**Waira v Arthur (Civil Appeal E290 of 2020)**
**[2024] KEHC 13168 (KLR) (Civ) (14 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13168 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E290 OF 2020**

**AM MUTETI, J**

**OCTOBER 14, 2024**

**BETWEEN**

**LOISE WAIRA ..... APPELLANT**

**AND**

**KENNEDY ARTHUR ..... RESPONDENT**

***(Being an appeal from the judgment of Hon. K.I ORIENGE SRM Magistrate delivered on the 30th April 2020 in the Chief Magistrate's Court at Milimani in Civil Case No. 5979 of 2013)***

## JUDGMENT

### Introduction

1. The appellant in this appeal approached the High Court aggrieved by the learned Honourable Magistrate's decision that found her liable to pay the respondent Kshs. 175,138 plus costs and interests at court rates following a road traffic accident which occurred on 28th September 2010 involving motor vehicle registration number KBH 711S and KAP 375Y.

2. The appellant was the registered owner of motor vehicle KAP 375Y which she allegedly negligently drove on the material date causing the accident.

3. The appellant had specifically denied that her vehicle was ever involved in an accident as alleged by the respondent in the Lower Court.

4. It is on that basis that the appellant has moved to this Court to set aside the Lower Court judgment.

### Analysis

5. The appellant set out the following grounds of appeal:-

1. Thatthe Honourable Magistrate erred in law and fact by failing to consider the tangible evidence of the Appellant's on record.

2. ThatThe court erred in law and fact in relying on the plaintiff's statement despite the fact that the same was not produced, neither adopted by the court nor did the plaintiff testify.

3. Thatthe Honourable magistrate erred in fact and in law in failing to appreciate that the issue of liability was contested by the defendant and it was upon the plaintiff to prove that the defendant was liable and out of his testimony, the plaintiff cannot be said to have proved his case on a balance of probabilities.

4. Thatthe Honourable court misdirected itself in fact and in law in holding that an accident occurred involving the defendant's motor vehicle despite the evidence of the defendant to the contrary and there being no eye witness called by the plaintiff.

5. Thatthe Honourable court failed to appreciate that onus of proof in civil cases primarily lies with the plaintiff and such burden cannot be abrogated or taken away by calling other witnesses in place of the plaintiff.

6. Thatthe learned magistrate erred in law and fact in relying on the evidence of the two plaintiff's witnesses who were themselves neither eye witnesses nor could they address the issue of liability.

7. Thatthe learned magistrate erred in fact and law in awarding the plaintiff Kenya shillings One Hundred And Seventy Five Thousand, One Hundred And Thirty Eight (kshs. 175, 138) plus costs & interest without the plaintiff uttering a word in support of his case.

6. From the grounds set out in the memorandum of appeal the following issues emerge:-

   a. Whether the respondent proved his case to the required standard to warrant entry of judgment against the appellant.

   b. Whether the learned Honourable Magistrate's decision on liability was supported by the evidence on record.

   c. Whether the learned Honourable Magistrate was right in relying on the statements filled by the respondent despite the same not having been produced nor adopted at the trial since the respondent did not testify.

   d. Whether in the absence of the respondent's testimony the respondent could be said to have established her case through other witnesses.

   e. Whether the learned Honourable Magistrate was correct in awarding the respondent the sum of Kshs.175,138 plus costs and interests without the plaintiff's testimony in support of his case.

**Analysis**

7. The appellant's case as urged through his submissions was that the learned Honourable Magistrate did not consider their evidence and erred in relying on the written statement of the respondent which was never produced nor adopted in evidence.

8. The appellant further urges that the plaintiff's failure to testify in support of his case dealt the respondent's case a fatal blow.

9. It is further contended by the appellant that by failing to consider the appellants evidence on record , the learned Honourable Magistrate denied the appellant a fair hearing thus the decision of the Court should be set aside.

10. The appellant further contends that the respondent ought to have testified in support of his case so as for the Court to be able to ascertain who was at fault before condemning the appellant.

11. According to him the police officer who testified as PW1 was unable to demonstrate that the appellant was to blame for the accident and the consequential loss suffered by the respondent.

12. The appellant further submitted that by failing to testify the respondent failed to discharge the burden of proving negligence.

13. In the circumstances the appellant submits that the doctrine of subrogation lacks feet to stand on and thus the decision of the Learned Honourable Magistrate ought to be set aside.

14. The appellant went further to submit that the police officer who testified was not the investigating officer and admitted that he did not know how the accident occurred.

15. The officer did not also produce any sketching and statement of the investigating officer to aid the Court in determining who was to blame for the accident.

16. The appellant also urged the Court to note that he was not charged with any traffic offence.

17. In support of his arguments on liability the appellant cited the case of PZ Cussons (e.a) Ltd Vs. Pelton Kimori & Another [2019] eKLR in which the Court stated:-

> " ..... in so far as proof of liability was concerned ,no attempt was made and no lota of evidence was availed. Where no proof is availed by the person whose duty it is, it follows that the burden remain undischarged and the person whose burden it was must fail. Here I find that there was no proof of liability against the appellant and that alone was enough to have the suit dismissed..."

18. The appellant maintained that causation and negligence was not proved.

19. The appellant also cited the case of Treadsetters Tyres Ltd Vs. John Wekesa Werukhulu [2010] eKLR in which Ibrahim ,J (as he then was) in allowing an appeal cited Charles worth & Percy on negligence 9th edition at page 387 on the question of proof and burden thereof where it stated:-

> " In an action for negligence, as in every other action, the burden of proof falls upon the Respondent alleging it to establish each element of the tort. Hence it is for the Respondent to adduce evidence of the facts on which he bases 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, (1) whether on that evidence, negligence may be reasonably infer and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

20. On quantum the appellant contended that the respondent's damages were as of result of a fabrication by the assessor thus the sum of Kshs.175,138 was excessive in the circumstances.

**Respondent's Case**

21. The respondent on his part implored this Court to strictly follow the principles laid out in Mbogo Vs. Shah [1968] EA P.93 regarding the interference by an appellate Court with exercise of judicial discretion.

22. The respondent also urged the Court to stick to its duty of analyzing the evidence re-evaluating the same and drawing its own conclusions. In support of this position the respondent cited the case of Abok James Odera & Associates Vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.

23. The respondent submitted that the suit emanates from subrogatory claim. As such, the respondent cited Blacks Law Dictionary 11th Edn. Page 1726 which defines the principle of subrogation to mean:-

> " the principle under which an insurer that has paid loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy," and urged the Court to disregard all the submissions by the appellant regarding the failure of the respondent to testify and find that the insurance company whole exercising its rights under the principle could file the suit only in the name of its insured.

24. The respondent went further to submit that under the principle of subrogation, the insurer is entitled to recoup the amount paid to indemnify its insured upon the occurrence of the insured risk.

25. The crux of the respondent's argument is that the insured simply lends his name to the insurance and the insurer steps into the shoes of the insured and is subrogated to his rights. See Mercantile Life & General Assurance Company Ltd 7& Another Vs. Dilip M. Shah & 3 Others [2015] eKLR .

26. The respondent therefore urged that the arguments by the appellant regarding the failure by the respondent to testify should be ignored by this Court and find that under the principle of subrogation the insurer was entitled to recover the loss from the appellant.

27. The respondent further urged the Court find that the testimony of the police officer was unshaken regarding the occurrence of the accident and that the evidence was sufficient to establish liability of the appellant.

28. Lastly, the respondent submitted that the special damages of Ksh.175,138 were proved. The respondent placed reliance on Nkuene Dairy Farm Ltd Vs. Nganga Ndeiya [2010] eKLR where the Court stated:-

> " In our view special damages in a material damage claim need not be shown to have been actually incurred, the Claimant is only required to show the extent of the damages and what it would cost to restore the damaged item to as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the value of repairs was given with some degree of certainty." [emphasis added]

29. The respondent urged this Court to dismiss the appeal.

**Determination**

30. Upon perusal of the respective submissions by both parties, I do agree with the submission by the respondent that under the principle of subrogation the insurance company is entitled to recover from a third party any sums incurred by it arising from a claim for which the third party is liable.

31. The insurance company steps into the shoes of the insured but since their claim is under the principle of subrogation, the insured need not give evidence if the insurance is able to establish liability for the accident against the third party through the testimony of other witnesses.

32. If the police officer is able to link the third party to the accident and is able to prove indeed, it was out of the third party's negligence that the accident occurred, the failure to call the insured as a witness cannot be fatal to the plaintiff's case.

33. The submission by the counsel for the respondent that the police officers evidence would be sufficient is thus valid.

34. However, the record of appeal in this matter is wanting in material respects.

35. The record at page 121 begins with cross-examination of a witness who is not identifiable. The name of the witness is missing and the record is littered with gaps in evidence.

36. For instance, the record reads at page 121 reads;-

> " Cross examined by Mr. Juma.
>
> The matter was.....
>
> I am not the driver. The abstract.....
>
> My car was not.....
>
> Hon. I. Orenge ( MR) SRM.
>
> Re-examination
>
> The matter was in Court.....
>
> .....the police station.....
>
> .....should have to.....
>
> Hon. I. ORENGE (MR) SRM
>
> DW1 male adult duly sworn and states in English.
>
> I am.....
>
> I am the husband of the defendant.....
>
> KAP 375Y saloon."

37. Further down at page 122 of the record more gaps in the evidence appear.

38. The record as it stands cannot allow this Court to engage in a considered evaluation of the evidence as required under the Law as espoused in Selle & Another Vs. Associated Motor Boat Co. Ltd.(1968) EA123

39. It is the duty of counsel for the appellant to ensure that the record placed before a judge on appeal is proper to enable the Court undertake an evaluation of the evidence and come up with its own conclusions.

40. The appellants counsel in this matter clearly did not pay attention to this aspect.

41. I would be failing in my duty as a first appellate Court if I proceeded to determine the appeal purely on the basis of counsel's submissions. That would be against the law.

42. Order 42 Rule 13 (4) (c) makes it mandatory that before the hearing of an appeal the notes of the trial magistrate made at the hearing be on record.

43. The proceedings appearing at pages 107-125 of the record are not certified and the Lower Court file is also not included in the appeal file.

44. The Court is thus left with a record of appeal that is grossly deficient as demonstrated above.

45. When counsel for the parties appeared on 4/7/2024 and 15th July 2024 they simply prayed for a date for judgment and the issue of the record of the Lower Court and also the latent defects in the record of appeal was never raised.

46. It was at the stage of the writing of this judgment that the Court independently identified the problem with the record of appeal.

47. It is unfortunate that this escaped the notice of both counsel for the appellant as well as for the respondent.

**Determination**

48. Owing to the matters pointed out in this judgment concerning the defects on the record, it is the finding of this Court that the appeal as presented is incompetent for failure to include complete notes taken by the magistrate in the Lower Court to enable this Court discharge its duty.

    Under order 42 Rule 13 (4) (c) the Court procedure Rules the notes are a pre-requisite before the hearing of the appeal. It touches on the jurisdiction of the Court thus it is fundamental inclusion which if not done renders the appeal incompetent. The omission of the same is thus fatal and must lead to only one conclusion, that this appeal is incompetent. The same is struck out with no order as to costs.

49. The appellant is at liberty to move court once a proper record of proceedings is availed to him for leave to appeal out of time.

50. It is so ordered.

**DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 14TH DAY OF OCTOBER 2024.**

**A. M. MUTETI**

**JUDGE**

In the presence of:

Kiptoo: Court Assistant

Mwangi for the Appellant

Muihiu & Co. Absent for the Respondent