Kamau & another v Muringi & another (Civil Appeal E250 & E147 of 2020 (Consolidated)) [2023] KEHC 1653 (KLR) (Civil) (10 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1653 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E250 & E147 OF 2020 (CONSOLIDATED)

AA VISRAM, J

MARCH 10, 2023

BETWEEN

HENRY NJUGUNA KAMAU ..... APPELLANT

AND

RUTH MUTHONI MURINGI ..... RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL E147 OF 2020

BETWEEN

RUTH MUTHONI MURINGI ..... APPELLANT

AND

HENRY NJUGUNA KAMAU ..... RESPONDENT

(Being an appeal from the judgment of the Honorable E. M. Kagoni, Principal Magistrate delivered on 21st September 2020 in CMCC No. 1787 of 2014 at Nairob)

JUDGMENT

Background

1. The judgment in this matter relates to Civil Appeal No E250 of 2020 and to Civil Appeal No E147 of 2020.

2. Both appeals arose from the judgment rendered on September 21, 2020, by the honorable EM Kagoni, Principal Magistrate in CMCC No 1787 of 2014 at Nairobi ("the Civil Suit").

3. The suit arose from a road traffic accident involving Mr Kamau ("the appellant") and Ms Muringi ("the respondent"). The appellant filed a suit in the lower court vide a plaint dated April 2, 2014. He alleged that on or about December 13, 2011, at approximately 11.45 p.m. he was driving motor vehicle registration No KBK 620S along Naivasha road, when the respondent, through her agent, drove motor vehicle registration number KAP 211P into his, causing a collision and occasioning loss and damage.

4. The appellant sought special damages in the sum of Kshs 361,246.00/- plus costs and interest from the date of filing the suit. The suit was filed under the doctrine of subrogation.

5. The respondent opposed the suit *vide* her defence dated May 14, 2014, in which, she denied all allegations set out in the plaint. Her version of events was that she had sold her car to a third person, who told her that he had been in an accident; no one was hurt; and that it was not his fault. She was therefore shocked when the appellant filed a suit in the lower court claiming damages.

6. Following a full trial in the lower court, judgment was entered against the respondent. Liability was apportioned in the percentage of 50:50 and the appellant was awarded special damages in the sum of Kshs 324,336.00/- plus interest from the date of filing the suit and costs of the suit.

7. Both of the parties were unhappy with the decision of the lower court and appealed. Those appeals have been consolidated in the present decision. For the sake of clarity, the memorandum relating to each appeal is set out below.

8. The appellant filed this appeal dated October 19, 2020 on the following grounds;

    a. The learned Magistrate erred in law and in fact in holding that the appellant and the respondent were liable in equal proportion when the evidence before the learned Magistrate clearly showed that the respondent was totally to blame for the accident.

    b. That the learned Magistrate erred in law and in fact as the evidence adduced did not support any negligence on the part of the appellant.

    c. The learned Magistrate erred in law by imposing a higher standard of proof upon the appellant rather than the normal required standard of proof of civil cases.

    d. The learned Magistrate erred in law and in fact, in failing to consider and appreciate the contents of the occurrence book as well as the police abstract produced as evidence in finding the appellant and the respondent liable in equal proportion or at all to blame for the accident contrary to the evidence before him.

    e. The learned Magistrate erred in law and in fact by dismissing the appellant's special damages claims in respect to the investigation fees for Kshs 22,170/-; assessment fees for Kshs 8,040/-; and towing charges for Kshs 6,500/- ;when the same were strictly proved as required by law.

    f. The learned Magistrate erred in law and in fact in failing to appreciate the evidence before him and the submissions made on behalf of the appellant.

    g. The learned Magistrate erred in fact and in law in reaching a conclusion that was contrary to the evidence placed before her.

9. The respondent, *vide* CA No E147 of 2020, filed the appeal dated October 15, 2020 based on the below grounds:

    a. The learned Magistrate erred in law and fact in arriving at a finding that the respondent had proved his case on a balance of probability.

b. The learned Magistrate erred in failing to find that the occurrence book produced and court had additional comments recorded on it stating that the appellant's vehicle was to blame without considering any other evidence to establish negligence to the required standard in law in a situation like this where there was a collision of two vehicles.

c. The learned Magistrate failed to take into account and consider the appellant's evidence and or submission that there was no evidence that the accident was caused as a result of the negligence of the appellant, her driver, servant and or agent or by the plaintiff before apportioning liability.

d. The learned Magistrate failed in law and fact to consider the fact the respondent did not avail the makers of the documents showing repair charges, assessment fees, investigation fees and towing charges during trial and did not prove the same, and as a result the special damages were not proved as required by law.

e. The learned Magistrate failed in law and fact to dismiss the respondent's case when in fact the Learned trial Magistrate had held that the respondent was not entitled to any reliefs.

f. The learned Magistrate erred in failing to appreciate and find that the respondent had not proved its case on a balance of probabilities as required by law.

g. The learned Magistrate erred in failing to properly and adequately consider the appellant's evidence and submissions.

Appellant's Submissions

10. The appellant submitted that liability ought not to have been apportioned in equal parts because the respondent was totally to blame for the accident. Counsel stated that this was corroborated by witness testimony, the contents of the occurrence book (OB), and police abstract.

11. The appellant submitted that the OB was reliable because police are expected to carry out investigations before recording observations in the OB and abstract. He submitted that PW4 testified that the investigating officer who carried out the investigation recorded that the driver of KAP 211B was to blame for the accident in the OB.

12. Finally, counsel submitted that in the absence of evidence on the contrary, this court has no option but to rely on the evidence that is available to it. The appellant relied on the case of *Swan Carriers Ltd v Damaris Wambui (suing as the legal representative to the estate of the late maritim Mwangi Ngirigasha* [2019] eKLR where the court held;

> " .... In the absence of any other evidence on record, this court is inclined to consider evidence adduced to find if the plaintiff proved her case on a balance of probabilities. From the forgoing, I find that the plaintiff discharged her burden and I have no reason to interfere with decision on liability...."

13. The appellant submitted that all the claims for special damages ought to have been allowed by the Magistrate. Namely, the claims for investigation fees (Kshs 22,170/-); assessment fees (Kshs 8,040/-); and towing charges (Kshs 6,500/-); as these had been proved. He stated that contrary to the finding of the lower court, he had indeed filed and produced invoices and payment vouchers relating to the said claims.

Respondent's Submissions

14. The respondent submitted that she purchased motor vehicle registration No KAP 211P on or around November, 2011. Because she could not drive at the time, she sold her vehicle to Mr Eshimwe Abdul, (DW2), who immediately took possession of it, and has been using it since then. He was the beneficial owner of the vehicle, and this was evidenced by the fact that he had been paying for it in installments.

15. She learned about the accident from DW2, who told her that that he had been involved in an accident, but that no one had been hurt. He told her that the vehicle was at Muthangari police station, which she attended the next morning to pick up her motor vehicle.

16. Her understanding was that the police officer who had attended the scene had directed each of the drivers to repair their own vehicles.

17. Counsel submitted that the lower court reached the wrong conclusion because it relied on only the OB and police abstract, yet the appellant had not produced a police file to support those conclusions. In particular, the police had not recorded statements by either of the drivers; no police file had been produced in the trial court; and no investigation concerning the accident had been carried out.

18. Counsel submitted that the OB had been altered after the incident. Additional comments had been added in after the incident. These had been entered outside the column with the title "nature of occurrence" which was the part that blamed the respondent.

19. Counsel's submission was that the abstract and OB, without additional evidence, was not enough to determine liability. He submitted that there was no sketch map on record to indicate the direction that the vehicles were traveling in at the time of the accident and without this information it was not possible to tell who had caused the accident.

20. The respondent relied on the High Court case of *Stephen M. Mwangi & 2 other v Albert Wesonga & Another* [2018] eKLR, where the court held as follows;

> "respondent's two eye witnesses. Their evidence is not explicit on who between the two drivers was to blame for the accident and to what extent, and also on the exact point of impact on the road.
>
> ...
>
> The fact of collision of two or several vehicles does not mean that all drivers have to blame for it. The respondent had a legal duty to establish negligence on the part of the appellant to the required standard in law, to which in my consideration of the evidence on record, they did not."

21. The respondent submitted that the appellant had not met the burden of proof in accordance with section 107 of the *Evidence Act*. This section provides that "whoever desires any court to give judgment as any legal right or liability dependent on the existence of fact which he asserts must prove that those facts exist. Further, section 109 of the *Evidence Act* states that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. He submitted that the appellant had not satisfied this test.

22. The respondent submitted at length in opposition to the various claims for special damages. In short, she stated that the same had not been strictly proved based on the evidence on the record. I will not however repeat the arguments in full.

23. Finally, Counsel submitted that this was not a proper subrogation claim because the appellant had not identified the policy number under which the vehicle was insured, which was a critical detail.

Analysis and Determination

24. I have read the record in its entirety and considered the grounds of appeal raised by each of the parties arising out of the consolidated appeal. The issues that arise for determination are essentially two:

    a. Was the lower court correct in its finding on liability?

    b. Is the appellant entitled to his claims for special damages?

Was the lower court correct in its finding of liability?

25. As this is a first appeal, I have a duty to re-evaluate the evidence before me. This principle as set out in the Court of Appeal decision of *Selle and Another Versus Associated Motor Boat Company Ltd & Others* [1968] EA 123, where the court stated that:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally."

26. Looking at the record before me, there are two contrasting accounts of events. The question I must answer is which one is more probable? Looking at the record, I am immediately struck by the lack of evidence available.

27. PW 1 testified that the respondent's vehicle veered into his lane, hit him, and damaged his vehicle. That is about the extent of his testimony relating to the accident.

28. DW 2 testifies the exact opposite. In his version of event, the appellant's vehicle drove on the wrong side of the road, hit him, and then swerved back into his lane, and eventually came to a stop.

29. Neither of the parties provides any further evidence to the court. There are no contemporaneous accounts by eyewitnesses, no contemporaneous statements made by the drivers; no sketch plan indicating the position of the vehicles at the time of accident is available; and there are no pictures of the vehicles taken at the time of the accident. I noted that even PW 4, the police officer who testified in the lower court, was not the investigating officer at the scene.

30. The lower court made its determination with the benefit of only the OB and the police abstract. I ask myself, was this enough? Looking at the judgment, I see that the Magistrate observed that he was faced with "two contrasting but equally believable versions on how the accident might have happened". He then reached the conclusion that both must be equally to blame and apportioned liability equally.

31. To my mind, this is where he went wrong. If the Magistrate found both versions equally believable, it was not logical for him to find that both were equally to blame. He should have applied the laws of evidence and found that the plaintiff had not proved his case on a balance of probability.

32. The Magistrate's conclusion was not the correct application of the facts to the law. For the sake of completeness, I will proceed to examine the facts and applicable law. Looking at the record, the OB and the police abstract are the only documents stating that the respondent was to blame. They are not supported by any further evidence at all.

33. I am of the view that in order to determine liability in a motor vehicle accident, negligence must be proven. Negligence is more than a word, it is a legal concept which refers to a failure to exercise reasonable care that results in harm to the victim. In order to succeed, the appellant must show that there was a duty (on the part of the respondent), that the respondent breached her duty, and that he suffered harm or loss as a result of the breach. The appellant had to prove the above on a balance of probability.

34. Looking at the totality of the evidence on the record, I am not satisfied. Too many questions remain unanswered: Why didn't the appellant record a statement at the time of the accident? where are the statements by eye witnesses? where is the picture of vehicle that hit the appellant's car? where is the police officer who investigated the accident? There are simply far too many gaps in the appellant's version of events.

35. The appellant's entire case hinges on the OB, yet he did not call the maker of the OB to give evidence at trial. Moreover, I am of the view that while the OB and police abstract may support a claim of negligence, they are not sufficient to determine proof of negligence and liability. This is especially the case here because the OB was very limited in detail and there were allegations relating to its credibility which could not be answered.

36. It was held in the case of *Peter Kanithi Kimunya vs Aden Guyo Haro* [2014] eKLR:

> " A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station."

37. In the end, I do not think that the evidence as a whole is consistent with the appellant's version of events. The upshot is that the appellant failed to meet the burden of proof to establish his case on a balance of probability.

38. Having found for respondent the appellant's claims for special damages also fail.

39. The orders of this court are as follows:

    a. The plaintiff's suit in the Chief Magistrate's Court at Nairobi 1787 of 2014 is hereby dismissed with costs.

    b. The judgment and decree of the honourable Mr Edga Kagoni is set aside.

    c. The costs of this appeal are to be paid by the appellant (plaintiff in the lower court).

    d. The respondent, (defendant in the lower court) is awarded costs and interest.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 10TH DAY OF MARCH 2023

ALEEM VISRAM

JUDGE

In the presence of;

.....for the appellant

.....for the Respondent