



**Mwenda v Mutembei (Civil Appeal E010 of 2021)  
[2023] KEHC 20889 (KLR) (11 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20889 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CIVIL APPEAL E010 OF 2021**

**LW GITARI, J**

**JULY 11, 2023**

**BETWEEN**

**PATRICK MWENDA ..... APPELLANT**

**AND**

**KHAMIS KARIUKI MUTEMBEI ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein was the Plaintiff in Chuka CMCC No. 76 of 2019. He instituted the suit against the Respondent claiming special and general damages following a road traffic accident that occurred on or about 6<sup>th</sup> February 2019.
2. The Appellant's claim is based on the facts that he was travelling aboard motor cycle registration number KMEM 541R when the accident occurred. As per the plaint, the accident resulted in the Appellant's right index finger being chopped off. He further sustained tenderness on his right thigh. After a full trial, the court found on 10<sup>th</sup> June, 2021 that the Appellant had not proved that the Respondent was to blame for the accident and consequently dismissed the suit. This is an appeal against the said decision. The appeal is based on the following grounds:-
  1. That the learned Trial Magistrate erred in law and fact and misdirected herself in finding the appellant liable notwithstanding the evidence on record to the contrary;
  2. That the learned Trial Magistrate erred in law and fact in failing to properly analyze the evidence before her which clearly established that the respondent was substantially to blame for the subject accident for dashing out into the road unexpectedly thereby causing the subject accident.
  3. That the Trial Magistrate erred in law in failing to appreciate and apply the principles applicable in a claim for negligence.



4. That the Learned Trial Magistrate erred in law and fact in finding the appellant liable against a clear evidence of the plaintiff and his witnesses.
  5. That the learned Trial Magistrate erred and misdirected herself in law by dismissing the Appellant case more so the evidence of the police.
  6. That the Learned Trial Magistrate erred in law and fact by relying on insinuation and unsubstantiated photographs against the weight of plaintiff's evidence.
  7. That the Learned Trial Magistrate erred in law and facts in failing to make a finding on quantum.
3. The appellant prays that the appeal be allowed and Judgment of the lower court be set aside. That costs of the appeal be granted to the appellant.
  4. The appeal was opposed by the respondents. The court directed that the appeal be canvassed by way of written submissions.
  5. It is the Appellant's submission that the trial court's finding on liability was incorrect. That the court placed undue weight on the photographic evidence adduced by the Respondent as conclusive proof of liability without addressing itself to the truthfulness, probability or otherwise of the Appellant's witness testimony and documentary evidence. It was thus his submission that the totality of the lower court's handling of the issue of liability fell short of the duty of care the judicial officer owed the Appellant as such, the impugned judgment should be set aside and the mater proceeds afresh.
  6. On the other hand, the Respondent submitted that the Appellant admitted to swerving his motorcycle to the right side and entering into the lawful lane of the Respondent and rammed into the Respondent's motor vehicle registration number KCH 968J. That as per the bundle of photographs taken after the accident, it was clear that the point of impact of the accident was within the Respondent's lawful lane. As such, the Respondent submitted that the Appellant should be blamed fully for causing the accident.

### **Issues for determination**

7. I have considered the grounds of appeal as well as the respective submissions by the parties. The main issues that arise for determination are:
  - a. Who is to blame for the accident?
  - b. Whether the trial court erred by dismissing the appellant's claim and not making a finding on quantum regardless of its finding on liability; and if so
  - c. Whether the Appellant is entitled to quantum of damages.

### **Analysis**

8. This is a first appeal and it is the duty of this Court imposed by law to evaluate afresh by way of a retrial the evidence recorded before the trial court in order for it to reach its own independent conclusion. In *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 the court held as follows in this regard:

“The court must consider the evidence, evaluate itself and draw its own conclusion though doing so it should always bear in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. However, this court is not bound necessarily to follow



the trial judge's finding of fact as it appears either that he had 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."

See *Adok James Odera T/A A.J Odera & Associates v John Patrick Muchira T/A Muchira & Co. Advocates* [2013] eKLR cited by the appellant where the Court of Appeal stated that "This being a first appeal we are reminded of our primary rule..... namely, to re-evaluate re-assess and re-analyze the extracts of the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

9. The Appellant testified as PW1. It was his testimony that on the material day, he was riding motor cycle registration number KMEM 541R from Irima to Njeru when he collided with motor vehicle registration number KCH 968J fielder. It (motor vehicle) was negotiating a corner at a high speed. It was his evidence that the said motor vehicle came into his lane and knocked him down. Further, that he swerved on the right lane of the said motor vehicle as it had come to his lane. As a result of the accident, the Appellant's right index finger was chopped off and he sustained tenderness on his right thigh. He produced as evidence his treatment notes, a bundle of receipts from Chogoria Hospital for Kshs. 7,845/=, his P3 Form, a demand letter, and a receipt for Kshs. 2,500/= and another for Kshs. 3,000/=.
10. On cross examination, the Appellant stated that the accident occurred at a blind corner. That he had on his helmet and reflector. Further, that he still had pain on the right index finger and leg. That they collided on the side of the motor vehicle. He did not produce his driving licence in court and the insurance cover.
11. PW2 was PC John Orenge Ogembo attached to Traffic Chuka. He produced in evidence a police abstract no. OP19/6/2/2019 that was issued on 27<sup>th</sup> February, 2019. According to him, the driver of the motor vehicle registration number KCH 968J failed to give way causing the accident. He blame the said driver for the accident. On cross examination, he stated that although he did not have the investigation report, he read the outcome of the investigations from the occurrence book. He testified that the driver of the motor vehicle was not charged in court. The witness further stated that he was not the investigating officer. He also admitted that there was nothing on the police abstract stating that the driver of the motor vehicle was to blame for the accident. Although he said he read the occurrence book to know the outcome, he did not produce it in court
12. On February 25, 2021, the parties consented to have the medical reports dated April 16, 2019 by Dr. Mwandiki and the one dated July 8, 2020 by Dr. John K. Macharia to be produced as evidence. The consent was adopted as a court order.
13. DW1 was the Respondent herein. He adopted his statement dated 1<sup>st</sup> July, 2020 as his evidence and produced a bundle of photographs and a certificate of photographic print as exhibits. According to him, the Appellant was to blame for the accident as he allegedly is the one who entered onto his lane. The Respondent further denied the Appellant's claim that he was the one who was speeding.
14. It is clear from the proceedings that the parties blame each other for the accident. According to the Appellant's case, the driver of the motor vehicle registration number KCH 968J was negotiating a corner at a high speed when the accident occurred. That he swerved on the right lane and knocked him down. On the other hand, the Respondent maintained that the accident did not occur at a corner as alleged by the Respondent. That he swerved to the right of the road while trying to avoid hitting the motor cycle when he fell into a ditch. That the motor cycle then hit his motor vehicle on the right side of the body and head light before falling on the left side of the road which was in his lane.



15. From my review of the evidence, it is my view that the Appellant in this case bore 100% liability for this accident. I am persuaded by the photographs produced in evidence that it is the Appellant who swerved to the Respondent's lane causing the accident. While PW2 blames the driver for the motor vehicle, his testimony was not substantiated by any evidence and is indeed not credible. I base the finding on the following grounds:-

1. He admitted that he was not the one who investigated the case.
2. He said he read the occurrence book which he never produced in court.
3. The Police Abstract had not indicated that the driver of the motor vehicle was to blame for the accident.
4. The respondent was not charged with a traffic offence.

The evidence of PW2 failed to provide the much needed independent evidence on who was to blame for the accident. The trial magistrate did not misdirect herself. It was evident that the evidence by the appellant was not credible.

Furthermore the appellant in his testimony admitted that he swerved his motor cycle to the right side and entered into the lane of the respondent resulting in the collision. The *Traffic Act* at Part VIII of the *Traffic Regulations* provides that, "every vehicle meeting or being overtaken by other traffic shall be kept close to the left or 'nearside' of the road as possible." The appellant who stated that he was meeting with the vehicle driven by the respondent had a duty to keep left. By his own admission that he swerved to the right, he breached the regulation and drove on his off side (right) and by so doing violated the regulation and exposed himself to danger on the other hand there is the testimony of the respondent who stated that it is the appellant who came to his side. He produced evidence of photographs which clearly show that the point of impact of the accident was within the respondent's lawful lane. The respondent relied on documents taken at the scene showing the motor vehicle on the left side as he swerved on the left to avoid a head on collision with the appellant. The photographs tell it all the respondent had swerved to the left and the motor bike was on its off-side. It is trite law that there can be no liability without fault, see the authority cited by the respondent *Muthuku v Kenya Cargo Services Limited* (1991) eKLR 464 which I quoted in Civil Appeal No 5/2018 *Joyce Wanjiku Kimani v Eunice Maina and two others* as follows:-

"in my view it was for the appellant to prove, of course upon a balance of probabilities, one of the forms of negligence, as was alleged in the plaint. Our law has not yet reached the stage of liabilities without fault. The appellant, clearly failed to prove any sort of negligence against the respondent, and in my respective view, his claim was rightly dismissed."

14. Where a person alleges negligence, he is supposed to prove that there was breach, of a duty of care: it is trite that whoever alleges must prove. And in this, the burden was on the appellant, to prove the particulars of negligence which were pleaded at paragraph 4 of the plaint, where it was alleged that; the vehicle was being driven at an excessive speed, without due care and attention, failing to brake, swerve, slow down and in any other manner control the motor-vehicle, failing to keep a proper look out, failing to have regard for the safety of pedestrian, and in particular the deceased.

Section 107 of the *Evidence Act* provides that;

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



2. When a person is bound to prove existence of any fact it is said that the burden of proof lies on that person.”

In the case of: *Trendsetters Tires Limited, v John Wekesa Wepukhulu* (2010) eKLR where Ibrahim J (as he then was) allowed an appeal and quoted Charles Worth & Perci on Negligence 9<sup>th</sup> Edition at page 387 on the question of proof and burden thereof, where it was stated:

“As in every other action, the burden of proof falls on the plaintiff alleging it to establish each element of tort, hence it is for the plaintiff to adduce evidence of facts on which he basis his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded two questions arise:

- i. Whether on that evidence negligence may reasonably be inferred.
- ii. Whether assuming it may be reasonably inferred, negligence is infact inferred.”

The appellant had pleaded various particulars of negligence at paragraph four (4) of the plaint. section 107 of the *Evidence Act* (*supra*) implies that the burden is on the appellant to prove negligence on the part of the respondent.

The appellant bore the burden to proof that the respondent was negligent. The appellant bears the burden to adduce credible evidence which is also believable that the respondent was at fault and was to blame for the collition. The appellant had pleaded the doctrine of ‘Res ipsa Loquitor.’ He never adduced evidence to support this claim. To the contrary, the photographs produce by the respondent show that the case speaks for itself as to who was to blame for the collition. The appellant while relying on the case of *Polytanks Limited v Wanza Musau & Mary Mutheu Sila & 2 others* (2020) eKLR has urged the court to hold that if the issue of liability is not adequately settled in favour of either party, the court would still be entitled to find that since the accident involving negligence did occur, it could apportion liability equally between the parties. It is indeed true that where the court is unable to determine who among the drivers was to blame it can apportion liability equally between the parties. Apportionment of liability need not necessarily be on equal basis, it can also be apportioned proportionately. Be that as it may, whether on equal basis or proportionately, it largely relies on the evidence or on the circumstances of the case. In this case the respondent demonstrated graphically with the photographs that the blame lay squarely on the appellant. The court must therefore declare that the blame must lay where it lies, and it is with the appellant.

16. Turning on quantum, the Appellant has raised the issue that the trial court ought to have assessed the quantum of damages regardless of its finding on liability. I do agree with the appellant’s submission to the extent that a trial court and this court are not courts of last resort. They must assess damages even where the party claiming is unsuccessful in a claim for general damages.
17. In *Lei Masaku v Kalpama Builders Ltd* [2014] eKLR Mabeya J. held that:

“There is the issue of failure to assess damages. It has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established. To have casually dismissed the suit and fail to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the Appellate Court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages,



its judgment was a serious flaw and cannot stand. It therefore behoves this court to assess quantum.”

I am in agreement with this holding, the trial magistrate had a duty to assess the quantum of damages it would have awarded had the plaintiff been successful. Damages are assessed based on the injuries sustained, the pain and suffering and the long term effects and special damages incurred.

18. The Appellant produced his treatment and medical reports. It is not in dispute that he had his index finger chopped off. At trial, the Appellant had submitted for an award of Kshs. 400,000/= and placed reliance on the case of *Blue Horizon Travel Co. Ltd v. Kenneth Njoroge* [2020] eKLR. He further placed reliance on the case of *Diamond Transporter Limited & another v. Joseph Kioko Mwikali* [2018] eKLR where the High Court awarded the Kshs. 350,000/= for sustaining a cut on the left hand middle finger and had his third finger amputated. Taking into account the extent of the Appellant’s injuries, and the cited case of *Diamond Transporter Limited & Another v. Joseph Kioko Mwikali* [2018] eKLR where the Appellant therein suffered injuries of a similar gravity to the Appellant herein, it is my view that an award of Kshs.350,000/= as general damages would suffice. As for special damages, a total of KShs. 13,345/= was pleaded and proved. The same would have been awarded if the Respondent was found liable for the accident.

From the fore-going, save for the failure by the trial magistrate to assess the quantum of damages, I find that the appellant failed to demonstrate that the learned trial magistrate erred in any way in arriving at her verdict. Having considered the evidence tendered before the trial court I come to the conclusion that the appeal is without merits. On costs, it is trite that they follow the event and are in the discretion of the court. They are awarded to compensate the winning party. I find that the respondent is entitled to costs.

**Conclusion:**

1. The appeal is without merits and is dismissed.
2. I award the costs of appeal and in the lower court to the respondent.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 11TH DAY OF JULY 2023.**

**L.W. GITARI**

**JUDGE**

**11/7/2023**

Mr. Kariuki for Respondent

Mr. Kijaru for Appellant,

Ms Nyaga H/B for him.

The Judgment has been read out in open court.

**L.W. GITARI**

**JUDGE**

**11/7/2023**

