



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimani v Kimando (Civil Appeal 268 of 2013)  
[2023] KEHC 1951 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1951 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL 268 OF 2013**

**J WAKIAGA, J**

**MARCH 9, 2023**

**BETWEEN**

**SUSAN WAIRIMU KIMANI ..... APPELLANT**

**AND**

**FRANCIS KIMANDO ..... RESPONDENT**

*(Being an Appeal arising from the decree and judgement of Hon. J Wekesa  
SRM on 1st November 2013 in Muranga SRM Civil Case No. 51 of 2006)*

**JUDGMENT**

1. By a Plaintiff dated February 27, 2006 the appellant sued the respondent in respect of a road traffic accident involving motor vehicle registration number KAC 909 K in which the appellant was travelling. It was pleaded that as a result of the negligence on the part of the respondents driver the aid motor vehicle rolled as a result thereby accessioning sever injuries to the appellant.
2. By a defence thereon dated June 12, 2006, the respondent denied the occurrence of the said accident, the particulars of negligence contained therein and stated that the said motor vehicle was a lorry and not a passenger ferry vehicle and that if the accident occurred then it was caused by an inevitable act beyond the control of the driver.
3. Based on the said pleadings, the cause proceeded for hearing and by a judgement thereon delivered on the 11<sup>th</sup> day of November 2013, the court held that the appellant had not proved her case on balance of probability on the basis that the occurrence of the accident was not established and neither were the particulars of negligence and injuries.



4. Being aggrieved by the said determination, Appellant filed this Appeal and raised the following grounds therein:
  - a) The learned Magistrate came to the wrong conclusion that the accident did not occur and that the injuries sustained were too remote to warrant an award.
  - b) That Magistrate erred in law and fact in finding that the evidence of negligence was not substantiated and further failed to analyse the evidence tendered and disregarded the submissions and authorities cited thereby coming to the wrong conclusion.
  - c) The court erred in declining to make an award despite finding that the injuries were too remote.

### **Submissions**

5. Directions were given that the Appeal be heard by way of Written Submissions and on behalf of the appellant it as submitted that the Magistrate categorizes negligence into serious and not serious there by ignoring the fault and that the court misdirected itself in the analysis of the evidence it was contended further that the injuries could not be too remote and in failing to make an award the court fell into error in support of which reference was made to the cases of *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR and *Cathrine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi* [2005] eKLR.
6. On behalf of the respondent, it was submitted that the evidence by the appellant was riddled with loop holes and not founded on law.

### **Determination**

7. This being a first Appeal the court is required to re-evaluate the evidence tendered ad to come to its own conclusion as was stated in *Mursal & another v Manese* [2022] KEHC 282(KLR).
8. In this matter, PW1 Susan Wairimu Kimani testified that on 26<sup>th</sup> while going to church she a boarded the subject motor vehicle at the back having been hired by the church and that the driver was in high speed, she was injured in the leg. On 28<sup>th</sup> she went to the hospital. It was her evidence that the owner of the motor vehicle was Factory Guards Ltd. In cross examination she stated that the motor vehicle leaned on the side and that the road had pot holes, she did not go to the hospital and neither did she report to the police.
9. PW2 Dr Kanyi Gitau, stated that the Appellant was examined on May 18, 2006 and that she had been involved in road traffic accident on June 28, 2005 where she sustained bruises on the left ankle and blunt injury anterior chest wall on both sides, he stated that the P3 form had been filed on August 22, 2005 at Maragua Hospital. In cross examination he stated that the injuries were sustained in June 2005. PW3 Ruth Wanjiru a Clinical Officer examined the Appellant who was complaining of chest pain with no visible injury. In cross examination she stated that the treatment note was not signed and that whereas the accident occurred on June 26, 2006, the treatment note was dated 6<sup>th</sup> June which details she used in filling P3 form.
10. The respondent in his defence testified as stated that he was driving his lorry when he met some children who requested for a lift at their own risk and in the process the motor vehicle developed problem and veered off the road as one of the ream tyres was off the road. He told the children including the appellant to get off and he drove way as none of them were hurt.



11. In cross examination he stated that he was driving the motor vehicle but it was not his. It was his evidence that the road was in bad condition with pot holes which he tried to avoid. He stated that he was only employed as a driver.
12. From the submissions and proceedings herein, I have identified the following issues for determination in this Appeal:
  - a. Whether the accident occurred.
  - b. Whether the Appellant proved her case.
  - c. Whether the Court should have made an award for damages.
13. On the first issues, the same remains a finding of fact and the appellant court can only interfere with the finding of fact if and when it appears either that he failed to take account of particular circumstances or probabilities of if the impression of the demeanour of the witnesses is inhabited with the evidence generally see *Mercy Kirito Mugeti v Beatrice Nkatha Nyaga* [2013] eKLR.
14. In this matter the first issue for determination is whether the said accident occurred, whereas the trial court found that the accident did not occur, the defendant in his evidence admitted to the fact that in deed the accident occurred and that the appellant was a passenger on the said motor vehicle as at the time of the accident and therefore find fault with the trial court determination on this issue.
15. On whether the Appellant proved her case, it is clear that he who alleges has the legal and evidential burden of proving the case on a balance of probability as stated in section 107 of the *Evidence Act*, the Appellant did not offer any evidence on how the accident occurred with the only evidence available to the Court being that of the Respondent, it was upon the Appellant to prove that the Respondent was negligent as was stated in the case of *Lucy Njoki Chege v James Macharia Kungu* [2005] e KLR where the court held that a claim based on tort of negligence must be strictly proved before the court can hold a party liable.
16. There being no evidence led by the plaintiff to prove negligence on the part of the respondent I find no fault with the courts determination by believing the respondent. It is also clear that the appellant failed to prove that the respondent was the owner of the subject motor vehicle in view of the production of the copy of records which corroborated the respondents evidence. I therefore find and hold that liability on the part of the respondent was not proved and find no fault with the trial court in dismissing the appellant case.
17. On whether the court should have made an award, it is trite law that the court was under a duty to assess an award which would have been given to the appellants had she succeeded in proving her case and therefore in holding that the injuries were too remote to warrant any award the court fell into error.
18. In exercising my powers as the first appellant court it is clear that the alleged injuries were mere soft tissue and if the appellant had succeeded in proving her case and proved that she sustained injuries which she did not, I would have assessed General damages at the sum of Kenya shillings fifty thousand.
19. In the final analysis I find no merit on the Appeal herein which I dismiss with costs to the Respondent.

**SIGNED DATED AND DELIVERED AT MURANGA THIS 9<sup>TH</sup> DAY OF MARCH 2023**

**J. WAKIAGA**

**JUDGE**

**In the presence of:**



Ms Muchiri for J. N. Mbutia for Applicant

N/A by the Respondent

Court Assistant – Ms Carol Mutahi

