



Mwaniki v Njeru & another (Suing as legal representative of Edward Gitonga Njeru - Dcd) & another (Civil Appeal E023 & E024 of 2024 (Consolidated)) [2024] KEHC 12409 (KLR) (16 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12409 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E023 & E024 OF 2024 (CONSOLIDATED)
LM NJUGUNA, J
OCTOBER 16, 2024**

BETWEEN

GENANDO NYAGA MWANIKI APPELLANT

AND

**VIRGINIA MBUYA NJERU & NJERU NJOKA (SUING AS
LEGAL REPRESENTATIVE OF EDWARD GITONGA NJERU -
DCD) 1ST RESPONDENT
JOHN KIILU MUSYOKI 2ND RESPONDENT**

*(Appeal arising from the decision of Hon. S.K. Ngii in the Siakago
MCCC No. E105 & E107 of 2021 delivered on 30th November 2023)*

JUDGMENT

1. The appeals herein have been filed vide memoranda of appeal dated 14th March 2024 wherein the appellant, being dissatisfied with the decisions of the court as abovementioned, now seeks orders that:
 - a. The judgments of the trial court be set aside and/or varied;
 - b. The honourable court be pleased to reassess the finding on liability; and
 - c. Costs of the appeal and in the lower court be awarded to the appellant.
2. The appeals are premised on the grounds that:
 - a. The trial magistrate erred in law and fact by finding the appellant 100% liable for causing the accident; and



- b. The trial magistrate erred in law and fact by failing to appreciate the submissions filed by the appellant on liability.
3. The respondents filed complaints dated 01st October 2021 seeking judgment against the appellant for general and special damages in a tortious claim. It was 1st respondent's averment that on 12th November 2020, the deceased was riding a motor cycle registration number KMEF 424Q along Embu Kiritiri Road when at Macembe area, the appellant's driver so negligently drove, managed, and/or controlled his motor vehicle that he caused or permitted the same to get out of control and knock the said motor cycle the deceased was riding and as a consequence, the deceased was fatally injured.
4. The 2nd respondent, from the same accident, was injured by the appellant's motor vehicle while riding his motor cycle registration number KMCA 120J immediately after knocking down the first motor cycle. The 2nd respondent sustained the following injuries: laceration on the left temporal region, dislocation of left shoulder joint, laceration of right-hand plantar surface, laceration of left wrist joint region and laceration of right ankle joint.
5. The appellant filed his statement of defense in both cases, denying any wrongdoing and he alluded negligence on the respondents. The respondents filed their replies to defense, confirming their averments in the complaints.
6. At the hearing, in Siakago MCCC E105 of 2021, PW1 was the 1st respondent Virginia Mbuya Njeru who testified that the deceased was 24 years old at the time of the accident. That they followed up for a grant to enable them file the suit herein. She blamed the appellant for the accident and stated that she witnessed the occurrence as she was standing by the roadside when the accident occurred and the police blamed the appellant for it. The trial court ordered that the findings on liability in Siakago MCCC E107 of 2021 will apply in Siakago MCCC E105 of 2021.
7. In Siakago MCCC E107 of 2021, PW1 was the 2nd respondent who testified that the appellant's motor vehicle was approaching from the Embu direction when it lost control and knocked the first motor cycle down before knocking him down while he was riding his motor cycle. He stated that the appellant's motor vehicle registration number KCQ 474L was being driven carelessly and it veered off into the opposite lane while the driver was trying to overtake when it wasn't safe to do so. On cross-examination, he stated that he was riding in the same direction as the deceased and the police blamed the deceased for the accident. That the deceased was 10-15 meters ahead of him while the appellant's motor vehicle was approaching from the opposite directions.
8. That he was hit as a result of the impact from the collision between the deceased's motor cycle and the appellant's motor vehicle. That the motor vehicle collided with the deceased motor cycle in the course of overtaking. PW2 was P.C. Peter Auka who produced police abstracts and stated that initially, he had opined that the deceased caused the accident. DW1, the appellant, stated that while he was driving, he saw 2 motor cycles heading towards the opposite directions at high speed and there was another motor vehicle behind which tried to overtake. That as soon as the motor vehicle overtook them, one of the motor cycles swayed towards his lane and he tried applying brakes to no avail. That the bull bars on his vehicle hit him, sending him into the air then onto his windscreen and he fell on the tarmac and he died on the spot.
9. The trial court found the appellant wholly to blame for the accident. In this appeal, the appellant is challenging liability only.
10. The appeal was canvassed by way of written submissions.



11. The appellant submitted that the trial court erred in finding him 100% liable for the accident in the circumstances of the case. He relied on the cases of *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021)* [2022] KEHC 282 (KLR) and *Ephantus Mwangi v. Duncan Mwangi Wambugu* (1984) eKLR. He also relied on section 107 of the *Evidence Act* and the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* (2004) eKLR and argued that the evidence did not place blame on him for the accident. Further reliance was placed on the case of *Rentco East Africa Ltd v Dominic Mutua Ngozi* [2021] eKLR.
12. The respondents submitted that the evidence adduced points to the appellant as being liable for the accident and he did not adduce evidence to prove that the deceased was to blame for the accident. They relied on the case of *Lake Flowers v. Cila Francklyn Onyango Ngonga & another* (2008) eKLR.
13. The issue for determination is whether the trial court's finding on liability should be set aside or reviewed.
14. As a first appellate court, it is the duty of this court to examine the evidence adduced at trial afresh. This was held in the case of *Coghlan v. Cumberland* (1898) 1 Ch. 704, where the Court of Appeal (of England) stated as follows:

“ Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanor, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.”

15. Liability is a matter of fact since this court must re-look the circumstances under which the accident in question occurred as appearing in the evidence. Matters of fact are determined from evidence and the burden of proof lies on the party alleging the facts to prove them. 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.”

16. The evidential burden is further established under sections 109 and 112 of the *Evidence Act*. In the case of *Evans Nyakwana –vs- Cleophas Bwana Ongaro* (2015) eKLR the evidential burden was discussed and the court stated 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 purport 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 desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge 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.”

17. The standard of proof in civil cases such as this one is on a balance of probabilities. In the case of *Miller v. Minister of Pensions* (1947) 2 All ER 372 (supra) discussing the burden of proof the court had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

18. In *Siakago MCCC E107* of 2021 which was relied upon for determination of liability, the 2nd respondent stated that he was riding his motor cycle a few meters behind the deceased and heading toward the appellant’s opposite direction. That the appellant tried to overtake unsafely and he hit the deceased’s motor cycle, causing him fatal injuries. That as a result of the collision, the appellant’s motor vehicle also hit his motor cycle causing him bodily injuries. The appellant stated that he was driving on his lane when he saw 2 motor cycles and a motor vehicle behind them. That the motor vehicle overtook the motor cycles causing the deceased to swerve onto his lane and causing the impact.

19. From the evidence, given the standard of proof, it is my view that the appellant was to blame for the accident. His explanation of how the events occurred does not place the deceased’s motor cycle in his lane. Further, he did not produce any further proof that the accident was caused by the deceased or the 2nd respondent. During the trial before the trial court, the learned magistrate observed the demeanor of the appellant’s driver who testified as DW1 and noted that he was evasive in cross-examination and appeared not to have been telling the truth. This court is bound by that observation as the learned magistrate had the benefit of observing the demeanor of that particular witness, which benefit this court did not enjoy. This Court does not have any reason to depart from the learned magistrate’s observation which must have informed his decision on liability.

20. Therefore, I find that the appeal lacks merit and it is hereby dismissed, with costs to the respondents.

21. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

