



**Awadh v County Government of Tana River & another (Civil Appeal
19 of 2021) [2023] KEHC 20641 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL 19 OF 2021**

SM GITHINJI, J

JULY 3, 2023

BETWEEN

BUYA HERO AWADH APPELLANT

AND

MAKORANI ASAHIL 1ST RESPONDENT

COUNTY GOVERNMENT OF TANA RIVER 2ND RESPONDENT

*(An Appeal from the judgment and decree by Hon. P. K. Rotich (SPM)
delivered at Garsen on 18th November, 2021 in Civil Case No. E10 of 2020)*

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Wambua Kilonzo & Company Advocates for the Appellant.

John Bwire & Associates Advocates for the Respondents.

1. The plaintiff (appellant) had in the lower court case sued the defendants (respondents) for an accident that happened on or about the 30th day of November, 2019 when the appellant was lawfully travelling on Motor Vehicle Registration No. CG04206A along Gamba-Kitere at Baratiro area. The appellant averred that the motor vehicle owned by the 1st Respondent while being driven by the 2nd Respondent, was driven negligently, lost control and overturned. That the appellant sustained severe injuries as a result of the said accident.
2. The respondents in their statement of defence filed on August 12, 2020 denied negligence on their part and averred that the accident was caused wholly and/or substantially contributed to, by negligence of the appellant.



3. The trial court in its Judgment found that the appellant was equally liable for the accident and apportioned liability at 50:50 and that the 1st defendant was vicariously liable for the negligent acts of the 2nd defendant and as such both defendants were 50% liable for the accident.
4. The appellant was dissatisfied with the said decision and on December 2, 2021 filed a memorandum of appeal, raising the following grounds; -
 1. That the learned Trial Magistrate erred in law and fact by applying the wrong principles in finding that the appellant was 50% liable.
 2. That the Learned Trial Magistrate erred in law and in fact by making a finding that the plaintiff was equally to blame for the accident.
 3. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate the evidence of the appellant as well as the evidence of the police officer hence leading to a miscarriage of justice.
 4. That the Learned Trial Magistrate greatly misdirected himself by not considering the evidence adduced by the appellant and submissions presented before him on liability by consequently apportioning liability against innocent passengers.
 5. That the Learned Trial Magistrate erred in law and in fact by arriving at a wrong conclusion on liability after considering extraneous matters.
 6. That the Learned Trial Magistrate erred in law and in fact by evaluating the evidence wrongly and not taking into account relevant factors especially by finding that the innocent passengers who were not in control of the motor vehicle contributed to the occurrence of the accident.
 7. That the Learned Trial Magistrate erred in fact and in law by failing to consider that the accident was solely caused by the negligence on the part of the 2nd respondent who was in control and management of the accident motor vehicle.
5. He proposed that the appeal be allowed with costs and the Judgment of the trial court delivered on 18.11.2021 be set aside and this Honourable court be pleased to make its own finding on liability.

Summary of the Evidence

6. PW1 Buya Hero Awadh told the court that on 30.12.2019 the Governor of Tana River County called village elders of different villages for a meeting in Hewani and promised to avail vehicles to transport them to the meeting. That the village elders invited from the village were between 10-15 people. He testified that they first congregated at Mnazini Health Centre at 7:00 a.m and that Hewani was about 80kms away.
7. He also testified that governor's meeting was at 9:00 a.m. and the vehicle which was to carry them was a tractor CGO4206 as was authorized by the governor. That they boarded the motor vehicle which carried about 60 people. According to him, the road was muddy, the vehicle skidded and they fell off. That they had complained to the driver to move slowly but he did not listen. He drove at a high speed and cause the accident.



8. He told the court that they did not force themselves into the tractor and that they had a list of people that has boarded the tractor. He also told the court that they cannot be blamed for the accident as the driver had control of the vehicle. He informed the court that he suffered injuries on the back, stomach and chest. That he went to Mnazini dispensary where he was treated and discharged. He presented treatment notes which were produced as plaintiff Exhibit No. 1, a P3 Form as plaintiff Exhibit No. 2, the Police Abstract as plaintiff Exhibit No.3 and the Medical Report as well as the receipt by Doctor Adede as plaintiff Exhibit No. 4 (a) and (b) respectively.
9. On cross examination, he told the court that he was aware that the tractor was not suitable for travelling but they boarded because they respected the governor. That they were not forced to board the tractor. According to him, the tractor was moving at a speed of 80km/hr and that he blamed the driver for the accident. His testimony is that a tractor ought not to ferry people but he boarded the trailer anyway. His further testimony is that he first went home but he did not remember the date he went to hospital.
10. PW2 PC David Lekaron attached at Gamba Police Station told the court that a report of an accident that occurred on 30.12.2019 was reported on 15.1.2020. That the accident involved a tractor owned by the County Government of Tana River GO4206A in the make of New Holland. According to the report, there were people involved in the accident who were passengers and that the accident occurred at Gamba-Kitere road at Barativo area. That the passengers were on a trailer that was being pulled by a tractor and that the police from Gamba police station visited the scene including the Investigating Officer PC Mwenesi who was transferred.
11. According to him, the tractor was speeding and the road was muddy, slippery and had potholes. That the driver of the tractor was the 2nd defendant who was also charged with dangerous driving. Further, the driver was over speeding because he was late and was in hurry to get to his destination.
12. On cross examination, he stated that he visited the scene of the accident but he had not brought the Occurrence Book on which the accident was reported. He confirmed that the tractor was not licensed to offer transport services and that people are not authorized to use a tractor for public transport. Further, that the passengers were not forced to board the tractor.
13. PW3 DR. Ajoni Adede informed the court that he examined the plaintiff in the matters before court and prepared medical reports for each of the 54 victims. That he indicated the injuries suffered by each of the plaintiffs.
14. At the hearing of the Defence case, one witness was called to testify.
15. DW1 Makorani Asahel told the court that on 30.12.2019, there was a function for the governor at Hewani. That on 29.12.2019, the Chief Officer of Agriculture in Tana River County instructed him to transport people from Minazi stage to Hewani for the meeting using the trailer belonging to the County Registration Number 04CG206A. That on the fateful day he found people waiting for him at Mnazini who boarded the trailer voluntarily. That the trailer had some people who were standing and others seated. He stated that as the trailer tilted while in motion around 8 to 15 passengers pushed each other. That he steered the tractor back to the road and informed the passengers that the road was bad but they insisted that the problem was minor. According to him, some people had jumped out but again boarded the tractor and they proceeded with the journey.
16. Further, that on their way, they found another pothole and the tractor tilted and 10 passengers jumped out. That they managed to get to the meeting place at 1:00p.m and all the passengers alighted saying “hakuna shida”, “hakuna shida”. That those injured raised their complaints before the County officials and requested to be taken to hospital. It is his testimony that the tractors are not used to carry passengers but instead are used to carry seeds and fertilizer for cultivation.



17. On cross examination, he stated that the County Government authorized him to take people to the governor's meeting using the tractor. He testified that the road had pot holes and it had rained. He also testified that he had no list of people who boarded, that he was not aware who boarded but the tractor was full.

Analysis and Determination

18. I have perused the entire record of appeal and considered the submissions by counsel for both parties. There is only one issue for determination in this appeal namely; whether the issue of liability was properly determined by the trial court.
19. This being the first appeal, it is this court's duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123, cited by the appellants where Sir Clement De Lestang (V.P) stated that:

“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. In particular, this 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”.
20. In apportioning liability between the appellant and the respondents the trial magistrate held as follow: -

“Further, it is not dispute that an accident occurred when the plaintiff were riding on the tractor Hewani and many suffered injuries. PW1 testified that the road was muddy and slippery but the driver drove with a high speed in a bid to reach the Governor's meeting on time. This evidence was not contested. The trailer of the tractor measuring 3x6 metres but it was congested with 30 to 60 people, some standing and sitting and when the trailer tilted and fell off some of plaintiff jumped off and others were injured as they moved out of the trailer in the ensuing commotion. The driver asked to stop the tractor after 10 to 16 plaintiffs fell off twice but the plaintiff said the problem was minor. The tractor was incapable of being fitted with safety equipment. Based on this evidence, I find that the plaintiff were equally to blame for the accident. I therefore find both liable for the accident on 50:50 basis as proposed by the defendant's counsel.”
21. DW1 testified that the tractors are not normally used to carry passengers but instead are used to carry seeds and fertilizer for cultivation. Further that the County Government authorized him to take people to the governor's meeting using the tractor. He also testified that the trailer had some people who were standing and others seated. He stated that as the trailer tilted while still in motion, around 8 to 15 passengers pushed each other. That he steered the tractor back to the road and informed the passengers that the road was bad but they told him that the problem was minor.
22. The respondents contend that the tractor was not meant for public transport as it is not designed for passenger safety and that the appellant was not forced into the accident vehicle but boarded it out of his



free will. The appellant on the other hand asserts that the trial court erred by making a finding that the plaintiffs were equally to blame for the accident. Going by the evidence of the witnesses, particularly, PW1 and DW1; PW1 told the court that they boarded the motor vehicle which had carried about 60 people. According to him, the road was muddy, the tractor skidded and they fell off. He later told the court that he was aware that a tractor ought not to ferry people but he boarded the trailer anyway. DW1 on the other hand informed the court that as the trailer tilted while still in motion, around 8 to 15 passengers pushed each other. Further, that on their way, they found another pothole and the tractor tilted and 10 passengers jumped out. Liability must always follow fault and the burden of proof as envisioned by section 107 of The *Evidence Act* lies with the plaintiff. The plaintiff must establish a causal link between the negligence by the defendants and the injuries he sustained. This position was well settled in the case of Nairobi Hcca No.152 of 2003, Statpack Industries Limited v James Mbithi quoted in Nakuru HCCA No.320 of 2004 *Timsales Ltd v Willy Nganga Wanjohi* that:

“It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone’s negligence and his injury. The plaintiff must adduce in evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessary as a result of someone’s negligence. An injury per se is not sufficient to hold someone liable.”

23. The appellant herein voluntarily took unreasonable risk by boarding a tractor trailer not designed for passengers and which had no safety gadgets, more so given the obvious bad condition of the road which was rough, muddy and slippery. He was negligent in accepting to travel in such conditions. The trial court was therefore right in its decision to apportion liability on 50:50 basis given the legal maximum of “volenti non fit injuria”.

24. The appeal is therefore in want of merit and is hereby dismissed with costs to the respondent.

JUDGEMENT READ, SIGNED AND DELIVERED VIRTUALLY AT GARSEN THIS 3RD DAY OF JULY, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Miss Nyambuto holding brief for Mr Kilonzo for the Respondent.

