



**Ngaburia v Joyce & another (Civil Appeal E128 of 2021)
[2023] KEHC 18401 (KLR) (Civ) (22 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E128 OF 2021

AN ONGERI, J

MAY 22, 2023

BETWEEN

OBED NGABURIA APPELLANT

AND

MANGERA NYAMBEKI JOYCE 1ST RESPONDENT

JOHN WAMBUGU MUIKIA 2ND RESPONDENT

*(Being an appeal from the judgment and decree of Hon. Wanjala
(PM) in Milimani CMCC 576 OF 2019 delivered on 26/2/2021)*

JUDGMENT

- 1) This case arose out of an accident that occurred on 14/5/2016 when the Appellant was travelling as the driver to motor vehicle registration no. KAV 594Q when the said motor vehicle collided with motor vehicle registration no. KAM 582M and the Appellant sustained injuries.
- 2) In his plaint dated 1/2/2019 filed in Milimani CMCC no. 576 of 2019, the Appellant was seeking compensation from the 1st and 2nd Respondents being driver and owner of motor vehicle registration no. KAM 582M respectively.
- 3) The Appellant in his evidence before the trial said when he reached Kobil Petrol station near Embakasi Tusks at Utawala along North Airport road, he found one lane had been closed due to construction and there was a diversion sign on the road.
- 4) When the Appellant reached the overpass, the Respondent's motor vehicle emerged from nowhere and collided with his motor vehicle and he sustained serious injuries.



- 5) The trial court relied on the police abstract that blamed the Appellant for the accident and found that the Appellant did not prove his case to the required standard in civil case.
- 6) The trial court dismissed the Appellant's case. The Appellant has appeal to this court on the following grounds;
 - i. That the learned trial magistrate erred in law and in fact in finding that the Appellant was entirely to blame for the accident based on the police abstract alone disregarding both the police and the eye witness evidence that was presented during hearing.
 - ii. That the learned trial magistrate reached a wrong decision in law and fact contrary to the weight of evidence before her.
 - iii. That the learned trial magistrate erred in law and fact in failing to consider and mis-appreciating the evidence adduced by the Appellant and its witnesses thereby arrived at a wrong conclusion of law.
 - iv. That the learned trial magistrate erred in law and practice in issuing a decision which is contrary to the evidence presented and considering other factors which were indeed affirmed and confirmed on who was to blame for the accident there being no one who controverted the evidence that was placed before her on a balance of probability. In effect the learned trial magistrate reached a wrong decision.
 - v. That the learned trial magistrate erred in law and in fact by considering and putting more emphasis on the documentary evidence based on a police abstract alone and failed to consider all the other evidence adduced in court that is the oral evidence and the circumstantial evidence on the occurrence of the accident and who was to blame for the accident and reached a wrong decision which is not impartial.
 - vi. That the learned trial magistrate's over reliance on the police abstract to reach her decision was overly speculative, biased and prejudicial to the Appellant since she disregarded all the evidence that was presented in court by the three witnesses including the eye witness and the police which pointed to the fact that the Respondents were to blame for the accident.
 - vii. That the trial magistrate erred in law in that if she was in doubt of who to blame in the said accident which was a head on collision, then liability would have been apportioned equally amongst the Appellant and the Respondents as has been the precedence set and held by courts.
 - viii. That the learned trial magistrate erred in law and in fact by misdirecting herself and acting on a wrong principal of law in determining the case before her and more so relying on matters that were not before her but another court for determination and thus reached a wrong conclusion.
- 7) The parties filed written submissions in the appeal as follows; the appellant submitted that the police abstract cannot be a conclusive proof of liability and/or ownership where the evidence produced has been rebutted. That PW2 the plaintiff's eye witness gave evidence to the effect that he witnessed how the accident occurred and it was his evidence that the driver of matatu motor vehicle registration



number KAM 582H was to blame for the accident for encroaching on the path of motor vehicle registration number KAV 594Q. This evidence was contrary to what was indicated in the police abstract which blamed the appellant and the evidence of the eye witness was not controverted but it was corroborated and confirmed by both PW1's evidence & further PW3 the police officer who produced the police Abstract also confirmed that the driver of motor vehicle registration number KAM 582H was to blame for the accident.

- 8) That from the evidence that was produced it was clear that the appellant was not to blame for the accident. That the learned magistrate therefore erred in relying solely on the police abstract and ignoring the evidence adduce before it which indicated the contrary.
- 9) It was the appellants argument that his witnesses gave eyewitness testimony on who was to blame for the accident and therefore based on the evidence that was adduced he proved his case on a balance of probability.
- 10) The respondents on the other hand submitted that the appellant was blamed in the police abstract and that it was further indicated that the charges for careless driving had been preferred against him. That indeed the appellant had control over motor vehicle KAV 594Q and drove so carelessly occasioning an accident and the documentary evidence that was produced spoke on the same.
- 11) It was therefore their argument that the trial court was therefore sound in its judgement that the appellant failed to prove his case against the respondents.
- 12) The respondents submitted further if the lower court was of different opinion, it would have awarded general damages in the amount of Kshs. 1,100,000 which would have been inordinately high. That the injuries suffered were as follows; zygomatic complex fracture, facial fracture 2nd Degree, lacerated wound on left zygomatic vision, multiple facial lacerations, post traumatic head injury, chest pains, deep cut wound on the left side of the neck, swelling on the left zygomatic area, oedema and tenderness and left-hand dislocation.
- 13) The respondents' proposed an award of Kshs. 350,000 and in support cited the following cases;
 - a. In *Harun Muyoma Boge v Dr. Daniel Otieno Agulo*, Migori HCCA No. 86 of 2012 [as quoted in *Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK)* [2019] eKLR, the Plaintiff sustained multiple injuries and fracture of right tibia and fibula the appellate court set aside an award of Kshs. 150,000/= and substituted it with an award of Kshs. 300,000/=.
 - b. In *Naomi Momanyi vs. G4S Security Services Kenya Limited* [2018] eKLR [as quoted in *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* [2019] eKLR, the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm and was awarded Kshs. 300,000.
 - c. In *Wakim Sodas Limited vs. Sammy Aritos* [2017] eKLR [as quoted in *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* [2019] eKLR], the respondent had sustained a fracture of the fourth rib and a compound fracture of the left tibia/fibula. The trial court awarded Kshs. 400,000, which was upheld on appeal.
- 14) This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether or not to support the findings of the



trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle -Vs- Associated Motor Boat Co.* [1968] EA 123 it was held;

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High 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.”

- 15) The issues for determination are as follows;
 - i. Whether the Appellant proved his case to the required standard.
 - ii. Whether the Appellant is entitled to general damages and the special damages he is seeking against the Respondent.
- 16) On the issue of liability, I find that the trial court was wrong in ignoring the evidence adduced by PW 1 and PW 2 on the basis of a police abstract report that blamed the Appellant.
- 17) I find that this case was determined against the weight of evidence before court.
- 18) I find that the Respondent did not challenge the Appellant’s testimony.
- 19) I accordingly find that the Respondents were entirely to blame for the accident.
- 20) I set aside the finding of the trial court on liability.
- 21) On the issue of general damages and special damages, I entirely agree with the assessment of damages. awarded general damages in the amount of Kshs. 1,100,000
- 22) I accordingly set aside the judgment and decree of the trial court and I enter judgement for the Appellant against the Defendant in the sum of Kshs.1,100,000 together with costs and interest at court rates from the date of the judgment of the Trial court(on 26/2/2021) until payment in full.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 22nd day of May, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the 1st Respondent

..... for the 2nd Respondent

