



**Waithaka v Kamande & another (Civil Appeal E042 of 2022)  
[2023] KEHC 24585 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 24585 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL E042 OF 2022  
MN MWANGI, J  
JULY 13, 2023**

**BETWEEN**

**ANDERSON KIBUI WAITHAKA ..... APPELLANT**

**AND**

**LAWRENCE KOI KAMANDE ..... 1<sup>ST</sup> RESPONDENT**

**SKYSOLVER LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from the judgment of Hon. M. Obura delivered  
on 8th September, 2022 in Voi CMCC No. E155 of 2021)*

**JUDGMENT**

1. The suit against the respondents in the lower Court was for general damages for pain and suffering and loss of amenities, special damages of ksh 29,600/=, costs and interest of the suit. The appellant averred that it was an express and/or implied term of contract of carriage between the appellant and the respondents, or it was the respondents express and/or implied contractual and/or common law duty, to provide a fare paying passenger with care while travelling in motor vehicle registration no KCU XXXU which was at the material time being driven by the 1<sup>st</sup> respondent on behalf of the 2<sup>nd</sup> respondent. The said motor vehicle was involved in an accident along the Nairobi-Mombasa road at a place known as Man-eaters, and as a result thereof the appellant sustained serious bodily injuries while inside the suit motor vehicle.
2. The appellant further averred that at all material times he was a lawful paying passenger in the respondents' motor vehicle registration no KCU XXXU. He relied on the *Traffic Act*, cap 403 Laws of Kenya, the Highway Code, and the doctrine of *res ipsa loquitor* as far as it is applicable.
3. It was stated by the appellant that the respondents breached the express and/or implied terms of the lawful paying passenger contract and are therefore liable for the occurrence of the accident in issue in their own capacity and that they are also vicariously liable for the negligence and/or careless acts of



- the driver. The appellant averred that as a result of the said accident he sustained serious injuries thus suffering loss and damage.
4. The respondents filed a statement of defence dated 5<sup>th</sup> October, 2021, where they denied all averments contained in the plaint and averred that if it is established that the accident herein occurred which is denied, then the same was caused by the driver of motor vehicle registration no KCD XXXV.
  5. In the lower Court, judgment was delivered on 8<sup>th</sup> September, 2022, where the Trial Court held that the documents relied on by the appellant's Counsel were not produced either by consent of the parties or formally as exhibits, to enable the Court make an informed determination. The Trial Magistrate referred to her finding in the lead file being Voi CMCC no E160 of 2021, where she found that in the absence of formal production of the treatment notes, either through the plaintiff's own testimony or by consent of the parties, there was no evidence placed before her to facilitate assessment of the appellant's injuries and damages payable. She dismissed the suit with no order as to costs.
  6. The appellant being dissatisfied with the Trial Magistrate's judgment, filed a Memorandum of Appeal dated 3<sup>rd</sup> October, 2022 raising the following grounds of appeal-
    - i. That the Honourable Magistrate erred in law and in fact by failing to appreciate that there was already a test suit, VOI CMCC no E79 of 2020 and the appellant and respondent had recorded a consent;
    - ii. That the Honourable Magistrate erred in both law and fact by making a finding that the plaintiff had not physically produced documents while there was a suit on the issue of production of documents being CMCC no 162 of 2021;
    - iii. That the Honourable Magistrate erred in fact and law by overlooking all open avenues in rules of natural justice, by just dismissing the suit for non-production of supporting documents while they were there in the Court file;
    - iv. That the Honourable Magistrate erred in fact and law by overlooking that the parties in CMCC no 162 of 2021, which had a full hearing and documents were produced and was part of the series while CMCC no 119/21, CMCC no 140/21, CMCC no 144/21, CMCC no 157/21, & CMCC no 160/21 had recorded a consent during pre-trial that production of documents be dispensed with;
    - v. That the Trial Magistrate erred in law and fact by failing to appreciate the appellant's pleadings, submissions and only went much further to accept defendants on back trucking of defendant consensus on the issue of production of documents during pre-trial having been settled (sic); and
    - vi. That the Trial Magistrate erred in law by ignoring that the suit did not proceed to full hearing and only submissions were allowed on consensus during pre-trial stage.
  7. The appellant's prayer is for this Court to allow the appeal with costs and set aside the Trial Court's judgment for dismissal of the suit delivered on 8<sup>th</sup> September, 2022 and for the lower Court suit be reinstated.
  8. The instant appeal was canvassed by way of written submissions. The appellant's submissions were filed on 9<sup>th</sup> January, 2023 by the law firm of D. K. Wanyoike & Company Advocates, whereas the respondents' submissions were filed by the law firm of Jengo Associates Advocates on 13<sup>th</sup> January, 2023.



9. Mr. Wanyoike, learned Counsel for the appellant relied on the Court of Appeal case of *Ali Ahmed Naji v Lutheran World Federation* Civil Appeal no 18 of 2003 and submitted that once parties consent to production of documents, the Court cannot interfere with the said consent but can only make the best out of the said documents. Counsel contended that the learned Magistrate interfered with the parties' agreement by failing to appreciate that there was already a test suit being VOI CMCC no E79 of 2020 and the parties herein had recorded a consent. He cited the case of *David Chege Ndungu v Robert Macharia & 2 others* [2015] eKLR and stated that since the documents herein were produced by consent, the Trial Court ought to have considered them as admissible evidence in this case.
10. It was submitted by Counsel that in view of the binding consent between the parties and the pending suit on production of documents being CMCC no 162/2021, the documents herein needed not to be produced physically. Mr. Wanyoike relied on the case of *East Africa Portland Cement, CFC Stanbic Limited & another v Peter Ividah Muliro* [2019] eKLR, where the Court cited with authority the case of *Mumias Agricultural Transport v Sony Agricultural Limited* Civil Appeal no 201 of 1997. He submitted that that in the instant case, the appellant's documents amount to evidence since they were introduced by consent. He also stated that there was no trial thus the appellant was not fairly heard.
11. It was stated by Mr. Wanyoike that the appellant was not given an opportunity to be heard which is against the rules of natural justice thus this Court should render the Trial Court's decision null and void ab initio. He referred to the Court of Appeal case of *Onyango Oloo v Attorney General* [1989] EA 456 and submitted that where a party has not been heard, a decision made in breach of the rules of natural justice is null and void ab initio.
12. He relied on the Court of Appeal decision in *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR and stated that the right to a fair hearing guaranteed under Article 50 of the *Constitution* requires disputes to be resolved by the application of the law. Mr. Wanyoike submitted that the parties herein entered into a consent to be heard by way of written submissions, which consent was confirmed by the Trial Court but the said Court did not consider the appellant's submissions. He contended that the mode of hearing chosen by the parties was not complied with by the Trial Court, and as such, the appellant was not accorded the right to a fair hearing guaranteed under Article 50(1) of the *Constitution* of Kenya, 2010.
13. Mr. Jengo, learned Counsel for the respondents submitted that the appellant has not in any way attempted to bring the instant appeal within the ambits of the principles laid down by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, since Counsel was not accusing the Trial Court of any acts of omission or commission. Mr. Jengo contended that the appeal herein is superfluous and should fail. He stated that the Trial Court considered the fact that there was a consent on liability as shown on page 53 of the Record of Appeal at paragraph 6 of the Trial Magistrate's judgment. He submitted that the case law referred to by the appellant on this ground has no relation at all with the adoption of the test suit's determination on liability and does not support the appellant's submissions on what is purely an issue of fact.
14. On the issue of production of documents, Counsel referred to the proceedings of 30<sup>th</sup> June, 2022 and stated that there was neither a consent on production of documents and nor was CMCC no 162/2021 mentioned at all. He stated that the appellant closed his case without calling any evidence on the issue of damages, judgment on liability having been entered by virtue of the test suit. To this end, Counsel relied on the case of *Trust Bank Limited v Paramount Universe Bank Limited & 2 others* Nairobi (Milimani) HCCC no 1234 of 2001 and stated that by failing to call any witness and to produce documents, the appellant did not substantiate its pleadings, thus the Trial Magistrate cannot be faulted for dismissing the case.



15. In reference to the case of *East Africa Portland Cement, CFC Stanbic Limited & another v Peter Ividah Muliro* (*supra*) relied on by the appellant, Mr. Jengo submitted that it is distinguishable from the present case, as the respondents' Advocate called upon the appellant's Advocate to produce the documents but the appellant's Counsel did not deem it necessary to do so. In submitting that the Trial Magistrate was justified in dismissing the instant case for want of proof, Mr. Jengo cited the holding by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* (*supra*) and *Kenneth Nyaga Mwiye v Austin Kiguta & 2 others* [2015] eKLR.
16. He also cited the case of *Andrew Nthiwa Mutuku v Court of Appeal & 3 others* [2021] eKLR and contended that the appellant was accorded an opportunity to be heard and to adduce evidence and a case had not been made out for breach of the rules of natural justice.

### **Analysis and Determination.**

17. I have considered the instant appeal, the submissions filed by Counsel for the parties and the authorities relied on. This being a first appeal, this Court as the first appellate Court has a duty to re-evaluate, re-analyze and re-consider the evidence adduced before the Trial Court and draw its own conclusions, while bearing in mind that it did not see and hear witnesses testifying and give due allowance for the said fact. This position was buttressed by the Court of Appeal in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR where it was held that-

“We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.
18. An appellate Court will not interfere with the finding of fact by a Trial Court unless it is based on no evidence, or it is based on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles or law in reaching his conclusion. See *Mkuba v Nyamuro* [1983] LLR, 403-415, at p. 403.
19. The appellant challenged the judgment by the Trial Magistrate on grounds that he was not accorded his right to a fair hearing as guaranteed under Article 50(1) of the *Constitution* of Kenya, 2010, since his pleadings and submissions were not considered by the Trial Magistrate in arriving at her decision to dismiss the suit with no orders as to costs.
20. The appellant's Counsel submitted that the Trial Court failed to appreciate the fact that the parties had by consent agreed to produce all the documents filed in support of the appellant's claim hence she had no option but to make the best out of the said documents. The respondents on the other hand submitted that the documents filed by the appellant before the Trial Court were not produced in Court by consent of the parties or formally as exhibits, therefore the Trial Magistrate was justified in dismissing the appellant's suit for want of proof.
21. In determining whether this appeal is merited, this Court has to determine whether the documents filed by the appellant before the Trial Court were produced in the manner provided for by law. On perusal of the judgment by the Trial Magistrate, it is evident that at page 2 paragraph 6 of the said judgment, she stated that the issue of liability was resolved amicably in the test suit, VOI CMCC no E079 of 2021, whereby parties recorded a consent on 17<sup>th</sup> January, 2022. She further noted at paragraph 7 of her judgment that on 30<sup>th</sup> June, 2022, the parties agreed to submit on the issue of quantum of damages without calling any evidence and the appellant relied on the list of documents dated 27<sup>th</sup> September, 2021 on record.



22. I have gone through the certified typed proceedings and it is evident that there was no consent on production of documents despite the fact that the respondent’s Counsel asked the appellant’s Counsel to clarify whether they would be producing any documents. It is also evident that the said documents were not formally produced as exhibits as provided for by law, and from the proceedings of the lower Court, there was no mention of VOI CMCC no 162 of 2021.

23. Order 18 Rule 2 of the Civil Procedure Rules, 2010 provides for statement and production of evidence as hereunder-

“Unless the court otherwise orders-

- 1. On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.
- 2. The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.
- 3. After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited.”
- 4. ....”

24. It is not disputed that the parties herein agreed to proceed with the suit before the Trial Court by way of written submissions since the issue of liability had already been determined in a test suit, and the said proposal was accepted by the Trial Magistrate. In light of the foregoing, it is clear to this Court that the Trial Court abdicated its duty when it allowed the appellant’s Counsel to go against the clear provisions of the law and thereby failed to draw the said Advocate’s attention to the provisions of Order 18 Rule 2 of the Civil Procedure Rules, 2010. By acceding to the shortcut taken by the appellant’s Counsel to a quick-fix in the case before her, the Trial Magistrate failed to accord the appellant a right to be heard. In this Court’s view, a Trial Court is not meant to be a bystander and just observe as procedural infractions are committed in its eyes. This is what happened in the case before the Trial Court and by failing to take charge of the proceedings before her Court, an injustice was occasioned on an innocent litigant who had no role to play in what transpired in Court.

25. It then followed that due to the said lapse, the appellant was not called to adduce evidence in support of his claim and to produce any documents in support of the same. All the appellant’s Counsel did was to indicate that the appellant was relying on the documents already on record.

26. I have anxiously considered the way this appeal should go. The easiest route would be to go by the proposal made by Mr. Jengo. I have however noted that if I take that route, the appellant will have been denied an opportunity to be heard through no fault of his own. I have in the interest of justice deemed it necessary to exercise my discretion by allowing the appeal as there was no evidence adduced at all, in the lower Court case. If anything, the so called trial of the appellant’s case was a sham, as the appellant was not called in Court to adduce evidence and produce the documents on the list of documents dated



27<sup>th</sup> September, 2021. Having said so, I hold that the so called trial before the lower Court that gave rise to this appeal was a nullity and is hereby declared void ab initio. I set aside the judgment of the lower Court dated 8<sup>th</sup> September, 2022. I order that a retrial be held before any other Magistrate of competent jurisdiction, other than Hon. M. Obura, Chief Magistrate.

27. Even though the appeal herein has been allowed, the costs of the appeal shall be borne by the appellant due to the lapse on the part of his Advocate in the lower Court case. Further, this appeal has been allowed due to procedural flaws made in the Trial Court.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF JULY, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Mr. Wanyoike for the appellant

Ms Julu for the respondent

Ms B. Wokabi – Court Assistant.

