

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPELLATE DIVISION
CIVIL APPEAL NO. E733 OF 2023

PURITY ANYANGO

KOMER.....APPELLANT

-VERSUS-

SINGH AMAR SINGH.....

.....RESPONDENT

***(Being an appeal against the judgement of the Hon. G.
Omodho (PM) delivered on 13th July, 2023 in Nairobi
Milimani CMCC No. 13711 of 2006)***

JUDGMENT

- 1.** This appeal emanates from the judgment delivered on 13.07.2023 by the lower Court in **Nairobi Milimani CMCC No. 13711 of 2006** (*hereafter the lower Court suit*). The lower Court suit was instituted via a plaint by **Purity Anyango Komer**, the plaintiff in the lower court (*hereafter the Appellant*) as against **Singh Amar Singh**, the defendant in the lower court (*hereinafter the Respondent*). The Appellant's claimed damages founded on negligence as a result of a road traffic accident that occurred on 09.12.2003.
- 2.** It was averred that the Respondent was at all material the owner of motor vehicle registration No. **KAM 800G** (*hereafter suit motor vehicle*) and that on the date in question the

Appellant was lawfully walking along Enterprise Road within Nairobi when the Respondent so negligently drove and or managed the suit motor vehicle and caused the same to knock the Appellant and as result she sustained serious bodily injuries.

3. The Respondent filed a statement of defence denying the key averments in the plaint and in the alternative and without prejudice to the said denial averred that even if the accident occurred as alleged the same was wholly caused and substantially contributed to by the negligence of the Appellant. In the further alternative, it was averred that if any accident occurred as alleged the same was wholly or substantially caused by the negligence of the owner and driver of motor vehicle registration No. **KG 3327**, to wit, the Respondent reserved the right to institute third-party proceedings against the owner of the said motor vehicle.
4. The suit proceeded to full hearing, during which both parties called evidence in support of the averments in their respective pleadings. In its judgment, the trial Court found that based on evidence placed before her, lack of proof of negligence as against the Respondent and thus proceeded to dismiss the Appellant's suit with costs.
5. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in her memorandum of appeal as itemized hereunder: -

1. That the learned Magistrate erred in law and fact in finding and holding that there was no

evidence to establish who was to blame for the accident yet the Appellant had adduced sufficient evidence to prove that the Respondent was wholly to blame for the accident.

2. That the learned Magistrate erred in law and fact in finding that “how the accident occurred is a mystery” yet there was evidence on record adduced by the Appellant as to how the accident occurred and why the Appellant blamed the Respondent for the accident.

3. The learned Magistrate erred in law and fact in dismissing the Appellant’s claim on the ground that “what comes out in totality is that there was a possibility of another causation” yet there was clear evidence on record showing that the Respondent caused the suit accident when he veered off the road and knocked the Appellant who was walking besides the road.

4. The learned Magistrate erred in law and fact in dismissing the Appellant’s claim merely because the police abstract produced in evidence indicated that a third party was blamed by the police for the accident and or was convicted for the offence of careless driving.

5. The learned Magistrate erred in law and fact in deciding the case against the weight of the evidence on record.

6. The learned Magistrate erred in law and fact in failing to follow the binding decisions of the High Court which the Appellant had cited in support of her case and which decisions were relevant and or were of similar facts.

7. The learned Magistrate erred in law and fact in assessing the special damages she would have awarded to the Appellant at Kshs. 26,759/- only when the Appellant had pleaded and proved special damages at Kshs. 402,895/-. (sic)

6. Directions were taken on disposal of the appeal by way of written submissions, only the Appellant complied. Nevertheless, the Court has duly considered the original record, memorandum of appeal, record of appeal and the Appellant's submissions.

7. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate Court in **Selle -Vs- Associated Motor Boat Co. [1968] EA 123**. Further, it is trite that an appellate Court will not ordinarily interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 - 1988] 1 KAR 278**. Thus, a revisit of the memorandum of appeal it is apparent that the appeal turns on the twin issue of liability and awardable damages.

8. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties' respective

cases before the trial Court. See;- Court of Appeal decision in **Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91**. This Court had earlier in its judgment outlined the gist of the respective parties' pleadings, as such it serves no purpose restating the same at this juncture. Further, having equally identified what the dispute before the trial Court twirled on, the key query for determination is whether the trial Court's findings on the issues falling for determination before it were well founded.

9. To contextualize the latter, it would be apposite to quote in *extenso* the relevant facets of the impugned judgment. The trial Court after restating the evidence tendered before it addressed itself on liability as follows-;

“Having considered the evidence and the submission it is not disputed that there was an accident on 9/12/2003 and that the Plaintiff suffered injuries therefrom.

....

The plaintiff annexed the police abstract to demonstrate that there existed an accident on even date. The evidence has been controverted by DW2 who maintained that another party was blamed for the accident. The defence did not call on the driver to show what really happened on the material day.

.....

In this case where the plaintiff blames the defendant, the defendant is blaming a 3rd party.

The police abstract relied by both parties confirms that there was a 3rd party who was blamed, charged and fined for careless driving. While the defence had indicated that they would enjoin the 3rd party, this option was not explored. Similarly, it is not clear why the plaintiff opted not to sue the person who was blamed for the accident from the onset of this claim. The evidence contained in the police abstract does not support the plaintiff's claim against the defendant as contained in the plaint.

.....

In this particular case the plaintiff had the abstract well in advance and produced it in evidence with the details clearly showing that a different person was blamed from the accident but opted to carry on with prosecuting the claim against another. The evidence before this Court is that the plaintiff was knocked down, how the accident took place is a mystery, the evidence was no unpacked to bring to light how it was the defendant and not the gentleman whose name appears on the police abstract as blameworthy. I would only blame the state of affairs on the counsel for failing to include the party in this suit who investigations pointed blame towards so he can clear his name. Much as the plaintiff was not shown to have contributed to the accident, I find

it difficult to blame a party who no direct evidence had been shown either. What comes out in totality is that there was a possibility of another causation. Based on the evidence placed before me I find lack of proof of negligence on the defendant's part and consequently proceed to dismiss the plaintiff's claim against the defendant with costs." (sic)

10. The applicable law as to the burden of proof is found in **Section 107, 108 and 109** of the **Evidence Act**. Equally, it is well trodden that the same is on a balance of probabilities meaning that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. See Court of Appeal decision in **Mumbi M'Nabea v David M. Wachira [2016] eKLR**. Hence, the duty of proving the averments contained in the plaint lay squarely on the Appellant vice versa with respect to the averments contained in the Respondent's statement of defence. See Court of Appeal decision in **Karugi & Another v Kabiya & 3 Others (1987) KLR 347**.
11. Further, this Court has continually observed that the mere occurrence of an accident, without more, cannot be proof of negligence. As the Court of Appeal stated in **Eastern Produce (K) Ltd v Christopher Atiado Osiro [2006] eKLR**, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant [*Emphasis mine*]. The Court in that case cited the famous decision of **Kiema Mutuku v Kenya Cargo Hauling**

Services Ltd [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing by stated that: -

“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.”

12. In **Gideon Ndungu Nguribu & another v Michael Njagi Karimi [2017] KECA 206 (KLR)** the Court of Appeal stated that the determination of liability in a road traffic case is not a scientific affair and proceeded to quote **Lord Reid** in **Stapley vs Gypsum Mines Ltd (2) [1953] A.C. 663** at **Pg. 681** that-;

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...

The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults

which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”

13. With the above wisdom in reserve, before the trial Court and on the issue of liability, the Appellant testified as **PW1**. She began by adopting her witness statement as her evidence in chief and adduced the documents appearing in his list of documents as **PExh1, 2, 3, 4, 5, 6, 8, 9**. The gist of her adopted witness statement was that on the date in question a vehicle hit her from behind and she lost consciousness thereafter she was admitted in the Intensive Care Unit (ICU) between 09.12.2003 until 14.12.2003. She maintained that the accident in question was wholly caused by the driver of motor vehicle registration number **KAM 800G** who veered off the road and knocked her while she was completely off the road. On cross examination, she stated that the police intended and preferred charges against one John Ndegwa. In re-examination she stated that as far as she is concerned it is the Respondent who was to blame from the accident for knocking her from behind with his vehicle and that she was not knocked down by John Ndegwa’s vehicle.

14. On the part of the Respondent, **PC Joseph Wachira - No. 85070**, testified as **DW1**. It was his evidence that he was attached to Industrial Area Police Station and that a road traffic

accident that occurred on 09.12.2003 at 4.25pm along enterprise road involving motor vehicles **KAM 800G** driven by Jeta Singh; **KG 327** Isuzu driven by John Ndegwa; and the Appellant was reported. The case was finalized by finding John Ndegwa to blame who was later charged with the offence of dangerous driving. He proceeded to adduce the abstract into evidence. Under cross-examination, he confirmed not being the investigating officer, did not visit the scene of the accident, know if motor vehicle **KAM 800G** hit the Appellant or who swerved off the road.

15. At the outset, it must be remembered that the Appellant's case was anchored on negligence as against motor vehicle registration No. **KAM 800G** with particulars of negligence as against the said driver being itemized at paragraph 3 thereof. Earlier herein, it was the Plaintiff's own evidence that she was walking along enterprise road when a vehicle suddenly hit her from behind and she lost consciousness immediately. She did not identify and or particularize in her evidence in chief that it was motor vehicle registration No. **KAM 800G** that hit her however merely stated that she was hit from behind. For all intents and purposes, she did not identify and or attribute the particulars of negligence itemized in her plaint as against the latter motor vehicle. However, she did qualify her evidence in re-examination to maintain that as far as she was concerned it was motor vehicle registration No. **KAM 800G** and not **KG 327** that hit her, despite the fact that she was hit from behind and immediately rendered unconscious.

16. By **DW1's** evidence, it can be garnered therefrom that he was not the investigating officer neither did not visit the scene nor did he witness the accident. His evidence appears entirely to be a restatement of the facts as captured in the Police Abstract that was adduced as **PExh.1**. Further to the forestated, he did not adduce the sketch plan and Occurrence Book (O.B) before Court. Thus, he appears to have merely read into evidence the contents of **PExh.1** confirming the occurrence of the accident. Therefore, it can reasonably be concluded that his evidence was not instructive in any way on the question of liability.

17. A cursory review of **PExh.1**, it captures the particular of both motor vehicle registration No. **KAM 800G** and **KG 3327** alongside their respective drivers. In particular, at items 4, 5 & 7 of **PExh.1** therefore, it states that John Ndgegwa the driver of motor vehicle registration No. **KG 3327** was charged with the offence of dangerous driving and fined Kshs. 5000 or in the alternative one (1) month imprisonment. The accident having occurred on 09.12.2003 the police abstract appears to have been prepared and or issued on 31.12.2003.

18. The trial Court in its judgment grappled with the issue of liability. Rightfully, it noted that the Respondent despite pleading negligence as against the driver and or owner of motor vehicle registration No. **KG 3327** failed to enjoin them the same despite pleading intent to institute third-party proceedings at the earlier opportune moment. Further the trial Court acknowledged the fact that despite the police abstract clearly indicating the party that was considered to blame for

the accident by way of preferred charges, the Appellant failed to include the said party to the proceedings. Particularly, the learned Magistrate observed that the manner in which the accident occurred was a mystery, as the Appellant failed to unpack or bring to light how the Respondent and not John Ndegwa was blameworthy for the accident.

19. The Appellant has made heavy whether through her grounds of appeal and submissions before this Court that there was sufficient evidence on negligence led as against the Respondent therefore the trial Court erred in its decision. In agitating the above, she relied on the decision in **Mary Njeri Murigi v Peter Macharia & another [2016] KEHC 3535 (KLR)** and **James Gikonyo Mwangi v D M (Minor Suing through his Mother and next Friend, I M O) [2016] KEHC 5370 (KLR)**. Firstly, while the Court concurs with rendition in **Mary Njeri Murigi** (supra) that where a defendant blames a third-party onus is on the defendant to enjoin the blameworthy party to the proceedings. However, ancillary to the forestated the plaintiff must in the first instant establish a nexus between the defendant's negligence and his injuries. Secondly, the Court concurs with the rendition in **James Gikonyo Mwangi** (supra) that notwithstanding criminal culpability the same does not necessarily translate to civil liability as negligence still has to be proved as against the said party on a balance of probabilities.

20. Thirdly, with aforestated in reserve, the Court of Appeal in **Timsales Limited v Stanley Njihia Macharia [2016] KECA 554 (KLR)** while discussing the principles of

'causation' cited with approval the decision by **Musinga J** (as he then was) in **South Nyanza Sugar Co.Ltd v Wilson Ongumo Nyakweba [2008] KEHC 2979 (KLR)** quoting **Statpack Industries Limited vs. James Mbithi Munyao HCCA No. 152 of 2003 (UR)** where it was held that:

"It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence."

21. Further, the Court of Appeal for East Africa in **Lakhamshi v Attorney General (1971) E.A 118** while addressing itself to the question of blameworthiness succinctly stated that-;

"It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident. (Emphasis added).

22. Here, at the risk of repetition, the Appellant's evidence was that she was hit from behind and rendered unconscious. She did not directly link the Respondent's negligence as particularized in her plaint and the injuries she sustained. Further, notwithstanding the fact that the Appellant evidence was uncontroverted by any other eye witness accounts she still fell short on balance of probabilities to link her injuries to

the Respondent's negligence. Whereas, **DW1**'s evidence was applied in an attempt to rebut the Appellant's evidence, it must be restated that his evidence was of no probative value as it was merely a regurgitation of the information in the police abstract. In any event, the information captured in **PEXh.1** is recorded after the fact whereas any criminal culpability of the driver and or owner of motor vehicle registration No. **KG 3327** did not necessarily translate into civil liability on a balance of probabilities.

23. As the question of culpability in a cause of action founded on negligence, the Court of Appeal decision in **Keziah & another (Personal Representatives of the late Isaac Macharia Mutunga) v Lochab Transport Limited [2022] KECA 477 (KLR)**, comes to mind wherein it observed in part that;

“The question that remains unanswered is who was then on the wrong, or caused and or contributed to the accident? The mere fact that an accident involving the two vehicles occurred does not per se translate into the respondent's driver being culpable. It was the duty of the appellants to call evidence to prove the particulars of negligence or any one of them that they attributed to the respondent's driver. We do not think just like the High Court that they discharged this burden.

24. The Court proceeded to conclude that: -

“.....The accident involved two motor vehicles and from the evidence adduced, there is

nothing to show that the respondent was culpable. There cannot be an assumption of liability as the appellant failed to prove facts which give rise to what may be called the res ipsa loquitur situation or moment. In our view, the doctrine was inapplicable in the circumstances of the case and the High Court was right in so holding.”

25. Similarly, in this case, beyond proof of the occurrence of the accident, the Appellant failed to prove facts which could give rise to or attribute negligence as against the driver motor vehicle registration No. **KAM 800G**. The Court of Appeal decision in **David Onchangu Orioki (Suing as personal representative of Anthony Nyabondo Onchangu (Deceased) v Ismael Nyasimi & Charles Michieka Nyoungu [2019] eKLR** while discussing the applicability of the foregoing principles stated that;

“Ordinarily, in a road traffic accident, a claimant must lead evidence to prove not only the occurrence of the accident but how it happened.”

26. The same court equally stated that;-

”.....in a cause of action founded on negligence, there are two elements in the assessment of liability, namely causation and blameworthiness. See (Baker v Willoughby [1970] AC 467). “.....

27. While the trial Court may have taken a tangential approach at arriving at its decision, it still arrived at the correct conclusion that the Appellant failed to prove her case as

against the Respondent on a balance of probabilities. In conclusion, this Court agrees with the trial Magistrate that the Appellant failed to establish on a balance of probabilities that the Respondent was blameworthy and liable for the accident and therefore this Court cannot fault the trial Court for arriving at the decision it did on liability. Under **Section 107** of the **Evidence Act**, the burden of proof lay with the Appellant and if her evidence did not support the facts pleaded, she failed as the party with the burden of proof. See the case of **Wareham t/a A.F. Wareham** (supra). It would therefore be inconsequential to consider the question of awardable damages in light to the forestated finding on liability.

28. Consequently, the appeal herein lacks merit and is dismissed with no orders as to costs.

29. Orders accordingly!

Delivered, dated and signed at NAIROBI this 17th day of SEPTEMBER 2025

L. P. KASSAN

JUDGE

Court Assistant - Carol.

ORIGINAL