



**Waiganjo v Resource Management and Policy Analysis Institute Limited & another  
(Civil Appeal 23 of 2020) [2023] KEHC 2087 (KLR) (8 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2087 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 23 OF 2020  
JM CHIGITI, J  
MARCH 8, 2023**

**BETWEEN**

**DANIEL MBURU WAIGANJO ..... APPELLANT**

**AND**

**RESOURCE MANAGEMENT AND POLICY ANALYSIS INSTITUTE  
LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**BENARD OKINYO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgement of Principal Magistrates Court, Kikuyu in  
Kikuyu Principal Magistrate Case No.71 of 2017 delivered on 29th January, 2020)*

**JUDGMENT**

**Brief background**

1. On the July 18, 2016 the appellant was riding motor cycle registration number KMDS 180 J when he was involved in an accident along Waiyaki Way.
2. He filed a suit against the respondents claiming general and special damages for the injuries sustained as a result of the accident.
3. According to the appellant the accident was caused by the 2<sup>nd</sup> respondent who was driving motor vehicle registration number KBY 254 Z. According to the appellant, the 1<sup>st</sup> respondent was vicariously liable for the negligence of the 2<sup>nd</sup> respondent.
4. The 2<sup>nd</sup> respondent on his part blames the appellant for the accident.
5. The appellant sustained injuries as set out on the medical report dated December 5, 2016.



6. Upon hearing the parties and their witnesses, the lower court in the judgment dated January 29, 2020 awarded liability in the ratio of 60%:40% in favour of the respondent this was adopted from the test suit Civil Case No 297 of 2017 and also awarded a total sum of Kshs 750,000/= as general and special damages of Kshs 27,000/=.
7. Being dissatisfied with the Judgment, the appellant filed a memorandum of appeal dated February 7, 2020.
8. The appellant raises grounds of appeal therein in that the learned trial magistrate; -
  1. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same by:
    - a. That the magistrate erred by arriving at her decision on liability in the ratio of 60% to 40% in favour of the respondents on assumptions not supported by evidence on record.
    - b. That the learned magistrate erred in law and fact in disregarding and failing to appreciate the evidence addressed, thus failing to arrive at her decision on the issue of Judicious manner
  2. The learned trial magistrate further erred in law and fact in that she failed to find that the case before the court was a civil case and the appellant had indeed proved the elements of negligence as required by the law and thereby the court imposed a higher degree of proof on the part of the appellant and thereby the court arrived on a wrong finding.
  3. The learned trial magistrate erred in law and fact in that he disregarded the appellant's submissions and judicial authorities both on liability with the resultant miscarriage of justice to the appellant.
  4. The learned trial magistrate erred in law and fact by failing to evaluate the entire evidence on record and make a finding that the appellant had proved his case against the respondent on a balance of possibilities and thereby arrived on wrong findings on the issues before the court.
9. The appellant seeks the following prayers;
  - a. The appeal be allowed.
  - b. The judgement and decree in Kikuyu PMCC No 71 of 2017 in relation to Liability be set aside.
  - c. This honourable court be pleased to re-assess and re-evaluate the entire evidence on record and arrive on its own independent conclusion and enter judgment for the appellant against the respondent on liability on liability as prayed.
  - d. Costs of this appeal be granted to the appellant.



### **Analysis and determination;**

10. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. As stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123* where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
11. In the memorandum of appeal the appellant asked the court to set aside the judgement and decree in PMCC No 71 of 2017 in relation to liability.
12. I have given careful consideration to the evidence placed before the lower court in the light of the grounds of appeal filed herein, as well as the written submissions filed herein. The grounds are anchored around the question of liability.
13. During the hearing of PMCC No 297/16 parties agreed to abide by the outcome thereof in so far as liability was concerned. This was captured in the Judgment dated January 29, 2020 in the following words:

“By consent of the parties through their respective counsels they agreed that Civil case No 297 of 2016 be used as a test suit on liability. In that case; this court apportioned liability in the ratio of 60/40 with the defendants jointly and severally bearing 40% of the liability see judgement rendered on January 22, 2020 in Kikuyu Civil Case No 297 of 2016.”
14. In PMCC No297 of 2016 the court apportioned liability at 60% to the plaintiff and 40% to the defendant.
15. In the submissions dated November 29, 2019, the appellant submitted authoritatively that the primary suit followed a road traffic accident which occurred on July 18, 2016 whereupon the plaintiff, a rider of motor cycle registration number RMDS 180J was seriously injured.
16. The accident involved motor vehicle registration number KBY 254Z (subject motor vehicle) owned by the 1<sup>st</sup> defendant and managed and/controlled and/driven by the 2<sup>nd</sup> defendant on the material date and motor vehicle registration number KMDS 180J (the subject motor cycle) which the plaintiff was lawfully riding.
17. The plaintiff in the test suit blamed the 2<sup>nd</sup> defendant for the occurrence of the accident. The 1<sup>st</sup> defendant was held vicariously liable for the same.
18. On the other hand, the defendants in the test suit denied liability and blamed the plaintiff herein for the occurrence of the accident.
19. Through his judgement delivered on the January 23, 2020 in Civil Suit No 297 of 2016 (the test suit), the trial magistrate apportioned liability between the parties at 60:40 in favor of the defendants. The judgment was adopted in the primary suit herein on January 29, 2020, which is the basis of this appeal.

### **Disposition:**

20. What the appellant is doing is to ask this court to rewrite their consent and or contract that was captured by the trial court in the judgment.



21. In the case of *National Bank of Kenya v Pipelastic Samkolit (K) Ltd & another [2001] eKLR* where it was held that a court of law cannot purport to rewrite a contract between the parties, the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded.
22. I do not have the jurisdiction nor the power to interfere with what the litigants had embraced as a binding contract.

**ORDERS:**

The appeal lacks merit and the same is dismissed.

**DATED AND DELIVERED AT KIAMBU THIS 8<sup>TH</sup> DAY OF MARCH, 2023.**

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**J CHIGITI (SC)**

**JUDGE**

