It is therefore repeatedly told to driving lesson students that ‘move forward only when the road is clear’

In driving schools it is also a rudimentary lesson that a driver is supposed to leave enough room in front of his car to stop when the car in front stops suddenly.

The logic of this rudimentary yet very critical and cardinal traffic rules is not difficult to discern. Cars are driven towards the front and not backwards on the highway and that may explain why the drivers take the foremost front seat and have a wider front windshield compared to smaller rear windshields and rear-view mirrors (sic!). Where visibility is impaired by darkness or band whether, like is alleged by the bus driver in this matter, extra caution is always advised. There is always a presumption that he who hits another from behind is at fault.”

39. Similarly in Samuel Stephen Were suing as the representative of Jared Ochieng Oduogo (Deceased) vs Sukari Industries Limited (2016) eKLR, Majanja J. held:-

“.....I find and hold that the evidence, taken as a whole, points to the fact that the tractor was being driven behind the motorbike at a high speed when it lost control and hit the motorbike ahead of it. Since the motorbike was hit from behind, it would have been very difficult, if not impossible, for the deceased to avoid the accident”..... (Emphasis mine)

40. It is my finding therefore that from the circumstances of the accident, the rider of the motorcycle registration number KMEX 335N was at fault for the accident. The driver of the lorry was hit from behind and it was unreasonable to place any liability on him as he was in his lawful lane. The rider of the motorcycle should have taken steps to prevent the occurrence of the accident. In essence, I find the rider of the motorcycle registration number KMEX 335N 100% liable for the accident. The Appellant has failed to prove that the Respondent was liable for the accident and this means that he has failed to prove his case against the Respondent. I therefore agree with the trial court’s dismissal of the Appellant’s suit.

41. The law mandates this court to assess damages that would have been payable to the Appellant even if he has failed to prove his case.

42. The Appellant suffered the following injuries:-

- i. Severe head injury with loss of consciousness.
- ii. Frontal contusion with oedema.



- iii. Chest contusion.
- iv. Blunt trauma to the lower back.
43. The trial Magistrate awarded Kshs 200,000/= as general damages. The trial Magistrate relied on *Jyoti Structures Limited & another vs Truphena Chepkoech Too & another* (2020) eKLR where the Plaintiff suffered blunt injuries to the head, neck, chest, back and thighs and he was awarded Kshs 250,000/=. The trial Magistrate also relied on *Elizabeth Wamboi Gichoni vs Benard Ouma Owuor* (2019) eKLR where the Plaintiff sustained deep cut wounds leaving keloids, two deep lateral cuts on the neck leaving keloids, multiple bruises on the chest, cut wounds on the buttocks and loss of consciousness and the award was revised from Kshs 300,000/= to Kshs 175,000/= on appeal.
44. For this court to interfere with an award, it must be satisfied that the trial magistrate has misdirected himself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there has been a miscarriage of justice. In the case of *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs Augustine Munyao Kioko* (2006) eKLR, the Court of Appeal stated that:-
- “It is generally accepted by Courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in *H. West & Son Ltd vs. Shephard* [1964] AC 326 at page 353- ‘The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such the present it is natural and reasonable for any member of an Appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.’”
45. I am satisfied that the trial Magistrate did not misdirect herself or exercise her discretion wrongly in arriving at the figure of Kshs 200,000/= for general damages. The Appellant suffered soft tissue injuries and in my view, the award of Kshs 200,000/= was sufficient. I also dismiss the Appellant’s proposal of Kshs 2,000,000/= as the injuries in the case (*John Maseno Ngala & another vs Dan Nyanamba Omare* (2006) eKLR) he relied on were much more severe than the present case. The injuries in the *John Maseno* (supra) case were severe head injury, fractures of the base of the skull with moderate brain damage and severe neck trauma with damage to the roots of the left brachial plexus resulting in complete paralysis of the left shoulder and left arm muscles. There is no comparison with the injuries suffered by the Appellant in the present case.
46. In regards to special damages, the Appellant produced receipts for the motor vehicle search (Kshs 550/=), medical report by Dr. Peter Morebu (Kshs 6,500/=) and the Patient Invoice dated 10th January 2020 from Moi Teaching and Referral Hospital (Kshs 38,636/=). The special damages proved amounted to Kshs 45,686/=
47. In the final analysis, I uphold the trial court’s award of Kshs 200,000/= for general damages and substitute the special damages of Kshs 39, 186/= with Kshs 45,686/=. This would have been the award if the Appellants succeeded in their case.



48. The final finding is that the Appellant's suit in the trial court stands dismissed.
49. In the end, the Memorandum of Appeal dated 30th March 2023 has no merit and is dismissed with costs to the Respondent.

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

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Ms. Kusa holding brief for Ms. Gogi for the Appellant and Mr. Nyasimi for the Respondent and Siele (Court Assistant).

