



**Ojiambo alias Stephene Sanya Odhiambo alias Stephine Sanya Odhiambo v Muchai
(Civil Appeal 067 of 2024) [2024] KEHC 16975 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16975 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 067 OF 2024
F WANGARI, J
OCTOBER 24, 2024**

BETWEEN

**STEPHEN SANYA OJIAMBO ALIAS STEPHENE SANYA ODHIAMBO ALIAS
STEPHINE SANYA ODHIAMBO APPELLANT**

AND

GEORGE MUCHAI RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. L.K. Sindani, Principal Magistrate delivered on 29/02/2024 in Mombasa CMCC No. E1759 of 2022. The Appeal is liability only.
2. The Appellant Plaintiff dated 05/12/2022 had sued the Defendant/ Respondent as the 1st Defendant and one Badar Hardware Limited as the 2nd Defendant, claiming damages for an accident that occurred on 01/07/2022 involving Motor Vehicle Registration No. KCA 570 owned and driven by the driver of the Defendant/ Respondent, and Motor Vehicle Registration No. KBW 548K owed by the 2nd Defendant.
3. The Plaintiff/Appellant was travelling in the 1st Defendant's motor vehicle as a lawful passenger when the vehicle collided with the 2nd Defendant's vehicle which was stationary and partially on the road. Thereafter, the Plaintiff withdrew the case against the 2nd Defendant leaving the Respondent in this appeal as the sole Defendant. The trial court apportioned liability on both the Respondent and the Defendant whose suit was withdrawn, on 50:50 basis.
4. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal. It was directed that this appeal be disposed of by way of written submissions. Only the Appellant complied with the directive.



Analysis

5. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

6. In the cases of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

7. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...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...”

Liability

8. The Appellant urge this court to find that the trial court erred in finding the Respondent 50% liable yet he was to wholly to blame for the accident. He proposes that the Judgement of the trial court on liability be set aside and substituted with 100% liability.

9. I have perused the Record of Appeal filed in Court and the Appellant’s written submissions and authorities cited in support and opposition to the Appeal. The issue for determination is whether the trial court erred in finding, on a balance of probabilities that the Appellant was wholly liable for the accident.

10. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, 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 case 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.”

11. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. Further, in *Evans Nyakwana –vs- 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.”

12. It is settled that the standard of proof on civil cases is on a preponderance of probabilities. In reevaluating the evidence, it is not in dispute that was an occurrence of the accident. The Plaintiff stated that it was the defendant’s driver who negligently drove his motor vehicle and hit the vehicle that had stalled on the road, resulting to injuries sustained by the Plaintiff.
13. I find that the trial court was right in finding the following; “The 1st Defendant’s driver must have been at a high speed that he failed to stop or swerve in good time to avoid hitting the stationary vehicle”. However, I do concur with the Appellant that the trial court erred in finding the Defendant whose suit was withdrawn was partly to blame for the accident.
14. The suit having been withdrawn against the said Defendant, the Respondent ought to have instituted third party proceedings against the said Defendant if blame was apportioned to him. However, that was not done. The Respondent therefore risked to have 100% liability apportioned against him. In *Kenya Commercial Bank v Suntra Investment Bank Ltd (2015) eKLR*, observed that:-

“.....In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under (Order 1 rule 15 - 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules.”

15. Further, I put reliance on the case of *Moses Ndumia Theuri v IG Transporters Ltd & Ano. (2018) eKLR* as submitted by the Appellant. The Respondent did not testify in the lower court proceedings. The issue is whether this court should interfere with the trial court’s findings on liability.
16. The principles guiding the appellate court’s power to interfere with the trial court’s finding on liability are well settled. In *Khambi & Another vs. Mahithi and Another [1968] EA 70*, it was held that:

“It is well settled that where a Trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge”

17. Stemming from the stated finding of the Learned Magistrate, I find reason to interfere with the trial court’s finding on liability. In the absence of any evidence to the contrary, judgment on liability at 50:50% basis is set aside, and I find the Respondent 100% liable for the said accident.

Determination

18. In the upshot, I make the following orders: -



- a. The Appeal on liability succeeds. Judgement in the lower court on liability is hereby set aside and substituted with a liability of 100% against the Respondent.
- b. Costs of the appeal to the Appellant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 24TH DAY OF OCTOBER, 2024.

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F. WANGARI

JUDGE

In the presence of;

N/A by the Appellant

Mr. Ndolo Advocate for the Respondent

Brian, Court Assistant

