



**Wanyonyi v Remwoi & another (Civil Appeal 14 of 2021)
[2023] KEHC 20281 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20281 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 14 OF 2021
AC MRIMA, J
JULY 20, 2023**

BETWEEN

JOHN WAFULA WANYONYI APPELLANT

AND

STEPHEN REMWOI 1ST RESPONDENT

JOSIAH KARANJA 2ND RESPONDENT

*(Being an Appeal arising out of the judgment and decree of Hon.
Nyang'ara Osoro (Resident Magistrate) in Kitale Chief Magistrate's
Court Civil Case No. 331 of 2018 delivered on 04/03/2021)*

JUDGMENT

Introduction:

1. There is no dispute that the appellant herein, John Wafula Wanyonyi, was involved in a road traffic accident on July 25, 2018. The contention is, however, in the manner in which the accident occurred.
2. After the trial, the court dismissed Kitale Chief Magistrates Civil Case No. 331 of 2018 John Wafula Wanyonyi vs. Stephen Remwoi & Josiah Karanja (hereinafter referred to as 'the suit') thereby prompting the appeal subject of this judgment.

The Appeal:

3. A Memorandum of Appeal dated March 30, 2021 was filed. The appellant preferred 5 grounds of appeal. He faulted the trial court for not properly evaluating the evidence and thereby arriving at a wrong decision, applying wrong legal principles including a wrong standard of proof and not making any finding on quantum of damages.
4. The parties canvassed the appeal by way of written submissions.



5. The appellant's submissions were dated November 5, 2022. The appellant buttressed the grounds of appeal in his submissions.
6. He contended that had the trial court properly evaluated the evidence, then it would have allowed the suit. He referred to various decisions in support of the submissions.
7. In the end, he urged this court to allow the appeal and to accordingly award damages to the appellant.
8. The respondents filed their submissions dated November 24, 2022. They argued that the trial court arrived at proper findings and, rightly so disallowed the suit.
9. They took the court through the assessment of the evidence and referred to several decisions in support of their position.
10. In view of the foregoing, the respondents urged this court to dismiss the appeal with costs.

Analysis:

11. The role of the first appellate court was discussed in *Abdul Hammed Saif vs. Ali Mohamed Sholan* (1955) 22 E.A.C.A. 270. Even though the case was an appeal from the High Court to the Court of Appeal still the applicable legal principles are similar to appeals from the lower courts to the High Court, hence, its relevance.
12. The Court of Appeal stated as follows: -

... 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....
13. See also *Selle & another v Associated Motor Boat Co Ltd. & others* (1968) EA 123.
14. This court has carefully considered the Memorandum of Appeal and the parties' rival submissions as well as the authorities relied upon. The court has also considered the evidence relied on at trial by both parties.
15. This court will now consider the appeal on the main twin grounds of liability and quantum.

Liability:

16. Three persons testified at the trial on the aspect of the liability. They are the appellant (as PW1), No. 83802 Cpl. (W) Christine Atwoli (as PW4) and the 2nd Respondent (as DW1).
17. PW1 pleaded the cause of action in Paragraph 4a of the Amended Plaint as follows: -

On or about the July 25, 2018 the plaintiff was lawfully standing off the verge the road along Kitale-Endebess road particularly at Mawe Saba area when the 2nd defendant so negligently drove and or managed motor vehicle registration number KAN 518Y as a result it lost



control and knocked the plaintiff thereby causing the plaintiff to sustain severe bodily injuries.

Particulars Of Negligence On The Part Of The 2Nd Defendant

- a. Driving motor vehicle registration no.KAN 518Y at a high speed in the circumstances.
 - b. Failing to heed to the nature of the road.
 - c. Driving a defective and unroadworthy motor vehicle.
 - d. Failing to slow down, brake and or swerve to avoid the accident.
 - e. Failing to follow the relevant traffic rules and regulations.
 - f. Driving in a dangerous manner.
 - g. Failing to consider other road users like the Plaintiff.
18. In his evidence before the trial court, PW1 stated that the accident occurred at around 7:30pm when it was already dark. That, the driver of the offending vehicle was evading a road bump, veered off the road unto the place where he was and knocked him down. He admitted, on cross-examination, that he was on the tarmac road when the accident occurred.
 19. PW1 denied alighting from a speeding motor cycle which, without any warning and due care, suddenly stopped ahead of the motor vehicle.
 20. PW4 produced the Police Abstract issued to PW1 by the police. She stated that she was not one of the investigating officers and did not visit the scene. According to the Abstract, PW4 stated that PW1 was a pillion passenger during the accident and who jumped from a motor cycle. PW4 also produced an extract from the Police OB report on the accident as an exhibit.
 21. It was admitted that the Police Abstract and the OB copy were not tallying and that it could not be ascertained if anyone was to blame for the accident. PW4 also confirmed that no one had been charged in Court in respect of the accident.
 22. DW1 was the driver of the offending vehicle. He had 20 years' experience behind the wheels. He stated that he was on the road when he was overtaken by a motor cycle carrying a pillion passenger on the left side. He was slowly driving uphill and the vehicle, a lorry, was loaded with cargo, hence was at around 5km/hr.
 23. Suddenly, DW1 so stated, that the motor cycle stopped just ahead and the passenger jumped. He only heard a passerby screaming and he stopped. He found PW1 under the lorry and rushed him to hospital.
 24. DW1 stated that he only saw the motor cycle from the left rear-view mirror which passed the vehicle and stopped barely 2 metres ahead. That, he never hit the motor cycle.
 25. DW1 vehemently denied that PW1 was standing by the roadside. He affirmed that he was a pillion passenger and that he alighted from the motor cycle which reckless stopped ahead of the vehicle.
 26. According to DW1, he applied emergency brakes and acted with reason and care in trying to avoid hitting the motor cycle, which he successfully managed. He denied that he was driving at a high speed and contended that he could not do so because of the luggage on board. To DW1, PW1 acted in the most reckless manner and was solely to blame for the accident.



27. PW4 was called to support PW1's case. It was PW4 who stated that PW1 was both a pillion passenger as well as a pedestrian at the time the accident occurred. The report was entered in the Police OB after the investigating officers rushed to the scene and then to Kitale County Referral Hospital where they also interrogated PW1.
28. PW1 held that he was not a pillion passenger.
29. The evidence of PW4, therefore, corroborated that of DW1 to the extent that there was a motor cycle in the larger picture. PW1 did not call any further evidence in reconciling the foregoing.
30. A careful consideration of the evidence and on a preponderance of probability, this Court finds that the issue of the motor cycle was adequately affirmed and, therefore, holds that there was a motor cycle at the scene of the accident, but of course it was not hit by the vehicle and that is why it was not captured as part of the incident.
31. The above finding, hence, fortifies the evidence of DW1. It was possible that PW1 was a pillion passenger who alighted from the motor cycle after it suddenly stopped about 2 metres in front of the vehicle and after the cyclist had wrongfully overtaken the vehicle on the left side.
32. By the time the offending vehicle hit him, PW1 was not on the motor cycle, but on the road, and to that extent, he was a pedestrian. That explains the position which may appear as contradictory, but in actual sense it is not. The possibility is real that PW1 was initially a pillion passenger who turned a pedestrian on alighting from the motor cycle.
33. With such evidence at hand, could the Respondents be held liable? DW1 stated that he was driving at the speed of 5km/hr. uphill since the vehicle was loaded with goods. PW1 did not endeavour to avail any further evidence including the police file or at least the sketch plan to show the topography at the scene of accident. He only talked of the bumps on the road and nothing more. The only evidence at hand on the state of the road at the scene of accident is that of DW1. Therefore, this Court adopts the evidence of DW1 and finds that the road was going uphill, the vehicle was loaded with goods and that it had just passed a bump before hitting PW1.
34. In such a state of affairs, the contention by PW1 that the vehicle was over speeding cannot be reasonable. It was possible that the vehicle was moving at such a slow speed of 5km/hr.
35. There is no doubt that there was very little, if at all anything, which DW1 could have done in the circumstances to avoid the accident. This was a case where PW1 and the motor cyclist were wholly to blame especially after the cyclist wrongfully overtook the vehicle from the left side and then suddenly stopped on the path of travel of the vehicle.
36. Whereas the motor cyclist wrongly and dangerously stopped as such, PW1 bore the greatest blame in alighting right ahead of a moving vehicle. It was possible that PW1 thought he would safely alight and move out of the road before the vehicle reached him. It appears that it all ended up as a serious wrongful calculation.
37. This case, once again, brings into focus the manner in which motor cyclists operate with impunity on our roads. It then becomes worse when pillion passengers likewise fail to take due care of their own safety and dangerously alight from such motor cycles. At the very least, the pillion passengers owe a duty care to themselves.
38. From the above discussion, even though it may be argued that the trial court failed in analyzing the evidence on record on the aspect of liability, still the Court arrived at the correct finding that the suit was not proved.



39. The evidence of PW1 and PW4 could not lay any blame on the Respondents herein. As such, PW1's claim could only suffer a dismissal.
40. It is also the legal position that a trial Court is duty bound to assess damages in a case of this nature even if it dismisses the claim. That did not happen in this case (See *Frida Agwanda & Ezekiel Onduru Okech v Titus Kagichu Mbugua* [2015] eKLR).
41. Given that this court has in essence agreed with the finding of the trial court, it is nevertheless under a duty to assess damages.
42. This court has perused the parties' submissions on quantum in the suit since none submitted on the same on appeal. The decisions referred therein speak to some aspects of like injuries as those sustained by PW1.
43. A look at the nature of the injuries sustained by PW1 reveal enormous pain and suffering having been visited upon him. The amputation is permanent. The need for an artificial leg was proved and the possible cost ascertained.
44. By considering the said decisions and that of *Abdi Werdi Abdulahi v James Royo Mungatia & another* [2019] eKLR, this Court finds that a global sum, inclusive of the cost of the artificial leg, of Kshs. 2,500,000/= would have served as adequate compensation.
45. Having said as much, whereas this court highly sympathizes with state of PW1, its legal hands are only, but tied to the rules of the game. This court wishes the appellant quick recovery and continued divine intervention.

Disposition:

46. In the end, having found that the suit was not proved, the following final orders do hereby issue.
 - a. The appeal is wholly dismissed.
 - b. Given the state of the appellant, each party shall bear its own costs of the appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 20TH DAY OF JULY, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Mr. Kweyu, Counsel for the Appellant.

Mr. Kibichiy, Counsel for the Respondent.

Regina/Chemutai – Court Assistants.

