



**Nderitu v Wandai & another (Civil Appeal E055 of 2023)  
[2024] KEHC 16767 (KLR) (14 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16767 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E055 OF 2023  
NIO ADAGI, J  
OCTOBER 14, 2024**

**BETWEEN**

**JUNE ALICE WANJIRU NDERITU ..... APPELLANT**

**AND**

**GEORGE KAIRU WANDAI ..... 1<sup>ST</sup> RESPONDENT**

**PETER MUREU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment of Hon. Edina Nyaboke Angima,  
PM in Nyeri MCCC. No. E328 of 2021 delivered on 07/8/2021)*

**JUDGMENT**

1. By a Plaint filed on 08/10/2021, the Plaintiff (1st Respondent herein) sought orders against the Defendants (Appellant and 2nd Respondent respectively) for;
  - a). General damages and special damages of Kshs.23,134/=.
  - b). Costs and Interest.
2. He pleaded that on 03/01/2021 an accident occurred between himself, as a pillion passenger on motor cycle Registration No. KMCX 607X being ridden by the 2nd Respondent and Motor vehicle Registration No. KCB 686N being driven by the Appellant along Ihururu-Mathari road.
3. That the motor vehicle KCB 686 N was so negligently driven that it lost control and swerved and hit the motor cycle he was riding as a passenger leading him to sustain injuries.
4. The particulars of injury pleaded were fracture of the leg, fracture of tibia, fibula and head injury, soft tissue injuries and bruises.



5. He also pleaded Kshs.22,284/- for medical expenses, cost of drugs, cost of medical report, police abstract fees, Kshs.550- cost of motor vehicles search and Kshs.300/- for P3 Form.
6. He blamed the Defendants for the accident, the rider and the driver of the aforementioned motor vehicles.
7. On 8/3/2022 the Appellant filed her defence and she pleaded that it is the motor cycle rider who made a sudden and sharp U-turn towards her lawful path of way from the right where she applied emergency brakes, swerved to her extreme left, but due to the short proximity, the motor cycle rammed into the frontal right side of her vehicle damaging its headlights.
8. She blamed the 2nd Respondent for riding motor cycle KMCX 706X at an excessive speed that he was unable to control it, making the sharp U-turn towards her path without regard to the presence of her vehicle which was in motion, failing to slow down, stop and or swerved in any way to avoid the accident and for riding a defective and uninsured motor cycle without a driving license. That the police also blamed the 1st Respondent and 1st Respondent in the statement of defence.
9. On 9/3/2022, the 2nd Respondent filed his defence where he blamed the Appellant for negligently driving her vehicle hence swerving and hitting the motor cycle he was riding. He pleaded that he also sustained injuries from the said accident.
10. The matter proceeded to trial. The Plaintiff/1st Respondent testified adopting his witness statement and produced his list of documents. He testified that the rider had stopped and ensured that the road was clear before making a turn but before he could fully get off the road, the 2nd defendant/Appellant approached driving on a very high-speed hitting them and he lost consciousness which he regained in hospital.
11. He denied distracting the rider. In cross examination, he continued to blame the Appellant exclusively as a person who was at the scene.
12. DW1/2nd Respondent also testified and adopted his pleadings. In cross examination, he denied that the plaintiff/1st Respondent distracted him in anyway as he rode. He stated that he was not in agreement with the findings of the investigating officer as he was not interrogated at any point.
13. He also testified that he is a licensed rider but that his motor cycle was not insured. That he had indicated before turning. He also blamed the Appellant as did the 1st Respondent in his narration of the accident but that the police didn't interrogate him. He admitted hat he had no safety gear for his pillion passenger.
14. DW2/Appellant also adopted her statement as evidence. That she suddenly saw the rider swerve into her rightful path causing her to swerve onto her extreme left but unfortunately, due to the short proximity, the accident was inevitable.
15. In cross- examination, she testified that she could not confirm whether or not the plaintiff/1st Respondent was distracting the 2nd Respondent as he rode. That there is a distance between the descend and the junction. That she was not on high speed and the rider failed to give way. She denied colluding with the police in the manner of recording on the abstract. That she was blamed for the accident because the point of impact was on her rightful lane.
16. The Parties closed their cases and the plaintiff/1st Respondent and the Appellant filed their written submissions which the trial court carefully considered in making its determination.



17. The 1st Respondent prayed that the Appellant be found 100% liable for causing the accident, Kshs.2,000,000/= as general damages, Kshs.23,134/= as special damages Ksh.23,134/=, Kshs. 75,000/= as future expenses, costs and interests of the suit.
18. The Appellant submitted that the 2nd Respondent be held 100% liable for causing the accident or in the alternative, that liability be apportioned to the 1st Respondent/plaintiff at 10%, to the Appellant 10% and 80% to the 2nd Respondent for causing the accident.
19. On general damages, she suggested Kshs.500,000/= subject to contribution, Kshs.23,134/= as special damages and nothing as future expenses as the same was never pleaded.
20. On liability, the trial court observed that the police abstract ideally ought to have cleared this issue. However, in this case the abstract was prepared on 12.7.2021 and the matter was pending under investigation and the investigating officer still records that the rider is to blame for the accident. This is conflicting statements from the same person. The 1st Respondent and the 2nd Respondent blamed the Appellant who in turn blamed the 2nd Respondent to a major extent for the accident. From the testimony of the parties, the occurrence of the accident is clearly pointed to the court.
21. That the Appellant was coming down a descent and on her extreme left is a junction that the 2nd Respondent rider was taking.
22. The rider was approaching from the other direction and needed to cross over the Appellant's Lane to get to the destination. The Appellant testified that there was a distance between the descent and the junction. For this court, it means that there was clear visibility for both the rider and driver.
23. The rider and driver agree that they had ensured that the road was clear before taking the turn while the Appellant on the other hand testified that she suddenly saw the rider take a turn. She denied being on a high speed whereas the Respondents testify otherwise.
24. The trial court was of the view that there was no doubt that the 2nd Respondent was riding a defective and uninsured motor cycle without a driving license and that the 1st Respondent did not have protective gear. This and especially the first finding does not in any way speak into the liability of the person liable for causing the accident. This is an issue that is to be resolved under traffic charge.
25. That the investigating officer did not supply the motor vehicle inspection reports to clarify the points of impact on both the motor vehicles. The accident occurred on the Appellant's Lane and from the evidence on record, the motor cycles rear tyre was almost getting off the road onto the murrum. The trial court's understanding of this analysis was that the rider had taken the turn before the Appellant's vehicle became visible to the rider and had she been on a low speed as she alleges, she would have had an opportunity to make proper judgment and swerved slightly to her right and not sharply brake and swerve to her left as she did. That was to say that the Appellant was to be liable for causing this accident.
26. The trial court found the Appellant 100% liable for causing the accident of 03/01/2021 that caused the Plaintiff/1st Respondent to sustain the injuries as pleaded.
27. On the general damages, the trial court considered the precedents as submitted by the parties. Considering the injuries sustained by the Plaintiff/1st Respondent, the trial court found an award of Kshs.1,200,000/= to be reasonable compensation
28. On future medical expenses, the trial court observed that the Appellant filed the 1st Respondent's medical report dated 13/6/2022 and which shows that the 1st Respondent will incur future expenses of Kshs.75,000/=. The Appellant could not turn around and submit that the 1st Respondent was not



- entitled to the award. The trial court thus awarded the Kshs.75,000/= to the 1st Respondent for future medical expenses.
29. On special damages, the trial court found that the 1st Respondent had pleaded and proved special damages of Kshs.23,134/= and the same was awarded.
30. The final award was as follows:-
1. The Appellant found 100% liable for causing the accident on 03/01/2021
  2. The 1st Respondent awarded Kshs.1,200,000/= as general damages
  3. The 1st Respondent awarded Kshs.75,00/- as future medical expenses
  4. The 1st Respondent awarded Kshs.23,134 as special damages
  5. The 1st Respondent awarded costs of the suit and interests on the above awards at court rates from the date of the judgment until payment in full against the Appellant.
31. The Appellant being aggrieved by the judgment above, filed the appeal herein in a Memorandum of Appeal dated 24th August 2023 which raises 4 grounds basically challenging liability and the Appellant prays for apportionment of liability between her and the 2nd Respondent. This court will thus determine whether liability ought to be apportioned as prayed by the Appellant.
32. This being the first appeal, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another v Associated Motor Boat Co Ltd* [1968] EA 123.
33. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbugua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held: -'An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.'
34. Guided by the above decisions, I have laboriously gone through, understood and considered the grounds of appeal, the record of appeal and the submissions by the Parties. I have also considered the authorities referred to by each counsel to support their legal propositions in the matter.
35. It is not in dispute that on 03/01/2021 an accident occurred between the 1st Respondent as a pillion passenger on motor cycle Registration No. KMCX 607X being ridden by the 2nd Respondent and Motor vehicle Registration No. KCB 686N being driven by the Appellant along Ihururu-Mathari road.
36. In her judgment, the trial court observed that:-
- i. The rider was approaching from the other direction and needed to cross over the Appellant's Lane to get to the destination. The Appellant testified that there was a distance between the descent and the junction. For this court, it means that there was clear visibility for both the rider and driver.....



- ii. There was no doubt that the 2nd Respondent was riding a defective and uninsured motor cycle without a driving license and that the 1st Respondent did not have protective gear. This and especially the first finding does not in any way speak into the liability of the person liable for causing the accident. This is an issue that is to be resolved under traffic charge.
  - iii. the rider had taken the turn before the Appellant's vehicle became visible to the rider and had she been on a low speed as she alleges, she would have had an opportunity to make proper judgment and swerved slightly to her right and not sharply brake and swerve to her left as she did. That was to say that the Appellant was to be liable for causing this accident.
37. This court's analysis of the trial court's observation regarding the accident as above is that, the trial court acknowledged that there was clear visibility for both the rider and the driver, She could not then turn around and say that the rider had taken the turn before the Appellant's vehicle became visible to the rider and had she been on a low speed as she alleges, she would have had an opportunity to make proper judgment and swerved slightly to her right and not sharply brake and swerve to her left as she did.
38. I do not agree with the trial court that riding a defective and uninsured motor cycle without a driving license does not in any way speak into the liability of the person liable for causing the accident and that this is an issue that is to be resolved under traffic charge. In any event, the outcome of a traffic criminal charge is not a bar to claiming contributory negligence in a civil case. In *David Kinyanjui & 2 Others -vs- Meshack Omar Monyoro* – civil Appeal No.125 of 1993 the Court of Appeal held that a conviction does not close the door to a defence on liability, as the issue of contributory negligence is open to the defendant in a civil trial.
39. To me a defective vehicle poses a danger to other road users and the defect might likely hinder the efficient operation of the vehicle for instance failed brakes, lack of horn, missing side mirrors or defective lights. In addition, a driving licence is the only proof that a person is qualified to operate the vehicle on the road. An unqualified person may not know the rules of driving and is likely to cause accidents. To me all these go into liability.
40. This court finds that both the rider, (2nd Respondent) and the driver, (Appellant) were able to see clearly and both had a duty to take precaution to avoid the accident. For this reason, this court will disturb the trial court's finding on liability and apportion the same at 70% : 30% between the Appellant and the 2nd Respondent.
41. Accordingly, the court makes the following orders:-
- a. Liability is apportioned at 70% : 30% between Appellant and 2nd Respondent.
  - b. Quantum awarded by the trial court is not disturbed save that the 65% of the decretal amount already settled by the Appellant shall be taken into account.
  - c. There shall be no order as to costs on the appeal.

**DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 14TH DAY OF OCTOBER 2024.**

**NOEL I. ADAGI**

**JUDGE**

