



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL APPEAL CASE NO. 53 OF 2010**

**ROBERT MURIITHI NJERU .....APPELLANT**

**VERSUS**

**DIOCESE OF EMBU**

**SALESIANS OF DON BOSCO.....RESPONDENT**

***(An Appeal from Judgment of the Resident Magistrate Embu dated 9th June, 2010 in Embu SPMCC  
No. 209 of 2008)***

**J U D G M E N T**

The appellant was the plaintiff in Embu RMCC No. 209 of 2008 where he sued the respondent for damages for negligence arising from road traffic accident which occurred on the 27th July 2007 along Embu – Kiritiri road. The plaintiff was cycling his bicycle near Jatomy Supermarket when the 2nd defendant negligently drove the 1st defendant's vehicle Registration No. KAD 804K hit him injuring him.

The defendant in his defence denied the claim thus putting the plaintiff to strict proof thereof. The court found that the plaintiff had failed to prove negligence against the defendant and dismissed the case.

The appeal was by consent disposed of by way of written submissions. Ms. Fatuma represented the appellant while Messrs Wanyonyi & Muhia are on record for the respondent.

In the petition of appeal, the appellant faulted the judgment of the magistrate for failing to find the respondent responsible for the accident while there was evidence that he drove the vehicle at a speed and that the 2nd respondent hit the cyclist off the road. It was not correct for the court to find that the respondent's evidence was corroborated by that of PW3. It was further argued that the magistrate failed to consider submissions of the appellant in her judgment. The counsel argued that the appellant had stopped at the junction waiting to join the road when he was knocked by the vehicle. The 2nd respondent must have seen the cyclist yet he did not even hoot which is a proof that he was negligent. Although the 2nd respondent testified that he was driving at 40 km per hour, the area was densely populated calling for extra caution. The appellant relied on two decisions on proof of negligence although they were not annexed to the submissions.

The respondent submitted that the appellant had a duty to prove his case on the balance of probabilities as required by Section 107 of the Evidence Act that whoever alleges the existence of a fact has a duty to prove it. It was argued that the fact that a motorist was involved in an accident was not proof of negligence on his part as was held in the case of **PETER KOIBUNGA NKITITI VS JOHN MWENDA MURAA HCA No. 152 of 2003**. The appellant's evidence was indeed inconsistent and fell short of

proof. He did not prove as alleged that the respondent was driving at a high speed.

The respondent's statement to the police when he reported the incident was not disputed by the appellant and it pointed responsibility of the accident squarely at him. The respondent further argued that he was not charged with traffic offence.

The duty of the first appellate court was explained in the case of **ABOK JAMES ODERA T/A A.J. ODERA & ASSOCIATES VS JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] eKLR** where the court cited its earlier decision in the case of **Kenya Ports Authority Versus Kuston (Kenya) Limited [2009] 2EA 212**. The court held inter alia that:-

*“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”.*

The evidence of the plaintiff was that he was standing off the road waiting to cross when the respondent's motor vehicle registration No. KAD 804K hit him. It was over speeding and it did not brake. It was at 3.00 p.m. and the appellant stood holding his bicycle before he was knocked down. He sustained injuries on the right leg. PW3 testified on the OB report made by the 2nd respondent after the accident. He said that appellant was joining the main road from a feeder road and that he did not observe due care and attention. No one was charged with a traffic offence by the Investigating Officer Corporal Ndambuki.

The 2nd respondent testified that on the material day he was driving the 1st respondent's motor vehicle entering town from Kiritiri side. He kept to his left side where there was a feeder road and appeared not to be in control of the bicycle. He then hit the motor vehicle on the left side, that is the passengers side mirror. Its a result of the impact, the cyclist fell down sustaining injuries. The respondent took the injured cyclist to the hospital. He then reported the accident to the police and that the appellant did not dispute the report made.

The appellant alleged that it is the over speeding vehicle of the 2<sup>nd</sup> respondent which hit him while off the tarmac. He said he was standing on the feeder road holding his bicycle and waiting to cross the main road. The only witness the appellant called was the police officer PW3 to produce the police abstract. However, the evidence of PW3 did not support that of the appellant. It was in tandem with the respondent's attribution of negligence to the appellant. PW3 said the appellant joined the main road from a feeder road without due care and attention. This witness contradicted the appellant's evidence.

The magistrate was right to observe in the judgment that PW3's evidence corroborated that of the 2<sup>nd</sup> respondent. Civil liability in a traffic road accident does not depend on conviction of a traffic offence. Provided that the plaintiff proves his case on liability on the balance of probabilities, the court may find in favour of the plaintiff.

The facts of the case before me is different in that the appellant's evidence was contradicted by his own witness PW3. PW3 said he was not the investigating officer and that he did not visit the scene. This fact could not affect the appellant's case if the plaintiff tendered cogent evidence to prove liability. The occurrence book report was in favour of the 2<sup>nd</sup> respondent. However, the plaintiff was duty bound to prove his case. On the allegation of over speeding, the appellant did not prove this allegation on the balance of probability. The assertion by the 2<sup>nd</sup> respondent that he was driving at 40 kph was not rebutted.

The appellant said in his submissions that it was a heavily populated area and that the speed of 40 kph was not safe. There was no evidence on record to prove the existence of the fact.

On the burden of proof, I wish to refer to the case of **JOHN KANYUNGU NJOGU VS DANIEL**

**KIMANI MAINGI [2000] eKLR** the Court of Appeal held that the plaintiff had the burden of proving her case on a balance of probabilities. When the court is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to say that one probability was more probable than the other.

Similarly, the Court of Appeal in **D.T. DOBIE & CO. LTD VS WANYONYI WAFULA CHEBUKATI [2014] eKLR** observed:-

*“The degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such tht the tribunal can say; we think it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained”.*

It is my considered view that the appellant failed to prove his case against the respondents on the balance of probabilities. He did not succeed in attributing negligence on the 2<sup>nd</sup> respondent considering that he was contradicted by his own witness. The trial magistrate reached a correct finding after analyzing and evaluating evidence on record.

I find no merit in this appeal. It is hereby dismissed with costs to the respondents.

It is hereby so ordered.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 11TH DAY OF FEBRUARY, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Ndorongo for Fatuma for Appellant**

**F. MUCHEMI**

**JUDGE**