**BM v Machakos County (Civil Appeal E059 of 2022)**
**[2023] KEHC 20447 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20447 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CIVIL APPEAL E059 OF 2022**

**FR OLEL, J**

**JULY 19, 2023**

**BETWEEN**

**BM ..... APPELLANT**

**AND**

**MACHAKOS COUNTY ..... RESPONDENT**

***(being an appeal from the judgment and decree of Hon. E.W Wambugu Resident Magistrate in Kithimani PMCC No. 7 of 2019 dated 14th April 2022)***

## JUDGMENT

1. This appeal arises from the judgement and decree of Hon. E.W Wambugu dated 14.04.2022 and issued in Kithimani SPMCC no 7 of 2019 where the learned trial magistrate found that both parties were liable for the accident and apportioned liability at 50:50, General damages was assessed at Ksh.1,700,000/= (less liability at 50%) which reduced it to Ksh.850,000/= and special damages were awarded at Ksh.52,855/= plus costs and interests.

### Brief facts

2. The appellant was the plaintiff in the primary suit and filed this suit on 01.02.2019 seeking damages arising from a Road traffic accident which occurred on 11.04.2018 between the appellant who was a lawful pedal cyclist along Kithimani – Katangi road and the respondent's motor vehicle registration number KBY 084C Isuzu Double cabin pick up (herein after referred to as the suit motor vehicle), which accident caused the appellant to suffer serious injuries for which he claimed damages. The plaint was amended 26.10.2021 to include further special damages claimed.

3. The Respondent filed their statement of defence on 09.07.2020, wherein, they denied in toto that their driver, agent and/or employee was negligent. They stated that the driver of the suit motor vehicle was an experienced driver who exercised reasonable care and precaution to avoid the said accident and they

blamed the obliviousness of the appellant for causing the said accident. Further the respondent too did file an Amended statement of defence in response to the Amend plaint and repeated the averments filed in the initial defence. They also pleaded "but for test" that the suit motor vehicle was driven by a cautious/Vigilant driver and the car in question was in good condition and thus the appellant was put to strict proof to establish negligence.

4. PW1 was Dr. Simeon Kioko who stated that he was a general medical practitioner based at Matuu. He examined that appellant, who was 16 years old. He had been involved in a road traffic accident on 10.04.2018 along Kithimani – Kikasa road. During examination the appellant had availed clinical notes and P3 form, which he also relied on to make his report. The appellant had obtained injuries on the head, left upper limb and lower limb. He had tender haematoma formation over the right front temporal scalp skin, tender haematoma formation over left wrist joint, tender haematoma formation and body angulation (bending on right fermur) over mid-section of right thigh giving rise to right lower limb movement limitation. The left leg had tender oedematous soft tissues formation over the distal – 1/3)

5. The appellant was attended to as a grievous harm patient as he had sustained several fractures and intermediary nails were inserted to secure the fractures, plastic of Paris too was applied on the left wrist distal ....and radius bones. The patient walked for three (3) months without applying pressure on the lower limb's and needed to have a second operation to remove metal/nails that had been inserted on his lower limbs, which operation would cost ksh.120,000/=. This included theatre surgeon fee, admission and drugs. On examination the appellant still had pain over right thigh and left leg. He was still attending outpatient orthopaedic clinic every six (6) months. He presented his medical report (P-exhibit 7(a) and Receipt P-exhibit 7(b). In cross examination PW1 stated that the appellant suffered grievous harm as he had a fracture of the left wrist, right leg and left lower leg. At the time of examination, the appellant had not undergone a second operation to remove the metal inserted on his bones but would need Ksh.120,000/= to undergo the said surgery.

6. PW2 was James Wambugu attached to Matuu Police station traffic section. He had the police abstract relating to this accident, which occurred on 11.04.2018 at around 18.00hours along Kithimani – Katangi road. It involved the suit motor vehicle and a paddle cyclist. The matter was reported to Matuu police station. The investigating officer one Corporal Mwaniki had been transferred but according to his investigations the suit motor vehicle was being driven by one Isaac Muendo Mutuku from Kithimani heading to Kikusa while enroute he knocked down one male juvenile who was riding a bicycle and had carried a pillion passenger. The juvenile had emerged from a feeder road on the left side of the road as you face Kikusa direction and as a result of the accident sustained serious injuries and was rushed to Machakos Level five hospital. The pillion passenger had escaped unhurt. According to PW3 the driver of the suit motor vehicle was to blame for the accident.

7. In cross examination PW3 stated that he did not visit the accident scene and did not have geographical understanding of the scene. He did not know if it was the driver or the juvenile who was careless. In re-examination the witness stated that, it was the suit motor vehicle that knocked down the pedal cyclist and as per the police abstract the suit motor vehicle driver was charged with the offence of careless driving.

8. Pw3 BMN testified that on 11.04.2018, he was from Katangi heading to Kithimani while riding a bicycle. Along the way he was knocked down by a motor vehicle being driven from Kithimani heading to Katangi. The suit motor vehicle was being driven at high speed and knocked him down while he was on his lane. On impact he was thrown up and landed on suit motor vehicle, which did not stop and was driven off until Mukutano where it stopped. The suit motor vehicle driver took off and good Samaritans took him to Machakos level five hospital, where he was admitted until 28.05.2018. PW3

stated that he sustained fracture injury of both legs, fracture of left hand and head injury. Metal was fixed on both legs and a POP put on his hand. The accident was reported at Matuu police station and he was issued with a police abstract. PW3 blamed the suit motor vehicle for the accident and the driver was charged in court with the offence of careless driving. PW3 also produced the documents in his list of documents, other then the police abstract and medical report which had been earlier produced.

9. In cross examination PW3 confirmed that they were from the opposite direction and did not join the Kithimani-Katangi road from a feeder road. When he was hit, he flew up and landed on the back of the suit motor vehicle. PW3 insisted that it was a head on collusion and he was on his lane, when he was hit by the suit motor vehicle. PW3 confirmed that the pillion passenger did not sustain any injury, but he was injured on his legs and metal/nails were fixed on both legs. The same were later removed by Dr. Muli on 06.01.2019. PW3 further stated that he still has problems while walking and could not walk for more than 1km.

10. The distance between the accident scene and Makutano was about 4km and he was unconscious while on top of the motor vehicle. The allegation that the suit motor vehicle did not stop and drove off with him was information he got from a good Samaritan who he would not call as a witness. When he regained his consciousness PW3 said he found himself in hospital at Machakos level 5 hospital. In re-examination PW3 stated that the suit motor vehicle left its lane and knocked him down on his rightful lane and on impact he landed on the motor vehicle and lost consciousness and regained it while in hospital. Further for the operation to remove the metal plated used to hold the fracture he was charged Ksh.40,000/=. He blamed the Respondent's driver for the accident as he was driving at high speed and knocked him down on his rightful lane. He prayed for compensation.

11. The defendant did not call any witness and closed their case. Both parties filed submissions and judgment was entered for the plaintiff at Ksh.902,855/= plus cost and interest after liability had been considered. The appellant being dissatisfied by the said judgment filed his memorandum of appeal dated 9th May 2022 and raised eight (8) grounds of appeal. The grounds were that;

    a. The learned trial magistrate erred in fact and in law in ignoring the evidence of the appellant's witnesses.

    b. The learned trial magistrate erred in fact and in law in holding the appellant 50% liable for the accident in absence of any evidence by the Respondent disputing liability.

    c. The learned trial magistrate erred in fact and in law in failing to appreciate the fact that no evidence was adduced by the Respondent to show that the appellant herein was joining the main road from a feeder road.

    d. The learned trial magistrate erred in fact and in law in failing to appreciate the fact that the point of impact was on the main road on the motor cyclist lane and that the appellant herein was hit by the Respondents motor vehicle from behind.

    e. The learned trial magistrate erred in fact and in law in failing to find that the Respondent was solely to blame for the accident.

    f. The learned magistrate erred in fact and in law in ignoring the appellant's evidence on liability and in particular the police abstract produced by the appellant which squarely blamed the Respondent for the accident.

    g. The learned magistrate erred in law and in fact in apportioning liability at 50:50% against the weight of the appellant ad that of his witnesses.

h. The learned magistrate erred in fact and in law in failing to consider the appellants submissions and authorities on liability.

**Appellants Submissions**

12. The appellant filed his submissions on 07.02.2023 and stated that the trial magistrate erred in law and fact in holding the appellant 50% liable for the accident in absence of any evidence by the Respondent disputing liability. The trial magistrate erred in placing reliance on the evidence of PW2 and ignored the fact that the oral evidence adduced could not prove negligence considering that PW2 was not at the scene of the accident and the police abstract squarely blamed the Respondent for the accident. The evidence of PW2 was hearsay and thus should not have been relied on. The appellant urged this court to find as much. They placed reliance on *David Kajogi M'mungaa v Francis Muthoni* (2012)eKLR and *Kennedy Nyongoya v Bas Hauliers* (2016)eKLR.

13. The appellant urged this court to find that the probable circumstances of the accident was as per evidence of PW3 who was the only one present during the accident and his testimony was not shaken during cross examination. The trial magistrate was thus wrong in apportioning liability and wrongly raised the standard of proof, thus reached an erroneous decision. Reliance was placed on *Fredrick Wichenje Ikutwa v Florence Mwikali* (2020) eKLR, *Florence Mutheu Musembi and Geoffrey Mutunga Kimita v Francis Karenge* (2021)eKLR.

14. The final issue the appellant submitted on was that the appellant was a minor and the general rule in law was that a minor could not be held liable for contributory negligence unless he/she is of such an age as to be expected to take precaution for his or her safety and that he is not to be found guilty unless blameworthy. Reliance was placed on *Attorney General and another v Vinod and another* (1978) EA 147, *Gouch v Thome* (1966) WLR 1387 and *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982- 1988) IKAR (1981) KLR 349.

15. The appellant submitted that he had adequately demonstrated that this appeal had merit and prayed that it be allowed. The appellant did not dispute *quantum* as awarded nor did they submit on the same.

**Respondents Submissions**

16. The Respondent did file their submissions on 26.01.2023 and supported the judgment delivered. They stated that it was appropriate. Further the respondent submitted that this court should not interfere with the judgment of the trial court unless the court exercised its discretion in a clearly wrong manner and misdirected himself/herself or acted on matters which he should not have acted on and/or failed to take into consideration, matters which he/she ought to have considered and thus the court arrived at the wrong conclusion. See *Farah Awad Gullet v CMC Motors Group Ltd.* (2018) eKLR.

17. The Respondent submitted that he who alleged must prove and It was incumbent on the appellant to prove the occurrence of the accident in the manner he stated it happened. The police abstract indeed proved the accident. But PW2 and PW3 gave contradicting evidence as to how the accident occurred. While PW3 stated that he was knocked on his lane, by the Respondents motor vehicle, PW2 testified that as per the report of the investigating officer, it was the appellant who entered the road from a feeder road without any proper lookout and caused the accident. Liability was thus not proved and the court was right in holding both parties 50-50% liable as the court could not be expected to ascertain which version is to be upheld. Reliance was placed on *Rosemary Vassalex v Kenya Power and Lighting Company Ltd* (2014) eKLR and *Attorney General v Oluoch* (1972) IEA 392 and *Kenya bus services Ltd v Humphrey* (2003) KLR 665, (2003) 2EA 519.

18. As regards the award of damages the Respondent submitted that the damages awarded should be reasonable based on actual injuries suffered, guided by comparable precedents on similar injuries and incident of inflation, taking into account the parameters of the Kenya economy. Reliance as placed on *Kenya Bus Services ltd v Jane Karambu Gituma* (Court of appeal at Nyeri civil Appeal No.241 of 2000).

19. The injuries sustained were no doubt severe as confirmed by the medical report produced but there was no resultant incapacity from the injuries and the appellant seemed to have healed well. Similar awards ranged between Ksh.450,000 – 1,500,000/= and thus the sum of Kshs.1,700,000/- awarded was adequate special damages proved was Ksh.52,855. The judgement was thus spot one and should not be disturbed.

20. The respondent prayed that this appeal be dismissed with costs to the respondent.

**Analysis and Submissions**

21. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

22. As held in *Selle & Another v Associated Motor Boat Co ltd & others* (1968) EA 123 where it was stated that;

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court Is by way of retrial and the principals 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 conclusion 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 demeanor of a witness is inconsistent with the evidence in the case generally. ( *Abduk Hammed saif v Ali Mohammed Sholan*(1955), 22 E.A.C.A 270

23. In *Coghlan v Cumberland* (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows -

> " Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

24. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of

law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the civil procedure Act a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko v Varkey Joseph* AIR 1969 Keral 316

25. Guided by the above cases, the duty of this appellate court is cut out. The only issue raised in this Appeal is that of apportionment of liability and if the trial court was right in sharing liability between the parties at 50:50% instead of apportioning liability at 100% as against the Respondent.

26. The appellant's own witnesses gave contradictory evidence.PW2 Srgt James Wambua from Matuu traffic base, stated that he was not the investigating officer. The investigating officer one Corporal Mwaniki had been transferred. According to the OB report an accident had occurred on 11.04.2018 around 18.00hrs along Kithimani – Katungi road at Kikesa area. It involved the suit motor vehicle and a pedal cyclist. The accident occurred when the juvenile emerged from a feeder road on the left side of the road as you face Kikesa direction and entered the road without a proper look out for other road users. As a consequence, there was a collision and the victim sustained injuries on his legs and was rushed to Machakos level 5 hospital. The witness also said he did not have a geographical understanding of the scene and did not know if it was the driver or juvenile who was careless.

27. PW3, who was the plaintiff on the other hand testified that the suit motor vehicle knocked him while he was on his lane and in the process threw him up and he landed on the back of the said motor vehicle which drove off with him on the back of the pick up until Makutano. According to him he obtained this information from a good Samaritan as he was unconscious from impact of the accident. In cross examination the appellant denied joining the road from a feeder road and insisted that it was a head on collision. He also confirmed that the pillion passenger did not sustain any injury.

28. The trial magistrate in his considered opinion did find that there was no evidence adduced to show the point of impact and in view of the contradicting evidence presented by the appellant, both parties had to share liability in equal measure.

29. In this appeal, it is clear that its determination revolves around the question whether the appellant proved his case on the balance of probabilities. That the burden of proof was on the appellant to prove his case is not in doubt. In *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR it was held that:

> "As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

30. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 stated that:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

31. That a Court faced with two sets of circumstances is duty bound to make a determination thereon however difficult the circumstances are, was appreciated by Madan, J (as he then was) in *Welch v Standard Bank Limited* [1970] EA 115 expressed himself as hereunder:

> " When there is no material to generate actual persuasion in the court's mind, still the court cannot unconcernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability. Everyday, proof of collision is held to be sufficient to call on the two defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence enabling the Court to draw a distinction between them, they must both be held to blame, and equally to blame...Justice must not be denied because the proceedings before the court fail to conform to conventional rules provided, in its judgement, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardising the vital task of doing justice. Provided there is no transgression of this sacred duty, the court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion...There being nothing to enable the court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The court does hold so in this case."

32. Similarly, in *Lakhamshi v Attorney-General* [1971 EA 118 it was held that:

> " A judge is under a duty when confronted with conflicting evidence to reach a decision on it and in most traffic accidents it is possible on a balance of probability to conclude that one or other party was guilty, or that both parties were guilty, of negligence. In many cases, as for example, where vehicles collide near the middle of a wide straight road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is, in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. It is usually possible, although often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but where it is not possible, it is proper to divide the blame equally between them."

33. Also in *Khambi and Another v Mahithi and Another* [1968] EA 70, it was held that:

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

34. That seems to have been the position in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR142 and *Mahendra M Malde v George M Angira* Civil Appeal No. 12

of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

35. In this case, a holistic reading of the judgement of the trial court reveals that the trial magistrate attributed negligence to both parties as the two key appellant's witnesses gave contradictory evidence. The appellant in his submissions, urged this court to ignore the evidence of PW2, the police office and rely on the evidence of PW3 the plaintiff. But there is no basis for doing so as both were his witnesses and gave evidence on his behalf. The evidence of PW2 is what was contained in the OB, which was recorded by the investigating officer after attending the scene and cannot be said to be hearsay evidence. The appellant had a duty to provide further evidence to show point of impact and disapprove the evidence of PW2, who unfortunate for him was his own witness. It was the appellant who had the burden of proof to discharge and would fail if the same was not.

36. PW2 further stated that according to the abstract, the driver of the respondent was to blame for the accident and he was charged with the offence of careless driving. This contradicted his earlier evidence and further no details and or proceedings were brought before court to show the outcome of the traffic case instituted if any, as against the respondent's driver. The appellant's explanation that they had an head on collusion with the suit motor vehicle is also in doubt as the pillion passenger was confirmed not to have suffered any injury, which would have been unlikely if the accident was a head on collusion and the impact made the appellant fly over the pick-up and land on its boot, so to speak.

37. In this suit, the appellant clearly failed to fully discharge the burden of proof based on the evidence presented and failed to prove that indeed it was the respondent's driver who was careless, reckless and negligent and thus 100% liable for the accident.

38. The court is guided by the opinion of the Court of Appeal in *Farah v Lento Agencies* [2006] 1 KLR 123 where it expressed itself as follows:

> "In our view, it was not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who was to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. Everyday, proof of collision is held to be sufficient to call the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the Court would unhesitantly hold that both are to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them... The trial court...had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."

39. I have considered the evidence on record and I am of the view that the appellants evidence and that of his witness was characterized with inconsistencies and internal contradictions, it was not possible to apportion liability as between the appellant and the respondent's driver. The trial magistrate thus did not err in making his decision.

40. Further, it is well settled that where a trial magistrate has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate

court will not consider itself free to substitute its own apportionment for that made by the trial Judge. A review of the evidence does not reveal any error and therefor I find no basis upon to interfere with the trial courts finding on liability.

41. The final issue raised in by the appellant was that at the time of the accident, the appellant was a minor and as a rule of the thumb, a minor could not be held liable for contributory negligence unless he or she is of such an age as expected to take precaution for his or her safety. The appellant was 16 years as at the time of the accident. His age is specified on the P3 form dated 27.08.2018, issued four (4) months after the accident. The appellant was by then capable of making solid decisions and taking precaution for his own safety. He thus could take responsibility if an incident occurred. This ground of appeal too fails.

**Disposition**

42. I hold and find that that this appeal has no merit and the same is dismissed with no orders as to costs.

43. It is so ordered.

**JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF JULY, 2023.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**Delivered on the virtual platform, Teams this 19th day of July, 2023.**

**In the presence of;**

.....for Appellant

.....for Respondent

.....Court Assistant