



**Kilet v E-Coach Company Limited & 2 others (Civil Appeal
E007 of 2020) [2023] KEHC 17950 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17950 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E007 OF 2020**

**RK LIMO, J
MAY 18, 2023**

BETWEEN

DAVID LESHAN KILET APPLICANT

AND

E-COACH COMPANY LIMITED 1ST RESPONDENT

E-COACH COMPANY LIMITED 2ND RESPONDENT

BADRI MOHAMED ALIAS ABDI MOHAMED 3RD RESPONDENT

JUDGMENT

1. This is an appeal that arose from the Judgement of Hon. I.G. Ruhu delivered on 29th October, 2020 vide Mwingi PMCC No 76 of 2019.
2. The cause of action in that case arose from a traffic road accident which occurred on 15th June, 2016 along Mwingi-Thika Road involving motor vehicle registration No KCG 131V in which the Appellant claimed he was travelling in at the time as a fare-paying passenger.
3. In suit at the trial court, the Appellant pleaded that he sustained injuries as a result of the said accident and sought the following reliefs: -
 - a. Special damages of Kshs 5,550
 - b. General damages for pain and suffering.
 - c. Costs and interests.
4. In response, the Respondents filed a defence and denied ownership, usage, possession or control of the motor vehicle registration number KCG 131 V. They also denied the Appellant's allegation that he was travelling on the said motor vehicle as well as occurrence of the said accident. The Respondent also



- attributed contributory negligence to the Appellant for the injuries he sustained. They further pleaded the doctrine of *volenti non fit injuria*.
5. During the hearing, the Appellant adopted his witness statement dated 7th June 2019 as his evidence in chief and proceeded to testify that he was travelling and seated in the middle of the vehicle but he could tell that it was being driven fast. That he had fastened his seat belt but when the accident occurred, he was injured on his leg, thigh and chest. That he was treated at Mwingi Level 4 Hospital and discharged.
 6. The Respondents did not call any witness to offer evidence in rebuttal.
 7. The trial court evaluated the evidence tendered and apportion liability at 60:40 in favour of the appellant.
 8. On quantum, the trial court awarded Kshs 150,000 in general damages and special damages of Kshs 5,550 less 40% contributory negligence.
The total amount after deduction amounted to Kshs 93,330.
 9. The Appellant felt dissatisfied and preferred this appeal raising the following grounds namely: -
 - i. That the Learned Trial Magistrate erred in law and in fact in awarding liability at 40% to the appellant bearing in mind the appellant was not in control of the suit motor vehicle registration number KCG 131V which caused the accident which occurred on the 15.6.2018.
 - ii. That the Learned Trial Magistrate misdirected himself in law and in fact by failing to appreciate the evidence adduced by the Appellant in relation to liability during trial held on 10.9.2020.
 - iii. That the Learned Trial Magistrate misdirected himself in law and in fact by failing to appreciate the evidence adduced by the Appellant in relation to liability during trial held on 10.9.2020 and placed more reliance to the Respondent's pleadings.
 10. In this written submissions through Counsel, the Appellant contends that the subject motor vehicle belonged to the 1st Respondent as per the Registration details in the log book. He relies on the decision in *Ignatius Makau Mutisya v Rueben Musyoki Muli* [2015] eKLR where the Court observed as follows:

“All this goes to show that the presumption that the person registered as owner of a motor vehicle in the log book is the actual owner is rebuttable. Where there exists other compelling evidence to prove otherwise, then the Court can make a finding of ownership that is different from that contained in the log book. Each case must however be considered on its own peculiar facts.”
 11. The appellants submit that, the 2nd and 3rd Respondents were the beneficial owners going by the information contained in the Police Abstract that was tendered in evidence.
 12. On the question of liability, for the accident, the Appellant submits that the Respondents' employee, servant, agent or authorized driver was in control of the motor vehicle and as such was responsible for the accident. He has relied on the cases of *Boniface Waiti & another v Michael Kariuki Kamau* (2007) eKLR, *Ann Mukami Muchiri v David Kariuki Mundia* (2008) eKLR and *Agnes Akinyi Okeyo v Marie Stopes Kenya* (2004) eKLR where drivers were held to be 100% liable for the accidents they were involved in having been in control of the vehicles.



13. He submits that the Respondents tendered no evidence to rebut his evidence at the trial.
14. The Respondents in this appeal have not filed any submissions in response to the Appellant's submissions despite service. In view of the directions given by this Court that this appeal was to be canvassed through written submissions, failure by the Respondents to file their submissions in effect means that the appeal herein is unopposed. This Court will nevertheless determine it on merit based on what is on record.
15. This being a first appeal, the duty of the first appellant court was well stated in *Selle v Associated Motor Boat Co.* [1968] EA 123 where the court of Appeal stated: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on 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 in the case generally.”
16. This appeal is largely on liability hence the main issue for determination is whether the Appellant was able to prove his case of negligence against the Respondents' driver and if so whether the trial court erred in apportioning liability to the appellant.
17. On this issue, it is the appellant's case that the trial court erred in apportioning liability to him. His case was that he was travelling as a fare paying passenger in the suit motor vehicle when the vehicle was negligently driven and the driver lost control, veered off the road and caused the vehicle to overturn. He relied on the police abstract on the question of occurrence of the accident. The Appellant also submits that his evidence remained uncontroverted as the Respondents failed to call any witnesses in support of their case.
18. The legal burden of proof is provided for under Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that;

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”
19. The evidential burden of proof is captured under Sections 109 and 112 of the *Evidence Act* as follows;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”
20. It is evident flowing from the above that a Plaintiff carries evidential burden of proof even where a defendant has not adduced any evidence in rebuttal but once a Plaintiff through evidence presents a case that constitutes a Prima facie case then the burden shifts to the defendant to rebut.



In the case of *Daniel Toroitich Arap Moi v another* [2014] eKLR, the Court of Appeal illustrated this position when it observed as follows;

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”

21. Similarly, in the case of *Nadwa v Kenya Kazi Ltd* (1988) eKLR, the Court of Appeal observed:

“In an action for negligence the burden is always on the plaintiffs to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiffs favour unless the defendant’s evidence provides some answer adequate to displace that inference.”

22. The Respondents herein, did not appear in court to defend themselves. They however filed a defense denying liability and occurrence of the accident. They averred that the Appellant was also to blame for the injuries sustained. They were present in Court during trial through Counsel and cross examination of the appellant. The issue before Court is whether the credibility of Appellant’s witness was shaken.

23. The Court of Appeal in the case *Charterhouse Bank Limited (Under Statutory Management v Frank N. Kamau* (2016) eKLR made the following observation regarding failure by the Defendant to call evidence;

“We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. 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. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.”

24. The Appellant’s evidence on how the accident occurred was that the suit motor vehicle was being driven fast which caused the driver to lose control and it overturned. The Appellant relied on the police abstract exhibited as P-EXH6.

25. It is trite that 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. In *Techarb Steam & Power Limited v Mutio Muli & Mutua Ngao* [2019] eKLR it was held as follows;

“Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of



the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigations officer is not necessarily fatal in accident claims. In *Peter Kanithi Kimunya v Aden Guyo Haro* [2014] eKLR it was held:

“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.”

26. Other than denying that the accident occurred in the statement of defence, the Respondents did not adduce any evidence to controvert the Appellants narration of how the accident occurred. The Respondents would have called the driver of the motor vehicle and give their version but their failure to avail a witness meant that the only version on the court’s records was that of the Appellant.

27. The trial court in its judgement gave no good reasons why he found the appellant 40% liable for the accident. It apparently fell into error by treating the Respondents’ written submissions as a fact. The trial court’s reasoning is captured thus:-

“.....the Defendants put it to Court that the Plaintiff failed to demonstrate that the vehicle was speeding since he was sitting in the middle of the motor vehicle at the material time. The defendants further submitted that the Plaintiff failed to demonstrate that investigations had been concluded whose results would have identified the party to blame for the accident.”

28. The Position taken by the trial Court was in error for the following reasons.

- i. The evidence placed before the trial court including the Police Abstract Prima facie showed that an accident occurred and the appellant testified and squarely blamed the Respondents for over speeding. The Respondent did not call the driver of the subject motor vehicle or any witness to rebut the same,
- ii. Secondly, one does not necessarily need to see a speedometer of a motor vehicle to tell that it is moving fast.
- iii. Thirdly, in his pleadings, the Appellant had pleaded the doctrine of res ipsa loquitor. The doctrine of Res ipsa loquitor (latin for the thing explains itself) operated in favour of a party who presents facts from which a Court can draw inference from the surrounding circumstances to conclude that negligence has been proved even if there is no evidence to directly point to the same. The appellant by establishing that he was a fare-paying passenger and that an accident occurred in a situation where the control of the motor vehicle was in the hands of the driver. Those facts in my view in conjunction with the doctrine was sufficient to establish a prima facie case against the Respondents it required a rebuttal to persuade the trial to make a finding that negligence had not been proved to the required standard in law.

29. It was a misdirection. For the trial Court to apportion 40% liability on blame on the appellant. There was no basis for that finding because the Appellant as a passenger had no role at all in the occurrence of the accident. He only happened to have been a passenger and got injured when the subject motor vehicle was involved in the accident. Those are indisputable facts.



30. In the premises, this court finds merit in this appeal. The trial court's decision on liability is set aside. In its place, the respondents are found 100% liable for the accident. The decision on quantum is uncontested and therefore, the same is upheld. Cost of this appeal shall go to the appellant.

DATED, SIGNED AND DELIVERED AT KITUI THIS 18TH DAY OF MAY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE

