



**Mwanza v Ngai & another (Civil Appeal E041 of 2023)
[2024] KEHC 11833 (KLR) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11833 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E041 OF 2023**

RK LIMO, J

OCTOBER 2, 2024

BETWEEN

MBITHUKA MWANZA APPELLANT

AND

DAVID MULWA NGAI 1ST RESPONDENT

ELIZABETH KAVINDU MULWA 2ND RESPONDENT

JUDGMENT

1. This is an Appeal that arose from the Judgment of Hon. J.W Wanganga delivered on 29th May 2023 vide Mutomo PM’s Court Civil Case No. E058 of 2021.
2. In that case the appellant sued the respondents on tort of negligence on account of a road traffic accident that occurred on May 14, 2021 along Kitui-Mutomo road involving the respondents’ Motor Vehicle Registration No. KDA 539X and unknown boda boda on which the appellant road as a pillion passenger.
3. A brief summary of case at the trial court revealed that the appellant was being carried as a pillion passenger by unnamed boda boda rider in unregistered boda boda on 14th May 2021 at Ikanga Trading Centre. The appellant in his evidence blamed the driver of KDA 459X for reckless driving and over speeding which he claimed led to them being knocked down together with the boda boda rider. He claimed that he sustained some injuries as a result and was rushed to a medical facility known as Blue Turtle Medical Clinic. He later reported the incident at Mutomo Police Station where he was issued with a P3.
4. Ruth Mutinda (PW2) a Clinical Officer tendered medical report authored by Dr. Calvin Ochieng. The injuries sustained by the appellant were mainly soft tissue injuries with degree of injuries being classified as harm. The doctor opined that the injuries had healed with no complication at the time he carried out medical examination.



5. Sgt Salim Chimwenge (PW3) a Traffic Police Officer from Mutomo testified and confirmed that indeed an accident occurred on 14th May 2021 along Kitui-Mutomo road at around 1925hrs. The officer however, laid blame squarely on the boda boda rider. He stated the motorcycle itself had unknown registration number because the rider fled the scene after the accident. He stated that he bluntly crossed the road from left to right “without due care” and the driver swung to the right to avoid the accident. He stated that the investigation revealed that the driver swerved to avoid the accident. He concluded that, “we blame the rider for crossing the road without due care.” He added that the driver was not speeding.
6. The trial court evaluated the evidence and found that the appellant “has not established that the driver was negligent” and liability had not been established. The appellant case on that basis was dismissed.
7. The appellant felt aggrieved and filed this appeal. These are the grounds raised namely;
 - i. That the trial magistrate erred in dismissing the appellant’s case when there was abundant evidence on record and occasioned miscarriage of justice.
 - ii. That the learned trial Magistrate erred in law and fault by not fully considering and/or appreciating all the facts presented to him by the appellant and finding that he had failed to prove his case.
 - iii. That the trial Magistrate erred by not considering the evidence and submissions made thereby ignoring relevant facts to reach a fair determination or quantum and liability.
 - iv. That the trial Magistrate erred by relying on information not in party with the facts of the case before him.
 - v. That the learned Magistrate erred by dismissing the appellant’s case in its entirety against the weight of evidence.
 - vi. That the trial Magistrate erred in assessment of damages by arriving at quantum that was so low.
 - vii. That the trial Magistrate considered irrelevant matters.
8. In his written submissions done through learned counsel Musili Mbiti LLP Advocates submits that he proved his case by tendering evidence or oath and tendering documents to prove his case. He contends that the respondent called no witness which in his view means that his evidence remained uncontroverted. He relied on the case of Linus Nganga Kiongo & 3 others –vs- Town Council of Kikuyu [2012] eKLR on that score.
9. He submits that the appellant was knocked down while being carried as a pillion passenger. He faults his own witness (PW3) who testified and contends that his evidence was not reliable as he was not the investigating officer. He further contends PW3 did not visit the scene. He submits that the respondent’s driver was to blame for the accident because he was in control of a lethal machine and ought to have been vigilant while driving on a public road.
10. He submits that the assessment of amount of damages by the trial court was too low. He contends that in view of the injuries sustained, an award of Kshs. 380,000/= would be reasonable & fair. He relies on the following authorities;
 - a. Poa Link Services Co. Ltd & Another –vs- Sindani Boaz Bonzemo [2021] eKLR and
 - b. Joseph Kimani Gathaga & Another –vs- Dickson Ndungu Njoroge [2019]



11. The respondents have opposed this appeal vide written submissions by counsel dated 5th July 2024. The respondents have outlined the summary of the evidence tendering during trial and the pleadings filed by both counsels on record.
12. The respondents contend that the appellant had the burden of proof. They contend that the respondents denied causing the accident and in their view that meant the burden was shifted to the appellant.
13. They submit that the appellant failed in his evidence to establish link of causation of the accident. They rely on the case of Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR. They submit that there was no prove of negligence on their part.
14. They submit that the trial court considered in depth the evidence tendered by the appellant and arrived at the correct conclusion.
15. They further support the trial court’s finding on quantum or grounds that the injuries sustained were soft tissue with no permanent incapacity anticipated. They rely on
 - a. FM (minor suing through the mother and next friend MWM) –vs- JNM & Another [2020] eKLR
 - b. Rege –vs- LA (Minor suing through the next friend and father [2022] eKLR and
 - c. JK (Minor suing through the father and next friend NLK) –vs- Jasper Nchonga Magari & Another [2021] eKLR
16. This court has laid out both the appellant’s case and the response made by the respondents. This is an appeal on both quantum and liability.
17. This is also a first appeal and my role as the 1st appellate court is to re-evaluate the evidence tendered and arrive at own conclusions.
18. The case before the trial court was a running down matter and as I have already observed above, the appellant was a pillion passenger being carried by unknown boda boda rider in an unknown motorcycle. The issues before the trial court and before this court is whether the appellant proved his case against the respondents on negligence and if so what he was entitled to in terms of compensation or damages.
19. To begin with the question on liability which in this appeal is the main issue, is that the appellant’s suit was based on a tort of negligence. He blamed the respondent’s driver for causing the accident mainly through recklessness and over speeding.
20. The provisions of Section 107 of Evidence Act provide the principle that where asserts must prove. The appellant is the one who bore the burden of prove. The respondents have submitted that they denied causing the accident and by a dont of denial the burden shifted to the appellant which is not correct. The burden of proof is always on the plaintiff because of the provisions of Section 107 (1) of the Evidence Act which provides;

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts much prove the facts exist”.
21. The appellant as I have said blamed the respondents’ driver for negligence and causing the accident. The respondents in their defence pleaded denial. They submit in this appeal that they gave evidence to establish the denial but that is not true because they did not all any witness. That notwithstanding, the



fact that a defendant does not all evidence to defendant their position does not mean that a court will automatically find that a case has been proved merely on account of that. A plaintiff must discharge the burden of proof and the evidential burden stipulated under Section 109 of the *Evidence Act* before the burden shifts to the defendant.

22. In this matter, the appellant testified that he was being carried as a pillion passenger by an unidentified rider. She stated that she had no idea whether the rider was licensed to ride or insured. He did not give details on how the accident occurred. He only stated that the driver was reckless, careless and over speeding at the scene which was a trading Centre.
23. However, the appellant's witness Sgt Salim Chimwenje from Mutomo Police Station discounted the appellant's evidence in respect to liability for the accident. The Investigating Officer stated that he visited the scene of the accident this is what he and under XXM;

“I visited the scene after taking over the investigations I visited the next day...”

He stated that the time of the accident was 1925hrs which means was that the night was first approaching. He stated that the rider was crossing the road from left to right “without due care” and that he “escaped after the accident”. The act of running away from the scene of the accident is on its own prima facie evidence of one feeling guilty for a wrong down. The Investigation Officer was also categorical that the rider as per the OB was to be charged for causing the accident. When pressed on the question of whether or not the respondent's driver was over speeding, he stated “we cannot say the driver was speeding...”

24. This was a witness presented by the appellant to support his cause in laying blame on the respondent what happened at the trial however is the opposite. The Investigation Officer turned up in court and absolved the respondent's driver for any blame.
25. The legal position highlighted above is that the appellant bore the initial burden of proof. Therefore, even before the respondents would be called to defend themselves, there was a legal requirement for the appellant to establish a prima facie case or demonstrate to the required standard that the respondent's driver was to blame or contributed to the occurrence of the accident even in some way. But what came out upon the close of his case was that the person to be blamed was the boda boda rider who crossed a road abruptly without due care. The respondents' driver was absolved because PW3 stated that he “swung to the right to avoid the accident”.
26. This court finds that the trial court made correct finding on liability upon evaluation of the evidence tendered before him. This court has re-evaluated the same evidence and I have come to the same irresistible conclusion. The respondents were not to blame going by the evidence tendered. They had no obligation to call a witness to rebut what had not been established in the first place.

This court finds no merit in this appeal on liability and I do not find it necessary to delve on the issue of quantum. The respondents will have the costs of this appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 2ND DAY OF OCTOBER, 2024

HON. JUSTICE R. K. LIMO

JUDGE

