



**Gatuga v Robin Hurts Safaris (Civil Appeal 26 of 2019)
[2023] KEHC 23903 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 26 OF 2019
PM MULWA, J
OCTOBER 19, 2023**

BETWEEN

JULIUS MUNORU GATUGA APPELLANT

AND

ROBIN HURTS SAFARIS RESPONDENT

JUDGMENT

1. This appeal challenges the judgment of the trial court in Thika Chief Magistrates Civil Case No. 795 of 2013.
2. The background to the appeal is that the appellant sued the respondent claiming special damages, costs and interests in a suit involving a personal claim arising from motor vehicle accident which occurred on 22nd May 2011.
3. In the amended plaint dated 10th February 2015, the appellant averred that he was travelling aboard motor vehicle registration number KBA 816K (the subject vehicle) along Thika Nairobi Super Highway when, by reason of negligence on the part of the respondent and or his authorized driver negligently drove or managed motor vehicle registration number KAB 849Q that it caused collision with the subject motor vehicle.
4. In an amended statement of defence dated 12th May 2016, the respondent denied any liability as pleaded in the amended plaint and put the respondent to strict proof thereof. He blamed the driver of the subject vehicle claiming that he caused the accident by ramming into the vehicle he was driving registration number KAB 849Q.
5. At the hearing, the appellant testified in support of his case and called one witness Mr. Daniel Kinuthia Chege who was his driver and who adopted his written statement as his evidence in chief. The respondent did not call any witnesses.



6. At the conclusion of the trial, the trial court found that the appellant was 100% liable for the accident and dismissed his case. He was aggrieved by the said decision and filed his Memorandum of Appeal on 7th February 2019 setting out nine grounds of appeal. The appellant faulted the trial court's decision principally on grounds that it was not supported by the evidence on record. He complained that the learned trial magistrate failed to consider his submissions on liability and quantum.
7. By consent of the parties, the appeal was prosecuted by way of written submissions which both parties duly filed.
8. Being the first appellate court, I am reminded of my duty which is to revisit and to independently re-evaluate and reconsider the evidence tendered before the trial court to draw my own conclusions regarding the validity or otherwise of the trial court's decision. In doing so, I should bear in mind that I did not see or hear the witnesses who testified before the trial court and give due allowance to that disadvantage.
9. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein rendered itself as follows: -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”
10. Having looked at the grounds of appeal and the respective parties' written submissions, it is clear that the determination of the appeal revolves around the question of liability and what ought to have been the quantum of damages.
11. It is trite that the burden of proof lies with the appellant in accordance with Sections 107, 109 and 112 of the *Evidence Act*, and were extensively dealt with in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of *the Act*.”
12. As regards the applicable standard of proof to the suit subject of the appeal herein, 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.”



13. The question then is what amounts to proof on a balance of probabilities. Lord Nicholls of *Birkenhead in Re H and Others (Minors)* [1996] AC 563, 586 held that;

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability...”

14. Applying the foregoing principle to the facts of this case, I have perused the record of the trial court. I note that the respondent was absolved from liability in the causation of the accident. However, looking at the proceedings of the trial court in totality, it appears that two versions emerged. One version was that the driver of KAB 849Q caused the accident when he suddenly made a U-turn to the opposite direction hence the subject vehicle hit it in the rear. This was the version shared by the appellant and PW2.

15. The other version that emerged is that it was the driver of Motor Vehicle Registration No. KBA 816K who hit KAB 849Q in the rear which caused the vehicle to lose control and overturn. This was the version shared in the statement of defence.

16. From my review of the evidence, I am persuaded by the totality of the evidence that it is only fair to apportion liability equally between the parties.

17. In my considered view, the appellant vividly proved his case on a balance of probabilities when he testified in court, produced exhibits in support of his testimony and even called PW2 as a witness. That is my comprehension of balance of probabilities.

18. Contrary to the finding by the trial court that the appellant was to wholly blame, I find that the respondent also contributed to the occurrence of the accident. In my view, there was sufficient evidence that the respondent failed in his expectation as a reasonable driver and should not have been wholly absolved from liability in the causation of the accident because he was expected to exercise a duty of care to other road users.

19. The driver of Motor Vehicle KBA 816K could also have done more to avoid the accident if he was driving at lesser speed in the circumstances and kept a safe distance.

20. For the above reasons, I am of the view that both the appellant and respondent were equally to blame for the occurrence of the accident and I hereby apportion liability in the ratio of 50:50.

21. As was held in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLE 526:

“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.”

22. Regarding assessment of damages due, the trial court did not assess any damages. That was manifestly erroneous on the face of the binding decision in *Frida Agwanda & Ezekiel Onduru Okech v Titus Kagichu Mbugua* [2015] eKLR, where the court held that: “Indeed even when the learned trial



magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead of returning the file to the lower court for assessment.”

23. With such trite position of the law, I find that there was an obvious error which cannot be left to stand but must be corrected in compliance with the law. I reiterate that a trial court has the duty to assess damages even where the suit fails. I will thus perform the duty of the court on first appeal and assess damages.
24. Out of the appellant’s claim for special damages in the sum of Kshs. 140,476 only Ksh.121,868 was proved by way of receipts and that is the sum which is due to the appellant.
25. In conclusion, it is my finding that the appellant’s appeal has merit and is allowed. The judgment of the trial court is hereby set aside and substituted with judgment on liability being entered for the appellant against the respondent in the ratio of 50:50. The appellant will have special damages of Ksh. 121,868 and interest thereon from the date of filing of the suit. Each party shall bear their own costs.

JUDGMENT DELIVERED VIRTUALLY, SIGNED AND DATED AT KIAMBU THIS 19TH DAY OF OCTOBER 2023

P. MULWA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

