



**Njeru (Suing as the personal representative of the Estate of Kennedy Mukundi Njiru) v Machikine Holdings Limited (Civil Appeal 21 of 2022) [2023] KEHC 585 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 585 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL 21 OF 2022  
LM NJUGUNA, J  
FEBRUARY 1, 2023**

**BETWEEN**

**PETER NJIRU NJERU (SUING AS THE PERSONAL REPRESENTATIVE OF  
THE ESTATE OF KENNEDY MUKUNDI NJIRU) ..... APPELLANT**

**AND**

**MACHIKINE HOLDINGS LIMITED ..... RESPONDENT**

*(Being an Appeal arising from the judgment of the learned Resident Magistrate  
Hon. S. Ouko in Runyenjes PMCC No. E013 of 2021 delivered on 07.04.2022)*

**RULING**

1. The appellant herein filed in this court a memorandum of appeal appealing against the judgment of the learned trial magistrate Hon. S. Ouko (RM) in PMCC No. E013 of 2021 delivered on 07.04.2022 in which his case was dismissed. The grounds upon which the appeal is based are enumerated on the face of the memorandum of appeal dated 20.04.2022.
2. The appellant thus prayed that the appeal be allowed with costs and the judgment of the trial court be set aside and the respondent be found liable for the occurrence of the accident.
3. The appeal proceeded by way of written submissions and wherein the appellant submitted that the learned trial magistrate erred in law and fact by finding that the respondent was not liable for the accident and in doing so adopted wrong principles in dismissing the appellant's claim for damages for pain, suffering and special damages. The appellant averred that the trial court raised the burden of proof upon the appellant that is higher than in normal practice in civil matters. That the evidence of the police officer who was not at the scene of the accident and who testified that he had not concluded investigations cannot be used to prove how an accident happened as was held in David Kajogi M'mugaa v Francis Muthoni [2012] eKLR. It was submitted that the trial court raised the standard of proof and in so doing, reached an erroneous decision. This court was therefore urged to find that the appeal



herein is merited. The appellant placed reliance on the case of Fredrick Wichenje Ikutwa v Florence Mwikali [2020] eKLR in support of his proposition that the degree of proof should be on a balance of probability. That the police officer's evidence that the motor cycle in which the deceased was a pillion passenger was to blame for the accident was hearsay and of zero probative value; therefore, the trial court ought not to have made a finding based on that evidence. That the evidence of DW1 remains uncorroborated and the court ought to disregard the same especially since both the rider and pillion passenger of the motor cycle registration number KMCR 539K died on the spot. It was submitted that the police abstract produced in court did not in any way blame the rider of the motor cycle registration number KMCR 539K as alleged in his testimony. That the witness also confirmed that the rider of the motor cycle registration number KMCR 539K was not blamed for the accident. That it was clear that the trial court solely relied on indirect and hearsay evidence of PW1 in dismissing the plaintiff's suit. This court was therefore urged to find that the respondent was liable for the accident herein.

4. On quantum, it was submitted that the assessment of damages is an exercise of discretion and the court can interfere with assessment of damages herein if the conditions set out in *Hidaya Ilanga v Mangema Manyoka* [1961] EA 705 are established. That the learned magistrate did not consider any case law nor did she explain how she arrived at different heads of damages in the event the plaintiff had succeeded. This court was therefore urged to reassess the damages in the event it found that liability was proved. In the same breadth, it was the appellant's contention that the trial magistrate only replicated the pleadings, the evidence, the parties' submissions and thereafter proceeded to determine the suit without analyzing the evidence by the parties. Further, the appellant submitted that it took all the essential steps to avail a copy of a decree of the lower court as was evidenced in his correspondences and thus prayed that he should not be punished for failure of the same given that it was beyond his power. Reliance was placed on article 159 (d) of [the constitution](#) and Order 42 Rule 13 (4) of the Civil Procedure Rules.
5. The respondent on the other hand made submissions under the following heads; whether the appellant's record of appeal was incomplete; whether the trial magistrate erred in law and fact in finding that the appellant failed to prove his case on a balance of probability against the respondent; whether the appellant is entitled to damages and who should bear the costs of the appeal.
6. The respondent listed the contents of Order 42 Rule 13 (4) and contended that the appellant's record of appeal essentially ought to have been complete as required under that order. It was further contended that the record herein was incomplete and reliance was placed on the cases of *Kakamega Election Petition Appeal No. 3 of 2018 Elvis Anyimbo Sichenga v Orange Democratic Movement & 4 Others* (2016) eKLR and *Trans Mara Sugar Co. Ltd v James Omondi Obidho* [2020] eKLR, it was submitted that the record as filed by the appellant did not have the requisite decree attached to it and no supplementary record of appeal was served upon the respondent to correct the anomaly. On this alone, the respondent argued that the appeal herein should fail.
7. On whether the trial magistrate erred in law and fact in finding that the appellant failed to prove his case against the respondent, it was submitted that the appeal herein is a non-starter given that the appellant did not prove negligence on the part of the respondent. The submissions before the trial court were rehashed and further reliance was placed on Sections 107 and 108 of the [Evidence Act](#) to show that the appellant failed to prove his case against the respondent. It was contended that the appellant's witness clearly corroborated the respondent's case; that the appellant having admitted in his submissions that the court relied on the evidence of PW1 which he referred to as hearsay is a sure proof that the appellant failed to call evidence to support his averments. It was submitted that the appellant failed to discharge his burden of proof against the respondent as required by the law. The respondent thus relied inter alia on the cases of *Jacob Momanyi Orioki v Kevian Kenya Ltd* [2018] eKLR and *Bwire v Wayo & Sailoki*



Civil Appeal 032 of 2021. The respondent reiterated that indeed the appellant adduced evidence to show that the deceased suffered fatal injuries but failed to establish causation that the same was as a result of respondent's negligence. It urged the court to dismiss the appeal for want of merit.

8. On whether the appellant is entitled to damages, it was submitted that given that the appellant did not prove his claim against the respondent, he did not deserve the damages sought and in an unlikely event that this court were to find otherwise, on loss of dependency, an amount of Kshs. 669,308/= was offered; pain and suffering, an amount of Kshs. 10,000/= and Loss of expectation of life, an amount of Kshs. 80,000/= was offered. On special damages, it was submitted that the same ought to have been pleaded and proved. That the appellant pleaded an amount of Kshs. 107,850/= and in the end, it was prayed that this court instead dismisses the appeal and award the respondent the costs of the appeal.
9. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. v Associated Motor Boat Co. Ltd* [1968] EA 123). This court nevertheless appreciates 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 the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348). These authorities echo section 78 of the *Civil Procedure Act* and by dint of the same, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.
10. However, in the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to, but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court and that what matters in the analysis is the substance and not its length. (See Supreme Court of Uganda's decision in *Uganda Breweries Ltd v Uganda Railways Corporation* [2002] 2 EA 634 and *Odongo and Another v Bonge* Supreme Court Uganda Civil Appeal 10 of 1987 (UR).
11. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the appellant. This appeal therefore revolves around the following issues: -
  - i. Whether the appellant proved her case to the required standards
  - ii. What damages ought to be awarded to the appellant if the court finds in affirmative the first issue.
12. Before determining the appeal herein on its merit, the respondent has raised an issue that this appeal is incompetent in that the appellant failed to annex the decree being appealed against contrary to the provision of Order 42 Rule 13 (4) of the Civil Procedure Rules. I will proceed and deal with the issue first.
13. To answer the Respondent's argument, I am guided by the finding of the Court of Appeal in the Case of *Emmanuel Ngade Nyoka v Kitheka Mutisya Ngata* Civil Appeal No. 63 of 2016 [2017] eKLR where it was held:

“Starting with the first issue, it is true that the record of appeal before the first appellant court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of Order 42 Rule 2 of the Civil Procedure Rules...



...the Respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from. Was this omission fatal to the appeal? The Appellant thinks so as according to him the requirement is couched in mandatory terms. The Judge did not agree with him reasoning that:

“The word “decree” has been defined by the Civil Procedure Act Cap 21 to include judgment. Infact the Civil Procedure Act as provided at Section 2 that the judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up”.

This is the essence of the proviso to the definition of the term “decree”. According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court; consequently, he reasoned the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.

We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon court to go for substantive justice as opposed to technicalities. Further, holding otherwise would have run counter to the overriding objective as captured in section 1A and 1B of the Civil Procedure Act. Finally, one would ask what prejudice the Appellant suffered with the omission of the certified copy of the decree in the record of appeal. We do not discern any.”

[Also see Kenya women Micro Finance Ltd v Martha Wangari Kamau [2020] eKLR.

14. Whereas it is true that the appellant did not annex a certified copy of the decree being appealed against, he did attach a certified copy of the proceedings of the lower court which include the judgment of the trial court and in my view, I find that the same sufficed in the absence of a certified copy of the decree. [Also see Article 159 (1) (d)]. Further, the respondent did not allege that he suffered any prejudice for failure by the respondent to annex a copy of the said decree. I therefore find that the appellant’s failure to annex the certified copy of the decree cannot be a basis for striking out the appeal.
15. Turning to the substantive issues herein, it is trite law that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probability (See Miller v Minister of Pensions [1947] 2 All ER 372 and Section 107 of the Evidence Act). However, there is evidential burden which is captured by sections 109 and 112 of the Evidence Act. These two provisions were dealt with in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi& Another [2005] 1 EA 334, in which the Court of Appeal held that: -

“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”
16. In East Produce (K) Limited v Christopher Astiado Osiro In Civil Appeal No. 43 Of 2001 the Court of Appeal held that: -

“It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku v Kenya Cargo Hauling



Services Ltd 1991 where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”

17. It follows that the initial burden of proof lay on the plaintiff, the appellant in this appeal to prove negligence.
18. Negligence was defined in the case of *Blyth v Birmingham Waterworks Company* (1856) 11 Ex Ch 781 (Baron Alderson) as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done” (See Salmond and Heuston on the Law of Torts 9<sup>th</sup> Edition). The elements of the tort of negligence which must be proved for an action in negligence to succeed are (a) there was a duty of care owed to him or her, (b) the duty has been breached, and (c) as a result of that breach he or she has suffered loss and damage (See *Donoghue v. Stevenson* [1932] A.C. 562.)
19. Similarly, the *Traffic Act* Cap 403 Laws of Kenya imposes a duty of care on drivers, to take necessary precautions to avoid accidents. In the event they breach the *Traffic Act* and the Highway Code they are liable for penal sanctions in cases of careless or reckless driving or causing death by dangerous driving. The Law on these issues is very clear, and the breach by a driver of any motor vehicle on the Kenyan roads.
20. The question therefore is whether the appellant in discharging the burden of proof placed on him did prove the elements of the tort of negligence (the tort upon which the suit was based)?
21. The plaintiff/appellant in the trial court filed his plaint whereby he pleaded the particulars of negligence on the part of the respondents herein. He further filed his list of documents and witness statements and which evidence was led. The defendant (the respondents herein) filed his defence wherein he denied the averments in the plaint and instead blamed the deceased and the rider of motor cycle registration number KMCR 539K (deceased) for negligence. The respondent further filed his documents and proceeded to defend the suit; the trial magistrate upon consideration of the facts and law, delivered a judgment on 07.04.2022 wherein she dismissed the appellant’s case and further awarded costs of the suit with interest to the respondent herein.
22. From the evidence on record, I note that the appellant’s witness PW1 clearly testified that it was the motorcycle that encroached into the respondent’s lane; that at the time of the accident, the motor cycle was overtaking a fleet of motor vehicles and that the respondent was neither charged nor blamed for the same. In the same breadth, the respondent testified that he wasn’t overtaking and that the rider of the motor cycle encroached his lane and given that the rider and the passenger did not have protective gears, both died of the impact. Of importance to note is the fact that the abstract did not blame any of the parties nor was the respondent charged before any court for causing the accident.
23. It is trite that there is as yet no liability without fault in our legal system and a plaintiff must prove negligence against the defendant where the claim is based on negligence. The plaintiff in my view must place sufficient material before court to discharge the burden placed on him.
24. The Court of Appeal in *Timsales Limited v Stanley Njihia Macharia* [2016] eKLR discussing the principles of ‘causation’ cited with approval the decision by Musinga J (as he then was) in *South Nyanza*



Sugar Co. Ltd v Wilson Ongumo Nyakwemba [2008] eKLR quoting Statpack Industries Limited vs. James Mbithi Munyao HCCA No. 152 of 2003 (UR) where it was held that:

“It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone’s negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone’s negligence.”

25. In my view, the trial magistrate duly considered and analyzed the evidence before her in that she considered that the appellant’s witness, PW1 and the respondent seemed to corroborate each other thus pointing towards the fact that the rider of the motorcycle was the one to blame for the accident herein. Even the police abstract which the appellant produced in evidence did not blame the respondent for the accident.
26. The appellant sought to rely on the doctrine of *re ipsa loquitur*. He argued that the trial court did not in any way analyze the evidence before her, in arriving at the determination. The operation of the doctrine of *re ipsa loquitur* depends on reasonable evidence of negligence being adduced by the claimant/plaintiff. In other words the doctrine did not shift the burden of proving negligence from the appellant. The Canadian case, which is persuasive to this Court, *Fontaine v British Columbia ( Official Adminsitrator)* 1998 Canlii 814 (Scc) (1998) Iscr 424 considered *re ipsa loquitur* and stated:-

“19 For *re ipsa loquitur* to arise, the circumstances of the occurrence must permit an inference of negligence attributable to the defendant. The strength or weakness of that inference will depend on the factual circumstances of the case. As described in *Canadian Tort Law* (5th ed. 1993), by Allen M. Linden, at p. 233, “[t]here are situations where the facts merely whisper negligence, but there are other circumstances where they shout it aloud.”
27. After considering the evidence herein afresh, I humbly hold the view that the appellant herein did not prove his case on a balance of probability in that he did not prove that the respondent was liable for the deceased’s injuries in order for this court to order for compensation. [See *Butt v Khan* (1997) eKLR].
28. As such, considering the evidence which was tendered before the trial court, I am of the view that the conclusion arrived at by the Learned Trial Magistrate of dismissing the suit was founded on sound evidence.
29. As such, the appeal herein is hereby dismissed with costs to the respondent.
30. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

