



**Mutua alias Kamene Ngwae v Mutui & 2 others (Civil Appeal  
E008 of 2020) [2023] KEHC 17953 (KLR) (22 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17953 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL APPEAL E008 OF 2020**

**RK LIMO, J**

**MAY 22, 2023**

**BETWEEN**

**LYDIA MWENDE MUTUA ALIAS KAMENE NGWAE ..... APPLICANT**

**AND**

**MACDONALD MUTUI ..... 1<sup>ST</sup> RESPONDENT**

**QASIM AND YAHYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**MWENDWA MWINZI ..... 3<sup>RD</sup> RESPONDENT**

*(An Appeal that arose from the Judgement of Hon. I.G. Rubu vide Mwingi  
PMCC No. 155 of 2018 The appeal is also related to Civil Appeal No. E006 of  
2020 and therefore the decision will apply in Civil Appeal no. E006 of 2020)*

**JUDGMENT**

1. This is an appeal that arose from the judgement of Hon I.G Ruhu, *vide* Mwingi PMCC No 155 of 2018. This appeal is also related to civil appeal No E006 of 2020 and therefore, the decision in this appeal will also apply in civil appeal No E006 of 2020.
2. Both appeals relate to the same cause of action filed through Mwingi PMCC No 155/2018 and 150/2018 respectively. In both suit the appellant herein, (Lydia Mwendu Mutua Alias Kamene Ngwae) as well as the appellant in civil appeal No E006 of 2020 Rhoda Mungai Swee alias Rhoda Swee claiming that as they were walking along Mwigwani-Bondoni Murram Road, the 1<sup>st</sup> respondent's motor vehicle Registration No KCJ 775C driven by the 3<sup>rd</sup> respondent was driven carelessly and so negligently that it knocked both of them down from behind and caused them to sustain injuries. The 2<sup>nd</sup> respondent was sued for being the registered owner while the 1st respondent was sued for being the beneficial owner and therefore, vicariously liable for the actions of the 3<sup>rd</sup> respondent who was driving the said motor vehicle at the material time which was on April 28, 2017.



3. The appellant in this instant appeal Lydia Mwendu Mutua pleaded that she sustained the following injuries namely;
  - a. Lacerations on the face.
  - b. Blunt back injury and;
  - c. Blunt injuries to both the lower legs with bruises.
4. In civil appeal No E006 of 2020, Rhoda Mungai Swee pleaded that she sustained the following injuries namely;
  - a. Blunt injury to the chest
  - b. Compound (open) fracture of the right tibia and fibula
  - c. Angulation deformity, severe tenderness and a wound with bones exposed over the right leg.
  - d. Not able to ambulate using the right lower limb.
  - e. Injury to the left breast causing swelling.

She also claimed special damages of Kshs 19,964

5. The evidence tendered at the trial it shows that the appellants were both walking on the left side of the road when the motor vehicle registration No KCJ 775C which was from behind, hit them. The appellants claimed that the motor vehicle was driven at high speed and knocked both of them down from behind as they walked side by side. They both tendered police abstracts as proof of the accident and stated that they, as a result of the accident they both suffered various injuries as enumerated above.
6. The record of proceedings indicates that, the respondents tendered no evidence in rebuttal.
7. The trial court upon evaluating the evidence, found that the appellants were partly to blame and apportioned liability at the ratio 50:50. On quantum, the appellant were awarded as follows:
  - a. Lydia Mwendu Mutua  
General damages Kshs 150,000  
Special damages Kshs 8,450  
Total (Kshs) 158,450  
Less 50% liability Kshs 79,225
  - b). Rhoda Mungai Swee  
General damages Kshs 1,000,000  
Special damages Kshs 19,964  
Total Kshs 1,019,944  
Less: 50% contribution Kshs 509,982  
Total sum Kshs 509,982
8. The appellants were dissatisfied and filed separate appeal but raised fairly similar grounds as follows: -



- i. That the learned trial magistrate erred in law and in fact in awarding liability at 50% to the appellant bearing in mind the appellant was not in control of the suit motor vehicle registration number KCJ 775C which caused the accident which occurred on the April 28, 2017.
  - 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 September 10, 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 September 10, 2020 and placed more reliance to the respondent's pleadings.
9. The appellant is civil appeal E006 of 2020 added that the trial court erred by not considering her diminished earning capacity despite having pleaded for the same. She also faults the trial court for not considering her submission with respect to the authorities cited contending the trial court failed to be guided by general principles in assessment of damages which is to the effect that similar injuries should attract similar awards and taking into consideration inflation.
10. This appeal is largely on liability. The appellant in this instant appeal has submitted on basically, three issues namely; the occurrence of the accident, ownership of the subject suit motor vehicle and who was to blame for the accident.
- The same issues have been framed in a similar fashion in civil appeal No E006 of 2020.
11. On the issue of beneficial ownership, the appellant submits that the 1<sup>st</sup> respondent was the beneficial owner of the suit motor vehicle and she relied on the police abstract. She submits that this evidence was uncontroverted by the respondents.
12. On the question of blame for the accident, the appellant submits that the 3<sup>rd</sup> respondent veered off the road and hit her and that without a reasonable explanation from the respondents as to why the vehicle veered off the road, it would be logical to assume that it was due to the carelessness and negligence of the driver. She has cited the case of *Michael Njagi Karimi v Gideon Ndungu Nguribu & Anor* (2013) eKLR where the driver was held to be 100% liable for hitting a pedestrian after it was alleged that his motor vehicle veered off the road and found the plaintiff standing on reserve section dividing the dual carriage-way. The driver did not turn up in court to testify and explain how the accident might have occurred. The cases of *Isabella Wanjiru Karanja v Washington Matele* (1982-88) KAR 186 and *Pitty Gathigia Baaru & Anor v Kenya Bus Services & Anor* (2005) eKLR were of similar circumstances where pedestrians were hit and the court found the drivers to be 100% liable for the accident.
13. The respondent in this appeal despite service filed no submissions in response. In view of the directions given by this court that this appeal be canvassed through written submissions, failure by the respondents to file any response in effect means that this appeal is unopposed. This court shall however, determine this appeal on merit notwithstanding the omission by the respondent to file any opposition.
14. 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."

15. This appeal is largely on liability hence the main issue for determination is whether the appellant was able to prove her case of negligence against the respondents' driver and if so whether the trial court erred in apportioning liability.

16. The legal burden of proof rests on whoever alleges. Section 107(1) of the *Evidence Act* provides as follows: -

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

17. The evidential burden of proof is provided under sections 109 of the *Evidence Act* which provide as follows;

"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."

18. A plaintiff therefore, always has the burden of proof and even where a defendant does not adduce any evidence in rebuttal, the burden must be discharged for the plaintiff to succeed in his or her claim.

The Court of Appeal in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi and another* [2014]eKLR made that position clear when it made the following observations:-

"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."

19. 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 interference 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 interference."

20. The above decisions clearly shows that once a prima facie case is made out by the plaintiff, the burden shifts to the defendant who has to offer evidence in rebuttal and where such a defendant offers no evidence, then the plaintiff's case is made out because the standard of proof in civil cases is merely on a balance of probability.



21. The Court of Appeal in the case *Charterhouse Bank Limited (Under Statutory Management v Frank N. Kamau* (2016) eKLR illustrated that position clearly when it observed as follows:-

“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.”

22. In the case of *Mercy Mueni Mutuku v Susan Oyondi Ombogo* [2021] eKLR, Odunga J held a similar view as follows;

“In this case there was evidence by the respondent and her eye witness that the accident occurred on a foot path and the respondent was hit from behind. There was no other evidence to challenge this evidence. Accordingly, what was pleaded in the defence without more could not form a basis upon which liability could be found.”

23. The respondents offered no evidence to controvert the allegations or particulars of negligence attributed to them by the appellant.

24. On the question of ownership of the subject motor vehicle, the appellant has relied on a copy of a search from the National Transport and Safety Authority which indicates that the 2<sup>nd</sup> respondent is the registered owner of the vehicle.

25. On beneficial ownership, the appellant’s case is that the 1<sup>st</sup> respondent was the beneficial owner. She has relied on the police abstract on this contention. The police abstract indicates Kimanzi Mutui as the owner of the motor vehicle. Evidence was however not tendered to dispute that Kimanzi Mutui was a different person from MacDonald Mutui, the 1<sup>st</sup> respondent herein.

26. Section 8 of the *Traffic Act* provides as follows;

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

There is therefore, a rebuttable assumption that the person whose name appears on a logbook of a car is the owner. The assumption is rebuttable by evidence to the contrary which was done at the trial in this case.

27. The respondent did not tender evidence to contest this issue and the Court of Appeal in *Joel Muga Opija v East African Sea Food Limited* [2013] eKLR addressing a similar situation held as follows;

“In any case in our view an exhibit is evidence and in this case, the appellant’s evidence that the police recorded the respondent as the owner of the vehicle and Ouma’s evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned judge in failing



to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the registrar of motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”

28. The question of ownership of the subject motor vehicle and in particular the fact of beneficial ownership as captured by police abstract was not controverted by the respondent. The documents relied on by the appellant including the police abstract were all produced by consent of the parties. That settled the question of ownership of the subject motor vehicle and the issue of vicarious liability. The trial court’s finding towards that end cannot be faulted.
29. I am further persuaded by the appellant’s contention that going by the evidence placed before the trial court, there was no basis for the trial court to apportion liability to her.
30. The reason for my finding is that, looking at the judgement of the trial magistrate, it is apparent that the trial court fell into error by finding that the appellant were walking on the wrong side of the road. This is what the trial court states in his judgement.

“.....it was the defendant’s case that the plaintiff was to blame for the accident because she was walking on the wrong side of the road in contravention of the Traffic Act and Highway Code. The defendants further averred that the plaintiff failed to prove that the driver of the subject vehicle had been charged and convicted of a traffic offence. The defendants also submitted that the plaintiff to determine that investigations had been concluded whose results would have conclusively identified the party to blame for the accident.”

The trial court then went ahead and apportion liability at the ratio of 50:50. The trial court did not give reasons for that finding. The decision appears to have been based only on the written submissions by the defence but without cogent or hard evidence, the trial court was erroneous in my view because to make such a finding, the court had to base it on evidence. The trial court should have for instance found that the evidence tendered by the plaintiff in respect to liability was insufficient to show that the respondents were 100% to blame.

31. This court is alive to the general principles that an appellate court should exercise caution in interfering with a trial court on a finding of fact but it is also a duty placed upon this court as the 1st appellate court to re-examine and re-evaluate the evidence placed upon the trial court and arrive at own conclusions.
32. This court has already set out the evidence tendered by the appellant and the fact that there was no evidence in rebuttal from the respondents who have also failed to challenge this appeal. In the circumstances, I find that this appeal on liability is merited. There was no reason for the trial court to attribute 50% liability to the appellant and for that reason, the decision by the trial court on liability is set aside. In its place, the respondents shall bear 100% liability.
33. The question of quantum is not an issue in this appeal. The award on quantum by the trial court is therefore upheld.
34. In sum, this court finds merit in this appeal the same is allowed. The lower court’s finding on liability is set aside for the reasons afore-stated. The respondents bear liability at 100% and the award of trial on quantum is upheld. Cost of this appeal to the appellants. This decision for avoidance of doubt shall also apply to civil appeal No E006 of 2020.

**Dated, Signed and Delivered at Kitui this 22<sup>nd</sup> day of May, 2023.**



**HON. JUSTICE R. K. LIMO**  
**JUDGE**

