



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**(CORAM: R. MWONGO, J.)**

**CIVIL APPEAL NO. 38 OF 2018**

**JOSEPH MWANGI GACHOKA.....APPELLANT**

**VERSUS**

**TUSKER MATTRESSES LIMITED.....RESPONDENT**

*(Being an appeal from the Judgment of the Hon. K. Bidali (CM) delivered on the 6<sup>th</sup> July, 2018 in Naivasha CMCC No. 813 of 2010)*

**JUDGMENT**

1. The appeal is against the judgment of Hon. K. Bidali in which he dismissed the Plaintiff's case with costs. The claim in the lower court was that the Plaintiff/Appellant was driving motor vehicle KAZ 519R/ZC 7277 when he was involved in an accident due to oil spillage on the road by motor vehicle Registration KBG 595E. The oil spillage allegedly caused the Plaintiff's vehicle to skid and collide with vehicle Registration KBG 595E which was stationary in the road.

2. The appellant laid five grounds of appeal, namely; that the trial court erred:

- In not finding that the plaintiff had proved its case.
- In failing to consider evidence of the plaintiff's witness.
- In dismissing the plaintiff's case when there was no rebuttal evidence by the defence.
- In failing to properly analyse the evidence and make a finding thereon and in arriving at the wrong conclusion.
- In failing to assess damages awardable to the plaintiff.

3. This court's role is to re-evaluate the entire evidence on record and to come to its own conclusions thereon being careful to note that it did not itself hear the witnesses or observe their demeanour.

4. From the record, evidence in the case was adduced by PW1, and PW2 PC Silas Kiptoo. There were no defence witnesses. Both parties filed written submissions in the lower court.

5. PW1 testified that on 11<sup>th</sup> April, 2009 at 4.30pm as he was driving vehicle KAZ 519R near Vatican Roundabout Naivasha, he came across something that looked like oil spilled on the road. He also saw another vehicle Registration Number KBG 595E which was at the roundabout. He applied his brakes, skidded, and hit the other vehicle. He was injured on his right leg and was admitted to Naivasha District Hospital. He blamed the driver of motor vehicle KBG 595E for the accident, stating that the said vehicle ought to have been off the road and for not putting up signs of oil spillage.

6. It is not disputed that the Plaintiff's injuries were:

- Fracture to tibia and fibula.
- Dislocation of right ankle joint.

- Bruises to right knee.
- Deep cut wound on right leg.
- Loss of right toe nails.

Dr. Omuyoma's report shows that the Plaintiff suffered permanent liability of 10%, constituting grievous harm.

7. PW1 produced a Police Abstract which I have carefully perused. It identifies both of the vehicles involved in the accident. It shows that the police did not intend to prefer any charges on any party. It also shows results of investigations or prosecution (as):

***“Referred to insurance for redress. Cause of accident slippery road surface (sic) due to spilled oil.”***

According to the Abstract the witnesses were to be the Plaintiff and PC Paul Omondi who was not called to testify.

8. In cross-examination, PW1 stated that he did not know who spilled oil on the road; that vehicle KBG 595E was stationary on the road; that he collided into the stationary vehicle from behind; that he could not deny that the driver of vehicle KBG 595E also found oil spilled on the road; that he did not know if the oil was spilled by another vehicle; and that according to the police, the cause of the accident was spilled oil which made the road slippery.

9. PW2 PC Silas Kiptoo was an eye witness. He testified that vehicle KAZ 519R/ZC7377 driven by the Plaintiff:

***“.....veered off the road and oil spilt on the road. The latter vehicle was also moving towards Naivasha and it rammed into motor vehicle KBG 595E due to the slippery road. No warning was placed on the road.”***

10. In cross-examination PC Kiptoo stated that a vehicle ought to keep a safe distance of about 70 metres. He said that:

***“The abstract indicates that it (KBG 595E) spilt oil on the road..... There was an oil spill caused the vehicle to skid and veer off the road. I am not aware of the other vehicle that spilt the oil.”*** (Emphasis added)

11. The only question that this court must resolve is whether the Respondent was responsible or partly responsible for the accident.

12. The Plaintiff's evidence is merely that, as he was driving his lorry, he skidded as he applied brakes and collided into the back of vehicle KBG 595E. It was about 4.30pm and there is no evidence to indicate unfavourable weather conditions. There is no doubt that there was an oil spill on the road. However, there is no testimony as to who caused the oil spill or how it came to be on the road. PW1 rammed into the rear of KBG 595E. This was at or near a roundabout.

13. In my view, a driver driving a vehicle at 4.30pm with no inclement weather conditions, and exiting a roundabout would be in a position to avert an accident with a stationary vehicle if he was driving with care. PW1 said that not only was he exiting the roundabout, but that he saw the stationary motor vehicle KBG 595E as he “neared it” as he was “exiting the roundabout”. He said he could not deny that the other vehicle also found oil spilled on the road.

14. PC Kiptoo's evidence did not add value in providing probative material in support of the Plaintiff's case. He inaccurately testified in cross-examination that “the Abstract indicates that it (KBG 595E) spilt oil on the road.” The abstract is clear that the cause of accident was “slippery road surface due to spilled oil.” The abstract did not indicate the source or cause of the oil spillage, nor connect the oil spill to KBG 595E.

15. The parties' pleadings set out the scope of the dispute. In this case the kernel issue for determination is the cause of the oil spill.

16. The plaint at paragraph 4 alleged that the Respondent's vehicle:

***“had spilt oil making the road slippery which subsequently made the plaintiff lose control of the vehicle registration No. KAZ 519R/ZC 7277.”***

17. The defence at paragraph 3 denied that their:

***“vehicle had spilt oil on the road making it slippery as alleged or at all and puts the plaintiff to strict proof.”***

The defendant further pleaded that the oil on the road had been earlier spilt on the road by an unknown vehicle which caused the defendant's vehicle to skid off the road.

18. The appellant's submissions in this court appear to emphasise and rely on the absence of defence evidence and that the respondents failed to prove their allegation of oil spillage being caused by another vehicle; and that there were no warning signs of the spillage.

19. I do not think it is the responsibility of a defendant to prove anything. The burden of proof is always on the plaintiff to demonstrate that

his injury or loss is due to the fault of the defendant. This was not done. **Section 107 (1) (2)** of the **Evidence Act** provides for this as follows:

***“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”***

20. This is supported by the holding in **Trust Bank Ltd v Paramount Universal Bank Ltd & 2 Others [2009] eKLR** that:

***“It is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant’s defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was uncontroverted and therefore unchallenged.”***

21. I am also aware of the decision in **KPLC v Nathan Karanja Gachoka & Another [2016] eKLR** where the Court stated:

***“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”***

### **Disposition**

22. Ultimately, I am not satisfied that the evidence adduced by the Plaintiff was able to demonstrate that the Defendant’s negligence or fault was what caused the Plaintiff’s misery. I therefore agree with the trial court’s conclusions and find no reason to interfere with its judgment.

23. Accordingly, the appeal is dismissed with costs.

### **Administrative directions**

24. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

25. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

26. Orders accordingly.

**Dated and Delivered in Naivasha by teleconference this 12<sup>th</sup> Day of July, 2021.**

**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. No Representation for the Appellant
2. Ms Karimi for the Respondent
3. Court Assistant - Quinter Ogutu