



**Ngugi v Abson Motors Ltd & another (Civil Appeal E215 of 2021)
[2023] KEHC 2188 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E215 OF 2021
JM CHIGITI, J
MARCH 7, 2023**

BETWEEN

MARTIN KARUMBA NGUGI APPELLANT

AND

ABSON MOTORS LTD 1ST RESPONDENT

SAMUEL KINUTHIA KAMANDE 2ND RESPONDENT

*(Being an appeal against the judgment and decree of the Chief Magistrate's Court at Thika
(Hon. O.M Wanyaga SRM) delivered on 6/10/2021 in Thika CMCC No. 807 of 2019)*

JUDGMENT

Brief Background

1. The Appellant sued the Respondents vide a plaint dated November 25, 2019 in Thika Civil suit No 807 of 2019 after a road traffic accident for compensation for the injuries he sustained on June 19, 2019, contending that the accident was caused by negligence and carelessness on the part of the Respondents and/or their driver, servant or agent. The Appellant claimed for general damages, special damages and cost of the suit together with interest.
2. On or about the 19th day of June 2019 the Appellant was lawfully and carefully riding motorcycle No KMEQ 530 V along Kimbo - Matangi road when Tuk Tuk registration No KTWB 972V was so recklessly and carelessly driven knocking down the Appellant occasioning him severe bodily injuries and losses/damages.
3. The Respondents filed a Statement of Defence dated February 20, 2020 denying the entire claim. The matter proceeded to hearing that culminated in the Judgement wherein the trial court dismissed the suit with costs to the Respondent.



4. Being dissatisfied with the judgment delivered by Hon. O.M. Wanyaga, (SRM) in Thika Civil suit No807 of 2019 The Appellant herein filed the current appeal raising the following grounds of appeal :
 - a. The learned trial magistrate erred in law and in fact in finding that the Appellant had not proved his case.
 - b. The learned trial magistrate erred in law and in fact by failing to appreciate that the police abstract filed by the Appellant did not blame the Appellant for the accident.
 - c. The learned trial magistrate erred in law and in fact by relying only on the evidence of PW3 on cross examination without considering the police abstract produced.
 - d. The learned trial magistrate erred in law and in fact by finding the Appellant wholly to blame for the accident.
 - e. The learned trial magistrate erred in law and in fact by misdirecting himself by failing to consider all the submissions made before him by counsel for the Appellant thereby reaching an erroneous finding on liability.
 - f. The learned trial magistrate erred in law and in fact by not making any award in damages to the Appellant.
5. The appellant prays for the following orders:
 - a. That the appeal be allowed.
 - b. That the judgment of Hon. O. M. Wanyaga dated October 6, 2021 in Thika CMCC No 807 of 2019 and Order dismissing the suit therein be set aside and/or varied as the Court may deem fit.
 - c. That this Honourable Court be pleased to set aside the judgment of Hon. O.M Wanyaga dated October 6, 2021 in Thika – CMCC No 807 of 2019 in its entirety and substitute it with this Honourable Court’s judgment.
 - d. That the costs of this appeal be provided for.

Analysis & Determination

6. The Appellants have called upon me to preside over this appeal by way of retrial. In the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, the principle was enunciated thus: "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..”
7. This is buttressed in the case of *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR where the Court pronounced itself as follows:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give



reasons either way. See the case of Kenya Ports Authority versus Kustron (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held, inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

Issues for determination

8. I have appraised myself with the grounds of appeal. I find that the two issues for determination are:
 - a. Who should shoulder liability and;
 - b. Whether the orders sought can be granted.
9. The trial Magistrate dismissed the suit on October 6, 2021 since the Appellant had failed to prove its case on a balance of probability.
10. In deciding whether or not this court can set aside the judgment this court must address its mind on whether or not the appellant proved its case on a balance of probabilities.
11. The Court in the case of *William Kabogo Gitau v George Thuo & 2 others* [2010] 1KLR 526, Kimaru J(as he then was) stated that:

“In ordinary Civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
12. PW3 in his testimony before the trial court testified as follows;

“I am Corporal Linnet Makuti attached to Juja Police station performing traffic duties. I have an abstract in an accident of 20.6.19 and recorded under OB 10.20.6.19. It occurred along Kimbo Matangi road at around 2240 hours involving a tricycle No KTWB 912V Tv and Motor cycle No KMEQ 530V which was being ridden by Martin Karumba Ngugi. The tricycle No KTWB 912V Tv was heading towards Matangi direction while the motor cycle KMEQ 530V was joining Kimbo-Matangi road at a junction called Wankan. The Tricycle was overtaking a vehicle ahead when it collided into the Motor cycle that was joining the road. After the collision, the rider sustained injuries and was rushed for treatment where a P3 and police abstract were issued. The cause of accident was blamed on the rider for joining the road without care.”
13. He then produced the abstract.
14. The police visited the scene immediately the accident took place. The police officer’s version of the accident is believable.



15. During cross-examination the Appellant testified and admitted as follows:
- “.....I saw it at 100 metres..... I couldn't avoid the accident.....The police came immediately....”
16. Before the accident occurred the Appellant testified that he saw the Tuk Tuk 100 meters away. He did not apply any emergency brakes or at all, did not attempt nor swerve or do anything to avoid the accident. He casually told the court during cross examination that he could not avoid the accident. It is either the brakes failed or that he was absent minded or negligent which led him to a state where he couldn't avoid the accident.
17. I take judicial notice of the fact that a licensed driver would in the circumstances that were prevailing at the time of the accident in issue have tried to avoid the accident by applying the brakes upon seeing danger that was 100 meters away. A different regular driver would have swerved and controlled the machine that was under his care away from the accident given that he was 100 meters away. The Appellant did none of that. He did not tell the court why he did not avoid the accident. I find that he was negligent.
18. The fact that the Respondent did not call any witness does not help the Appellant to prove his case. The burden of proof remained on the Appellants shoulder.
19. In the case *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No 834 of 2002 Justice Lesiit, citing the case of *Autar Singh Bahra and Another v Raju Govindji*, HCCC No 548 of 1998 stated as follows:
- “ Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”
20. In the case of *Karugi & another v. Kabiya & 3 others* [1987] KLR 347 cited in the case of *Midans Services Limited & another v Ronald Kapute* [2022] eKLR the Court of Appeal stated that:
- “The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and the burden of proof is in no way lessened because the case is heard by way of formal proof.....The Plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”
21. In an act of desperation, The Appellant even went to the extent of attacking the credibility of his own witness PW3. The impeachment did not avail. The Appellant argues that the police abstract indicates that the matter is under investigations. The Criminal Traffic offences or the finding of the Traffic Court has no relevance to the Civil Suit under reanalysis. This argument has no relevance to the appeal.
22. Having determined the issue of liability, the court finds no value in delving into the next issue. The prayer for the grant of the reliefs as set out in the appeal fall by the way side.



Disposition:

23. I find that the seven grounds of appeal are a nonstarter and that the appeal lacks merit. I also find no justification at all to set aside and/or vary the judgment of Hon OM Wanyaga dated October 6, 2021 in Thika CMCC No 807 of 2019 or any compelling reason for substituting it with this Honourable Court's judgment.

Order:

The appeal is dismissed with costs.

Dated and delivered at Kiambu this 7th day of March, 2023.

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JOHN CHIGITI (SC)

JUDGE

