



Wachira aka Pauline Wangari Wachira & another v Wambugu (Civil Appeal E221 of 2023) [2024] KEHC 13781 (KLR) (6 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E221 OF 2023
HM NYAGA, J
NOVEMBER 6, 2024**

BETWEEN

**PAULINA WANGARI WACHIRA AKA PAULINE WANGARI
WACHIRA 1ST APPELLANT**

SIMON KINGORI MURIITHI 2ND APPELLANT

AND

JOHN MATHENGE WAMBUGU RESPONDENT

(Being an appeal arising from the Judgment and Decree of Hon. P.W.Nyotah – SRM in Nakuru Chief Magistrate’s Court Civil Case No. E254 of 2021 delivered on 19th July, 2023)

JUDGMENT

1. This appeal arises from the judgment and decree passed by the Senior Resident Magistrate Hon. Nyotah on 19th July, 2023 in Nakuru Chief Magistrate’s Court Civil Suit No. E254 of 2021.
2. The Memorandum of Appeal filed on 24th August, 2023 by the firm of Kimondo Gachoka & Co. Advocates on behalf of the appellants herein sets out four grounds of appeal namely that: -
The Learned Trial Magistrate;
 - i. erred in law and fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages which were too high.
 - ii. erred in law in law and fact by failing to consider the Appellants’ submissions and judicial authorities on liability and quantum thereby arriving at an erroneous figure on quantum.
 - iii. erred in law and fact in assessing damages for loss of income whereas the same was not proved.



- iv. erred in law and fact in finding the Appellants 75 % liable against the overwhelming evidence on record against the respondent.
3. It was the appellants' prayer that the Appeal be allowed, the said judgment of the subordinate Court be set aside and the suit against them be dismissed, and the costs of this Appeal to be borne by the Respondent.
4. The appellant's claim in the lower court was set out in the plaint dated 13th March, 2021. It arose from a road traffic accident which occurred on 29th December, 2020 along Nakuru- Nairobi Highway at or near Kiondo area. It was alleged that the Respondent was a lawful pedestrian along the said road when the designated or authorized driver of the Motor Vehicle Registration No. KCK 054 L Toyota Matatu in his lawful course of duty so carelessly, negligently and or recklessly drove the said motor vehicle thereby permitting it to violently hit the respondent as a result of which he sustained serious bodily injuries. The Respondent sought General Damages for pain, suffering and loss of amenities/ Future Earning Capacity, Loss of income/ earnings at Ksh. 500/= per day (and or minimum wage and or any other sum) for such a period/time that the Honourable Court shall deem fit; Costs of future medication and or treatment; Special Damages of Ksh. 106,230/=; costs of the suit; and interest on all the above at court rates.
5. The particulars of negligence pleaded against the Appellant's driver and Appellants were; driving at excessive, risky and or unreasonable speed taking into account all the circumstances of this case; failure to control ,slow down, stop, pass, be observant, give way, swerve, gap, keep-lane; keep distance, brake and or in any other manner maneuver the said motor vehicle under his or her control so as to avoid the accident; failure to keep any proper look out or have sufficient regard for the plaintiff or other lawful users of the road; failing to give timely, reasonable or adequate warning, hooting, signal or indication of the approach of the said motor vehicle and or looming danger, peril and or collision; permitting or causing the said motor vehicle to hit the plaintiff; driving a defective, ill maintained and or un-roadworthy motor vehicle; driving without the necessary qualification/authorization/attention; failure to adhere to the rules of common sense, road signs, logic, reasonableness and the provisions of the Highway code and *Traffic Act*; and intruding, joining, veering, encroaching and driving into the rightful/lawful lane, path, road, course and location of the plaintiff when it was not safe, reasonable, lawful, authorized and or prudent to do so.
6. The Respondent relied on the doctrine of Judicial Notice, Res Ipsa Loquitor, Rule of the Road, Waiver and or estoppel.
7. The Appellants vide their defence dated 11th August, 2021 denied the claim and in the alternative they averred that the accident was contributed wholly and substantially by the negligence of the Respondent. The defendant/respondent set out the particulars of negligence on the part of the respondent as: walking and or crossing the road without proper eye of an adult; failing to keep to the pedestrian walk; failing to have regard to other road users; failing to walk with due care and attention; failing to move and avoid the accident; walking carelessly and dangerously on the road; entering the road without observing the kerb drill; crossing the road when it was unsafe to do so; walking on the wrong side of the road contrary to the traffic rules; crossing the road at undesignated place i.e. Zebra crossing; and volenti non fit injuria.
8. The Appellants also denied the applicability of the doctrine of judicial notice, Res Ipsa Loquitor, rule of the road, waiver & estoppel, and prayed that the Respondent's suit against them be dismissed with costs.



9. The matter went into full trial. The trial court after considering the evidence on record delivered its judgment on 19th July, 2023 in favour of the Respondent apportioning liability at the ratio of 85:15 in favour of the respondent against the appellants and further awarded Kshs. 350,000.00 as general damages for pain and suffering, Ksh. 90,295.50 as special damages, Ksh. 85,000.00 as Future Medical expenses, Ksh. 66,328.90 as Lost earnings, costs of the suit, interest on all the above at 12% per annum.
10. The trial court also directed that interest on special damages to run from the date of filing suit and on the rest of the award, from the date of the judgement till payment in full.
11. The Appeal was canvassed through written submissions. Only the Appellants' submissions are on record.

Appellant's submissions

12. On liability, the Appellants submitted that the Respondent failed to discharge the burden of proof bestowed upon him under Sections 107, 109 and 112 of the *Evidence Act*. They argued that the Respondent's evidence showed that he was the author of his own misfortunes. The Appellants faulted the respondent for not availing an eye witness to buttress his averments surrounding the circumstances of the accident and contended that he did not prove liability against them but rather through his witnesses proved that he was to solely blame for the accident as he crossed the road at undesignated area and without due care.
13. The Appellants submitted that the evidence of PW2 established the above position; that no charges had been preferred against the driver of the suit motor vehicle; that the matter was pending under investigations; and that the driver of the suit motor vehicle was driving in his rightful lane. In buttressing their submissions, the Appellants relied on the case of *Kiema Mutuku v. Kenya Cargo Hauling Services Ltd (1991) 2 KAR 258* where the Court of Appeal held:-

“There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”
14. The Appellants also relied on the cases of *Kenya Power & Lighting Co. Ltd v Mary Wambui Kiere [2020] eKLR* for the proposition that any user of a highway is under an obligation to exercise reasonable care to other road users expected of a reasonable man/woman & *Benter Atieno Obonyo v Anne Nganga & another [2021] eKLR* where it was held that in civil cases, the standard of proof was on a balance of probabilities and the burden of proof lay with the party who alleged.
15. The Appellants thus urged this court to find that they were not liable for the accident, set aside judgement on liability and substitute the same with an apportionment of liability at the ratio of 90:10 in their favour.
16. On quantum, the Appellants faulted the trial court for awarding the Respondent Ksh. 130,337.10 as loss of income despite the Respondent's failure of proving the said earnings. According to the Appellant the Respondent ought to have availed the bank statements to prove his alleged earnings prior to the accident and trade license or business permit to prove the existence of any business or the earnings. In buttressing their submissions, reliance was placed on the cases of *Cecilia W. Mwangi & Another V. Ruth W. Wangui (1977) CA 251/96*; *S J v Francesco Di Nello & another [2015] eKLR*; & *Fairley –vs- John Thomson Ltd [1973] 2 LLOYD'S Law Reports 40* at pg.14.
17. The Appellants argued that the Respondent failed to prove his earnings capacity and ultimately that he lost any earnings. They therefore urged this court to wholly set aside the award under this head and make no award.



18. The Appellants also prayed for costs pursuant to Section 27 of the *Civil Procedure Act*.

Analysis & Determination

19. From the pleadings, the evidence and submissions, these issues arise for determination:
- i. Whether the trial court erred in apportioning liability at the ratio of 85%:15% in favour of the respondent herein.
 - ii. Whether the trial magistrate erred in law and in fact on her award on lost earnings.
20. This being a first appeal, this court has a duty to re-evaluate the case, and come up with its own conclusion as was held in *Jabane vs Olenja*, [1986] KLR 661, *Selle vs Associated Motor Boat Company Limited* [1968] EA 123 and *Peters vs Sunday Post* [1958] E.A. 424.
21. The standard of proof in civil cases is on a balance of probability. The balance of probability was defined in the case of *Kanyungu Njogu vs Daniel Kimani Maingi* [2000] eKLR that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.
22. In *East Produce Kenya Limited vs Christopher Astiado Osiro* [2006] eKLR, the court stated that he who alleges negligence bears the burden of proof.
23. In the case of *Kiema Mutuku vs Kenya Cargo Hauling Services Ltd* (supra) the court held that;
- “ there is yet no liability without fault in the legal system in Kenya and the plaintiff must prove some negligence against the defendant where the claim is based on negligence”
24. It was thus upon the Respondent to discharge the burden of proof of negligence against the Appellants.
25. In the instant case, the respondent adopted his written statement as his evidence in chief. In that statement he stated that he was lawfully crossing the road along Nakuru- Nairobi Highway from the left side to the right side as one faces Nairobi General Direction when the 2nd Appellant failed to keep to his lane and swerved to where he was thereby hitting him. He reiterated the particulars of negligence against the 2nd Appellant aforementioned. He stated that he did not contribute to the happening of the accident. In his testimony before court he testified that he saw the suit motor vehicle from far but chose to cross because he knew the driver would make a U-turn to Nakuru Direction.
26. PW2 testified that the accident occurred at Kiondoo area. He said in that area there are three lanes and that there is a part for u- turn. It was his testimony that on the material date he saw the respondent crossing the road, and when he was about to finish crossing, the driver suddenly turned to the lane heading to Nairobi Direction. He said the 2nd Appellant tried to avoid hitting the respondent but the left side of the Motor Vehicle hit him. He blamed the 2nd Appellant for driving on the wrong path.
27. PW3 was CPL Jacktone Nkonge. He said the accident happened at Kiondoo area. It was his testimony that the 2nd Appellant was driving the suit motor vehicle when he saw the respondent crossing the road from left to right side while facing pipeline, and he swerved to the right to avoid hitting him but the left side of the matatu did hit him. On cross examination, he confirmed that the police abstract indicated that the matter was pending under investigation. He did not have sketch plan for the accident in court.
28. PC David testified as DWI. It was his testimony that the respondent was hit by the suit motor vehicle while crossing the road. He said the driver swerved to avoid hitting him, but he was hit by the rear



side of the Motor Vehicle. He said there was no Zebra crossing at the scene of the accident. He stated that the respondent was to blame for the accident as he was crossing the road from left side to the right side. On cross examination, he confirmed he was not the investigating officer and that he did not have evidence to show the Respondent was to blame for the accident. He stated that the 2nd Appellant swerved to where the Respondent was and there was no reason given as to why he did not swerve to another direction. He also stated that the accident happened during the day and there was no indication that the driver hooted or braked.

29. The trial court disregarded the evidence by the two police officers for reasons that they did not witness the accident and did not lay a basis for their evidence. Whilst apportioning liability, the trial magistrate found that the pedestrian was to blame as he chose to cross the road despite seeing the suit motor vehicle approaching. She also faulted the respondent for crossing the road at non designated point and miscalculating that he would cross the road in good time and the driver of the suit motor vehicle would make a U-turn. On the part of the Appellants, the court found that they did not adduce evidence to controvert the Respondent's evidence that the driver of the suit motor vehicle made a sudden move from his lane to that used by motor vehicles heading to Nairobi. The trial court was of the view that PW2 was an eye witness and his evidence was credible. The court took note that the 2nd Appellant was not called to explain his side of the story and found that he was to blame as he did not do anything to avert the accident.
30. In my view, the holding of the trial court on liability was sound. From the evidence on record it is clear that indeed there was an accident involving the Respondent and the suit motor vehicle on the said date. PW3's evidence that the suit motor vehicle suddenly changed lane to that used by motor vehicles heading to Nairobi was uncontroverted. The Respondent was to partly blame for crossing the road despite seeing the suit motor vehicle approaching and for miscalculating that it would make a u turn and head towards Nakuru Direction. It was undisputed that the Respondent was crossing the road at non designated area. The 2nd Respondent did not attend court to give his side of the story. I opine that the 2nd Appellant was to blame to a large extend, as he suddenly changed lanes and swerved to where the Respondent was.
31. Further the liability between a driver of a Motor Vehicle and a pedestrian cannot be equated unless it is so crystal clear that a pedestrian put himself or herself in a position that a driver could not be anticipated such as when a pedestrian jumps into a road on a suicide mission. Additionally, the drivers are expected to exercise due care and diligence and take all evasive action to road users who may themselves be negligent on the roads as that is not an unreasonable thing to expect. See the case of *Onyancha (Suing as the Personal representative and legal administrator of the Estate of Beatrice Kerubo Nyakundi alias Kwamboka (Deceased)) v Makini (Civil Appeal Suit E048 of 2021)* [2022] KEHC 9826 (KLR) (19 July 2022) (Judgment)
32. In *Joseph Mutunga Wambua v Kantilal Khimji Patel & another* (1986) eKLR in respect of the duty of care that is required to be observed by drivers the court stated that;

“A pedestrian has to look to both sides as well as forwards. He is going at perhaps three miles an hour and at that speed, he is rarely a danger to anyone else. The motorist has not got to look sideways though he may have to observe over a wide angle ahead, and if he is going at a considerable speed, he must not relax his observation for the consequences may be disastrous. And it sometimes happens... he sees that the pedestrian is not looking his way and takes a chance that the pedestrian will not stop and that he can safely pass behind him.... It is quite possible that the motorist may be very much to blame than the pedestrian.”



33. In view of the foregoing, I agree with the trial court in terms of apportioning the liability at the ratio of 85% to 15% in favor of the respondent.
34. On the second issue, it is trite law that the assessment of general damages is at the discretion of the trial court.
35. The Appellants only challenge is to the award loss of earning of Ksh. 66,328.90. in his plaint the respondent had pleaded loss of income/earnings at the rate of Ksh. 500/- per day or the minimum wage for the days he was unable to work.
36. The trial magistrate in making the award under this head was persuaded by the Respondent's authorities i.e John Kipkemboi & another v Morris Kedolo [2019] eKLR; Esther Nyambura Njenga V Carnos Rashid Chepaurengé & Another [2008] eKLR & David Kimani Githinji & Grace Mbaile (suing as the administrator of the estate of Catherine Njeri Kimani - deceased) v. Mutai Hardware Stores Limited which state it is not necessary for one to avail documentary evidence to prove earnings.
37. That is indeed the correct position. The Court of Appeal in Jacob Ayiga Maruja & Another vs. Simeone Obayo [2005] eKLR observed that -

‘We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.’
38. The trial court then proceeded to adopt multiplicand of Ksh. 13,005.70 pursuant to Section 2 of the Insurance (Motor Vehicle Third Party Risks) Act and Minimum wage Regulations for general laborers of 2018. It was undisputed that the Respondent suffered temporarily disability for 6 months as a result the accident. That period cannot be said to be unreasonable, given the nature of the injuries.
39. The trial court therefore applied the correct principles in arriving at the said award. The award was justified and proper and I hereby uphold it.
40. The upshot is that this appeal is devoid of merit and the same is dismissed in its entirety with costs to the Respondent.
41. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MERU 6TH DAY OF NOV 2024.

H. M. NYAGA,
JUDGE.

