



REPUBLIC OF KENYA



**Gathoni & another v Mukoma & another (Civil Appeal E051 of 2023)
[2024] KEHC 14238 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14238 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E051 OF 2023
MA ODERO, J
NOVEMBER 15, 2024
(FROM THE ORIGINAL CIVIL SUIT KARATINA CC 76 OF 2020)**

BETWEEN

MARGARET WANJIKU GATHONI 1ST APPELLANT

JOHN EPHANTUS WERU KABURU 2ND APPELLANT

AND

FRANCIS MWANGI MUKOMA 1ST RESPONDENT

STANLEY MAINA NJERU 2ND RESPONDENT

JUDGMENT

1. Before this Court is the Memorandum of Appeal dated August 16, 2021 by which the Appellant Margaret Wanjiku Gathoni and John Ephantus Weru Kaburu (suing as legal representatives of Wilson Kaburu Weru) sought the following orders:-
 - a. This appeal be allowed.
 - b. That this Hon. Court do proceed to set aside the judgment of the lower court and substitute it with a finding of 100% liability against the Respondents.
 - c. That this Hon. Court be pleased to assess and award the damages to the appellant as pleaded and proved by evidence and submissions in the lower court record.
 - d. That this Hon. Court do proceed to set aside costs awarded to the respondent in the lower court and award the same to the appellant together with costs of the appeal.
2. The Respondents Francis Mwangi Mukoma and Stanley Maina Njeru opposed the appeal.



Background

3. The Original Plaintiff in this matter Wilson Kaburu Weru passed away on May 4, 2022. A copy of the Death Certificate Serial Number 129xxxx appears at Page 54 of the Record of Appeal filed on November 23, 2023.
4. The Current Appellants who are the wife and son respectively of the Deceased plaintiff were issued with a Limited Grant *ad Litem* dated May 3, 2023 authorising the two to represent the estate of the Deceased in this Appeal (see page 55 of the Record of Appeal).
5. The genesis of this Appeal is a Road Traffic Accident which occurred on October 5, 2020. The accident involved the Appellant who was a pedestrian at the time and a motor vehicle Registration KCR 140W Toyota Hiace which was being driven by the 2nd Respondent as driver/agent of the 1st Respondent along the Nyeri-Karatina Road in Nyeri County.
6. The Plaintiff stated that on the material day there was a traffic jam and he was in the process of crossing the road when the 2nd Defendant drove the said motor vehicle carelessly and recklessly thereby losing control of said vehicle and hit the plaintiff.
7. That as a result of said accident the Appellant sustained bruises and a fracture of the right leg. The Appellant was rushed to Karatina Hospital where he was admitted for eleven (11) days. Upon his discharge the Appellant recorded his statement at Karatina Police Station.
8. A demand letter written to the Respondents elicited no response. The Appellant then filed a Civil Claim *vide* Nyeri Civil Case No. 76 of 2020. In the Plaint dated October 5, 2020 the Appellant sought the following:-
 - a. Special Damages of Kshs. 50,100
 - b. General Damages
 - c. Costs of the Suit.
 - d. Interest on (a) above at Court rates from the date of filing suit.
 - e. Interest on (b) and (c) above from the date of judgment.
9. The Respondents filed a statement of Defence dated April 23, 2021 in which they denied any and all responsibility for the accident. The Respondents instead stated that the Appellant was solely to blame for the accident by jumping into the road in the face of oncoming traffic.
10. The suit was heard *inter partes* and *vide* a judgement delivered on July 31, 2023, Hon. E. Kanyiri Principal Magistrate dismissed the Appellants suit with costs.
11. Being aggrieved the Appellant filed this appeal which appeal was premised on the following grounds:-
 - a. The learned trial Magistrate erred in law and in fact in holding that the appellants have not proved their case on a balance of probability and dismissing the appellants claim with costs.
 - b. The learned trial magistrate erred in law and in failing to consider the evidence adduced by the appellants and the traffic police officer in support of the appellant's case.
 - c. The learned trial Magistrate erred in law and in fact in disregarding the submissions on liability and quantum and hence arriving at an erroneous decision.



- d. That the learned Trial magistrate erred in law and fact in disregarding the documents produced by the appellants specifically the police abstract which the traffic police blame the defendant for driving without due care and attention c/s 49(i) of the Traffic Act.
 - e. That the learned Trial magistrate erred in law and fact in failing to compute the award that would otherwise been awarded to the appellant.
 - f. That the learned Trial magistrate judgement as a whole is not supported by the evidence that was tendered in court by the parties.”
12. As stated earlier the appeal was opposed.

Analysis And Determination

13. I have carefully considered this Appeal as well as the written submission filed by both parties.
14. This being a first appeal it is the duty of this court to examine the evidence adduced during the trial and to draw its own conclusions on the same. In *Selle & Another -vs- Associated Motor Boat Company Ltd & Others* [1968] E.A 123 the court held as follows:

“An appeal to this court from 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 through 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 facts 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.....”

15. Likewise in the case of *Abok James Patrick Machira 1/a Machira & Co Advocates* [2013] eKLR the Court of Appeal stated as follows:-

“This being a first appeal we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give the reason either way.”

16. The plaintiff in his evidence stated that on the material day there was a traffic jam on the Nyeri-Karatina Highway. That he waited for the traffic to slow down and upon ascertaining that there was no oncoming vehicle he began to cross the road. That suddenly the Respondents vehicle emerged overtaking a long line of vehicles and hit the plaintiff knocking him down.
17. Although the plaintiff stated that there were several people at the scene who witnessed the accident no eye witness was called to testify.
18. The 2nd Respondent was charged with the offence of Driving a Motor Vehicle on a Public Road without due care and attention contrary to Section 49(1) of the Traffic Act, Cap 403, Laws of Kenya. The traffic case did not proceed to its logical conclusion. The case was later withdrawn under Section 87(a) of the Criminal Procedure Code, Cap 75 Laws of Kenya.



19. As such the 2nd Respondent was not found liable for any wrongdoing in respect of the said accident. In the absence of any outcome of the Criminal Case evidence that the 2nd Respondent was charged under the [Traffic Act](#) is of no assistance at all to the court.
20. The evidence produced by the plaintiff in this suit in my view was too scanty to enable the court make a finding on liability. It boiled down to the plaintiffs word against the 2nd Respondents word. There was no evidence from the Police Officer who visited the scene and no sketch map was produced as an exhibit.
21. PW2 PC Linus Kimenji of Karatina Traffic Section testified in the matter. The said Officer did not witness the accident neither did he visit the scene. He relied on the police record and stated that the driver of the motor vehicle (the 2nd Respondent) was overtaking a motorcycle when he hit the Appellant. This contradicts the Appellants testimony that the vehicle was overtaking a line of vehicles. Although PW2 said he obtained the information about the motorcycle from the driver and the conductor of the vehicles, the said conductor was not called as a witness to testify. I do agree with the learned trial magistrate that the contradictions and gaps in the Appellants case made it difficult to determine the exact cause of the accident and who was to blame.
22. In the case of [Christine Daniel -vs- Sammy Kamene](#) [2022] eKLR Hon. Justice Limo observed thus

“This court finds that the tendency by Advocates to just rush to a police station and pick any police officer in uniform to come and tender police abstracts in evidence is irregular and improper in light of the clear provisions of the law cited above [Section 33 [Evidence Act](#)]. An officer in a traffic matter should be well seized with the investigation file and any other relevant information relating to the occurrence of the accident before he/she can testify. He or she should also lay basis under Section 33 of the [Evidence Act](#) as to why he is coming to testify on behalf of the police officer who carried out the investigation otherwise coming to testify just because one has been paid Kshs. 5,000 or any other consideration runs the risk or having the evidence rendered as hearsay.”
23. As it stands there was no evidence to corroborate the testimony of the plaintiff regarding the cause of the accident.
24. At page 39 of the record is the Police Abstract in relation to this accident. The Abstract dated February 21, 2020 merely indicated that the “case is pending investigations” No decision regarding who was to blame was presented in the Police Abstract.
25. In the defence the 2nd Respondent stated that the Appellant caused the accident by suddenly jumping into the path of his oncoming vehicle. Once again there is nothing to disprove this defence, as no independent witness was called to testify.
26. The medical examination Report dated February 12, 2020 [see page 9 of the Record] indicates that when he arrived in hospital after the accident the Appellant ‘appeared intoxicated’ As such the claim by the 2nd Respondent that the victim jumped into the path of his oncoming vehicle cannot be totally excluded.
27. In any event no medical report indicating the Appellants level of intoxication was produced as an exhibit. Thus the court is unable to determine with certainty to what level (if any) the Appellant himself may have contributed to the accident. As stated earlier this court is presented with scenario where each party blames the other for the accident. There is no independent evidence to enable the court make a determination one way or another.



28. Based on the above I find that the Appellant failed to prove on a balance of probability that the Respondent was to blame for the Accident.
29. In the absence of sufficient evidence to prove liability, the entire suit collapses. In the premises this appeal fails. The finding and decision of the learned trial magistrate in the judgment dated July 31, 2023 is upheld. Costs of this appeal are awarded to the Respondents.

DATED IN NYERI THIS 15TH DAY OF NOVEMBER 2024.

MAUREEN A. ODERO

JUDGE

