



**Kiarie v Njue (Civil Appeal 116 of 2020) [2023] KEHC 19928 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19928 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 116 OF 2020  
HK CHEMITEI, J  
JULY 13, 2023**

**BETWEEN**

**RUNSON MBURU KIARIE ..... APPELLANT**

**AND**

**JULIUS MAINA NJUE ..... RESPONDENT**

*(Being an Appeal from the Judgement of Hon. B Mararo  
(PM) dated 20th May in Nakuru CMCC No. 1016 Of 2013)*

**JUDGMENT**

1. The appellant was sued by the respondent at the lower seeking damages pursuant to a road traffic accident that occurred on 10<sup>th</sup> May 2011 along Mau- Narok- Njoro road. The said accident involved the appellants motor vehicle registration number KBL 089E and the respondent's motor vehicle registration number KAN 609C.
2. As a result of the said accident the two vehicles were damaged as well as the appellant sustaining bodily injuries. The respondent filed suit claiming damages for the loss and damage on the said vehicle. The appellant counterclaimed as well for the bodily injuries he sustained.
3. The matter proceeded to full trial whereby the trial court apportioned liability at 70:30 in favour of the respondent against the appellant as well as special damages of Kshs 368,000 and the loss of user of Kshs 200,000. He was also awarded costs of the suit less the 30%.
4. The court also awarded the appellant the sum of Kshs 500,000 as general damages for pain and suffering and Kshs 205,278 being special damages.
5. The appellant has appealed against the said judgement on the issue of liability. He submitted that since the trial court found that the parties gave contradictory evidence on the issue of liability the apportionment should therefore have been equal. He relied on the case of *Enock Sinda Obegi v. Bernard Sumo* (2020) eKLR



6. The Respondents on his cross appeal is contesting two issues as can be deduced from the memorandum of appeal namely liability and the question of the validity of the counterclaim. The latter was because according to the Respondent the counterclaim by the appellant was way out of time and run foul the provisions of the *Limitation of Actions Act*.
7. The court directed the parties to file written submissions which they duly complied.
8. The appellant contented on the question of liability that the respondents counterclaim was filed 5 years after the incident and was therefore against the provisions of Section 4(2) of the *Limitations of Actions Act*. The said section states that no action may be brought on tort after the end of three years.
9. The appellant relied among others on the case of *Allan George Njogu Kamau v. National Bank of Kenya limited* (2019) eKLR.
10. On liability it was the appellant's submission that the evidence adduced by the respondent did not challenge the fact that it was the driver of motor vehicle registration number KAN 609C that caused the accident as he did not exercise great care. The appellant while relying on the doctrine of res ipsa loquitor submitted that the evidence of PW1 was more reliable than DW1 who visited the scene several minutes after the accident.
11. It was his case that the trial court ought to have find the respondent 100% liable. He further among others relied on the case of *Khambi and Another v. Mabithi & Another* (1968) E A 70.
12. On quantum the appellant submitted that it was erroneous to hold that the respondent was entitled to the damages yet the counterclaim was already found to be illegal and hopelessly out of time.
13. He therefore prayed for the appeal to be allowed and to hold that the Respondent was 100% liable for the accident. The respondent on the other hand prayed for the court to find liability against the appellant and to dismiss the counterclaim. Each of them prayed for the costs of the appeal.

### **Analysis and determination**

14. The court has perused the proceedings herein as well as the submissions by the parties. The court proposes to start with the issue of counterclaim.
15. From the evidence on record the accident occurred on 10<sup>th</sup> May 2011. The counterclaim was filed on 25<sup>th</sup> October 2016. Evidently there was a five-year cap between the said period. The provisions of section 4(2) of the *Limitations of Actions Act* is worth reproducing here. The same states;

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

16. The counterclaim is of course a suit on its own. The said *Act* under Section 35 finds so when it states that;

“For the purposes of this *Act* and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.”. Underlining mine.



17. That being the case the trial court ought to have considered the preliminary objection raised by the plaintiff/respondent. Had it done so then it would not have taken time to consider the prayers contained in the counterclaim. In any case no leave of the Court was sought before the same was filed.
18. For this reason and without belabouring the point I find that the appellant /respondent's prayer for allowing the appeal on this ground is hereby allowed. This as well means that the general and special damages awarded to the appellant as prayed in the counterclaim are hereby set aside.
19. On liability I have carefully read the evidence of PW1, PW4, DW1 and DW2. All the witnesses testify that there was a sharp corner at the scene. Both are not in agreement on the speed the vehicles were. Naturally they would not admit because they each pull on different sides of the case.
20. As a matter of fact, none was able to pinpoint with precision that they witnessed the accident and how it occurred. Their respective evidence countered each other.
21. The police officer PW3 did not aid the matter either for the simple reason that he did not carry out proper investigations including drawing sketch maps of the scene. He seems to have arrived at the scene several hours after the accident. In short his evidence was not of much value. Concluding that the owner of the small vehicle was to blame was without any basis unless he had his evidence which he failed to produce. Issuing the notice of intention to be prosecuted was not a prima facie evidence that he was culpable. He ought to have gone beyond assumptions.
22. Consequently, I find that this was a matter the trial court ought to have awarded equal liability against both parties. In *Farah v. Lento Agencies* (2006) 1 KLR 124 the court stated that;

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is 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.”
23. In the premises this court concludes on both the appeal and cross appeal as hereunder;
  - (a) The ground on counterclaim succeeds and the same is hereby set aside and the respondent/appellant Julius Maina Njue is hereby awarded the costs of the counterclaim at the trial court.
  - (b) All the awards emanating from the said counterclaim are hereby set aside for all intend and purposes.
  - (c) On liability the trials court findings are hereby set aside and substituted with the findings that liability shall be shared equally, that is, 50;50 basis between the parties.
  - (d) The findings of the trial court on the main suit between the parties shall remain the same save on apportionment of liability on (c) above.
  - (e) Each party shall meet their own costs in this appeal.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 13<sup>TH</sup> DAY OF JULY OF 2023.**

**H K CHEMITEI**

**JUDGE**

